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

**REPORT NO. 24**

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## **CONTENTS**

KEY FINDINGS AND RECOMMENDATIONS .....	4
GOALS AND METHODOLOGY .....	7
PUBLIC PROCUREMENT MONITORING REPORT .....	8
ANALYSIS OF PROCEDURES LED IN FRONT OF THE STATE COMMISSION ON PUBLIC PROCUREMENT APPEALS IN THE PERIOD JANUARY-DECEMBER 2014 .....	28

## **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 – Centre for Civil Communications

## KEY FINDINGS AND RECOMMENDATIONS

- **In the first months of its operation, the Council of Public Procurements increased the administrative burden in implementation of tender procedures, but not the competition therein. The number of bidding companies per tender procedure in the second half of 2014 is reduced, even when compared to the first half of the year.**

*Recommendation:* Competent authorities should develop a detailed analysis and assess effects and purposefulness of introducing the Council of Public Procurements as additional administrative and financial burden in the public procurement system.

- **In the second half of 2014, the Council of Public Procurements was addressed with as many as 5,725 applications for approval concerning implementation of tender procedures. The relevant ratio between approvals issued and denied is 40:60. State institutions incurred a cost of around 600,000 EUR for requesting such approvals.**

*Recommendation:* LPP should be amended with a view to address the current situation marked by submission of several approval applications for one and the same tender procedure.

- **All tender procedures from the monitoring sample applied the selection criterion defined as “lowest prices” – from procurement of foodstuffs, medicaments and equipment for the health care sector, to ICT equipment and construction works. Low prices, which during e-auctions result in absurdly low levels, bring under question the quality of public procurements.**

*Recommendation:* To abandon the concept of bid evaluation exclusively on the basis of prices bided. Such practices are contrary to the most recent EU Directives in the field of public procurements, according to which contracting authorities, when awarding public procurement contracts, should rely on the criterion defined as “economically most favourable bid”.

- **Mandatory approval from the Council of Public Procurements for organization of negotiation procedures without prior**

**announcement of call for bids has reduced the number of these non-transparent procurement procedures. In the second half of 2014, this type of procedures was used to award procurement contracts in cumulative amount of 22 million EUR, whereby the annual amount of procurement contracts awarded in this manner reached 56 million EUR.**

*Recommendation:* To maintain the trend on reduced organization of negotiation procedures without prior announcement of call for bids.

- **In the second half of 2014, every fourth tender procedure was annulled, most often on the grounds that the contracting authority did not receive any bids or did not receive a single acceptable or adequate bid. On annual level, 23% of all tender procedures announced in the course of 2014 have been annulled.**

*Recommendation:* Competent authorities should monitor this problem at the level of contracting authorities for the purpose of providing a detailed overview of the state-of-affairs and taking measures to sanction possible abuses and malpractices.

- **In the second half of 2014, a total of 19 negative references were issued, by means of which 18 companies for the first time found their place on the so-called black list. Total of 72 companies are now prohibited to participate in tender procedures. Practices on selective application of this measure on the part of contracting authorities were observed in this monitoring period as well.**

*Recommendation:* Use of negative references in the Republic of Macedonia must be immediately aligned with generally accepted rules in the EU.

- **Contracting authorities joined the appeal process in the field of public procurements. 109 from the total of 612 appeals lodged to the State Commission on Public Procurement Appeals in the course of 2014 were motioned by institutions implementing tender procedures and contest decisions taken by the Council of Public Procurements. With only 503 appeals lodged by companies in the course of 2014, the multiannual trend on reduced number of appeals motioned by companies in front of the State Commission is continuing.**

*Recommendation:* Changes to the Law on Public Procurements are needed for the purpose of improving legal remedies and enabling participants in public procurements more efficient protection of their rights.

## GOALS AND METHODOLOGY

From November 2008, the Centre for Civil Communications from Skopje is continuously analysing the implementation of public procurements in the Republic of Macedonia, as regulated under the Law on Public Procurements. The analysis aims to assess the implementation of public procurements in the light of the new Law on Public Procurements and application of the underlying principles of transparency, competitiveness, equal treatment of economic operators, non-discrimination, legal proceeding, 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, but 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 (EPPS), 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 procedures 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 July – December 2014. 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 – December 2014.



## **PUBLIC PROCUREMENT MONITORING REPORT**

- **In the first months of its operation, the Council of Public Procurements increased the administrative burden on implementation of tender procedures, but not the competition therein. The number of bidding companies per tender procedure in the second half of 2014 is reduced, even when compared to the first half of the year.**

In the second half of 2014, institutions at national level more frequently organized market research compared to requesting approval from the Council of Public Procurements in order to demonstrate that their respective public procurement procedures use technical specifications and eligibility criteria that facilitate greater competition among bidding companies. It is a matter of obligations imposed to contracting authorities with the amendments to the Law on Public Procurements that entered in effect on 1 May 2014. As regards the newly-imposed obligations for contracting authorities, monitoring findings provide three main conclusions:

- tender procedures implemented with previously obtained approval from the Council of Public Procurements do not automatically result in increased number of bidding companies;
- market research implemented by contracting authorities and received confirmations that companies fulfil requirements defined in tender documents (technical specifications or eligibility criteria for tender participation) do not necessarily imply that the same companies will appear as bidders in the tender procedure; and
- in the first several months, contracting authorities were insufficiently familiarized with legal obligations related to market research and requesting approval from the Council of Public Procurements.

Monitoring activities recorded a series of examples providing evidence that approvals obtained from the Council of Public Procurements and expert reviews of tender documents are not effectuated in practice, i.e. they do not result in increased competition among companies. For example, in the monitored tender procedure for procurement of toner cartridges for hybrid mail, the Council of Public Procurements

stated that technical specifications have been drafted in a manner that is conducive to non-discrimination and equal treatment of potential bidding companies, as well as competition among companies. Nevertheless, this tender procedure was presented with only one bid and the procurement contract in the value of around 58,000 EUR was signed with the single bidding company. It is a matter of the same bidding company with which the contracting authority had signed contract for the same type of procurement in the last year.

Furthermore, in the monitored procedure for procurement of ready-made meals for patients with duration of one year, the Council of Public Procurements was asked to provide its approval for the technical specifications and eligibility criteria for tender participation used by the contracting authority. The approval was issued on both grounds, but only one company participated in the tender procedure and was awarded the contract in the value of 90,000 EUR. It is a matter of the same company with which the contracting authority had signed same type of public procurement contracts in 2012 and 2013. The only difference observed is in the fact that, according to notifications on procurement contract signed submitted to EPPS, in the previous years the contracting authority was presented with bids from 3 companies each, and now it was presented with a bid from only one company.

In the monitored procurement procedure concerning works intended for rehabilitation of a highway bridge, the public enterprise requested approval from the Council of Public Procurements because the previously conducted market research failed to demonstrate that there are at least 6 companies that fulfil the eligibility criteria which the contracting authority intended to use. The Council of Public Procurements issued the approval for use of long list of eligibility criteria, most important among them being:

- minimum annual turnover of 300,000 EUR, for the last three years;
- successful experience with at least 1 (one) contract for construction, reconstruction, fortification or rehabilitation works, including one or more AB bridges (overpass, viaduct or junction) in total span of 30 meters intended for traffic of motor vehicles, in the last 5 (five) years and with minimum value of 200,000 EUR;

- staff requirements: key staff for performance of works must fulfil the following minimum requirements (with indicated facilities):
  - manager of construction works – chief engineer (1 graduated construction engineer), holding an A license for construction engineers, with at least *10 years* of working experience in the field of construction works, *7 years* of experience on similar projects (rehabilitation or reconstruction of bridges, overpasses, underpasses, viaducts or junctions), *5 years* as manager of facilities;
  - assistant for facilities and materials (1 graduated construction engineer), holding an A license for construction engineers, with at least *7 years* of working experience in the field of construction works, *4 years* of experience on similar projects (rehabilitation or reconstruction of bridges, overpasses, underpasses, viaducts or junctions);
  - equipment and machinery (montage scaffolding of minimum 500 m<sup>3</sup>; suspended scaffolding – montage; sander and compressor).

Despite the approval that eligibility criteria used are not limiting and that they are conducive to competition in the tender procedure, only one company presented the contracting authority with a bid and was awarded the contract in the value of 210,000 EUR. It is a matter of a company with which the public enterprise has previously signed contracts for bridge construction and rehabilitation.

Furthermore, in the public procurement concerning extra light heating oil for the heating season 2014/2015, the contracting authority - unable to demonstrate that five manufacturers from Macedonia and five manufacturers from abroad fulfil technical specifications - requested and was granted approval by the Council of Public Procurements. Two bidding companies participated in the tender procedure, one of which was disqualified on the grounds of trivial remarks concerning the manner in which the bid template had been filled-in. Hence, the contract was signed with the single company whose bid has been assessed as acceptable. It seems that the contracting authority has spent time and money on simulating greater competition, but ultimately disqualified one of the two bidding companies due to the fact that its bid contained a minor administrative omission, which could have been timely addressed.

In the tender procedure for procurement of vaccines for continuous immunization and immunization upon epidemiological indications for the population in the

Republic of Macedonia for the years 2014 and 2015 in estimated value of 6.2 million EUR, the Council of Public Procurements was presented with three approval applications. One of them concerned approval of technical specifications, and two concerned the eligibility criteria used, of which the first request was negatively answered followed by changes to the eligibility criteria by the contracting authority and received positive opinion on the second approval request. Nevertheless, the tender procedure comprised of 25 lots, despite the intensive communication with the Council of Public Procurements, was marked by competition for only three of 25 lots in total. No bids were submitted for two lots, and only one company was registered for as many as 20 lots, and was awarded the relevant procurement contracts without engaging in price reduction.

The second conclusion inferred on the basis of monitoring of public procurements in terms of the newly-introduced legal mechanism for stimulating competition implies that market research performed by contracting authorities seems to be ineffective, at least for the time being. For example, in the monitored procedure for procurement of services defined as rehabilitation of shelters and equipment servicing, the state institution used eligibility criteria for bidding companies (economic and financial status, as well as technical and professional ability) and pursuant to the Law, was obliged to conduct a market survey in order to demonstrate that at least six companies fulfil these criteria (Article 36-a, paragraph 2, item 3 of the LPP). The state institution, in documents disclosed during the monitoring activities, reported that it had conducted a market research and received confirmations from 10 companies that they fulfil the eligibility criteria defined. However, de facto only one company participated in this tender procedure worth 195,000 EUR and it was awarded the contract. In that, most disputable eligibility criteria from this tender procedure include:

- possession of own mobile derrick registered by competent state body for operation at elevation of 12 meters and evidence (certificate) for training of at least 3 people to handle such machinery;
- to have at least 150 employees, of which at least two in the following profiles each: masonry, plastering, electricity installation, carpentry, water installation, paintwork and locksmith;
- possession of transportation vehicles: pickups, transporters, and other;

- possession of height ladder up to 9/10 meters, at least two pieces;
- reference list with minimum five big contracting authorities with whom it has signed contracts.

Insistence on such high number of employees, possession of equipment instead of allowing rented equipment (support by another entity), requirement on reference list to demonstrate past experiences exclusively with state institutions, which should be large scale contracts nonetheless (thereby excluding the private sector) is more than discriminatory and it is unclear how the market research conducted actually resulted in securing confirmations from 10 companies.

Next, the procurement of chemical substances needed for operation of existing equipment for the water treatment and filtration system at a swimming pool and recreational aqua park implied implementation of market research. In this research, the contracting authority claims to have received 5 confirmations from companies on fulfilment of tender requirements. Nevertheless, only one bid was submitted in the tender procedure and the contract was signed with the single bidding company.

Market research was used also in the monitored procedure for procurement of foodstuffs for preparation of meals for homeless people and beneficiaries of the soup kitchen programme. The contracting authority claims that with the said market research it has proved that technical specifications are met by 5 bidding companies. However, in the implementation of this tender procedure only one company submitted its bid and was awarded the contract without reduction of initially offered prices.

Monitoring activities recorded several public procurement procedures in which contracting authorities, pursuant to LPP, should request approval from the Council, but have not done that.

In the monitored procurement of services defined as renting of passenger vehicles and vans, including drivers, for transportation needs of the contracting authority, in the response to the information request submitted, the state agency indicated that it did not request approval from the Council of Public Procurements with the explanation that such approval is not required in cases of services in the value of up to 20,000 EUR. With this tender procedure, the agency did not only demonstrate utter lack of knowledge about the Law, notably because LPP does not include such

threshold in terms of approval requests, but confirmed its violation of the Law. Namely, LPP is decisive that in cases when eligibility criteria are used to determine companies' ability, which is the case with this monitored procurement procedure, the contracting authority must conduct market research in order to demonstrate that there is an adequate number of companies that fulfil the requirements defined or, on the contrary, request approval from the Council of Public Procurements for implementing the procurement procedure with such terms and conditions.

Similar problem was observed in the monitored procedure for procurement of services defined as vehicle servicing and maintenance, which used eligibility criteria for bidding companies, but the relevant contracting authority failed to conduct a market research or request approval from the Council of Public Procurements.

In addition, documents obtained for several other public procurement procedures from the monitoring sample do not include evidence that market research has been conducted or that approval was obtained from the Council of Public Procurements.

Strict law-stipulated rules aimed at stimulating competition have been reduced to absurd situations in practice, such as the tender procedure for procurement of additional air-conditioning, ventilation and filtration system for the system hall, with included maintenance services, organized by a joint stock company in state ownership. This tender procedure received 5 bids. Nevertheless, instead of selecting the most favourable bid, the tender procedure was annulled with the explanation that the contracting authority was unable to select the most favourable bid due to significant violations of the Law on Public Procurements, in compliance with Article 2010 thereof. The significant violation concerns the fact that the joint stock company anticipated eligibility criteria for bidding companies' technical or professional capacity for the public procurement procedure, but did not conduct a market research to demonstrate competition nor it requested an opinion from the Council of Public Procurements. This procedure is an example of paradoxes in enforcement of the Law. On one hand, the tender procedure with one bid is not considered disputable although there was previously obtained approval from the Council, but on the other hand, the tender procedure implemented without previous market research and without requested approval from the Council is disputable despite being

presented with several bids, and therefore the tender procedure is considered illegal due to identified grounds for criminal responsibility.

In summary, competition in tender procedures from the monitoring sample has not been improved, and has been marked by deterioration compared to the first half of 2014. While in the first half of 2014 the share of tender procedures marked by satisfactory level of competition (three and more participants) accounted for 56%, it was reduced to 48% in the second half of the year.

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

<b>Period</b>	<b>No bidders</b>	<b>1 bidder</b>	<b>2 bidders</b>	<b>3 and more bidders</b>
January – June 2014	5%	28%	11%	56%
July – December 2014	2%	30%	20%	48%

Calculations are based on the monitoring sample.

As shown in the table above, in the second half of the last year the share of tender procedures with only one bidder account for high 30%. As a consequence of low competition, but also as a result of disqualification of companies that presented their bids, although planned e-auctions did not take place in 35% of monitored tender procedures. The risk related to high share of procedures which did not end with organization of e-auctions lies in the unwritten rule whereby companies, in anticipation of planned e-auctions, offer higher prices at the public opening of bids, which would be reduced later during the e-auctions. Hence, there is real risk for tender procedures to be awarded to the single bidding company and, in the absence of e-auctions, to be signed under prices that are higher than the real prices.

**Recommendation:** Competent authorities should develop a detailed analysis and assess effects and purposefulness of introducing the Council of Public Procurements as additional administrative and financial burden in the public procurement system. In the meantime, implementation of mandatory market research/analyses as stipulated in Article 36-a, paragraph (3) of the LPP should be regulated in more details by means of bylaw. This is expected to address the current problem of various

ways in which market research is organized and conducted, as their current efficiency is questionable.

- **In the second half of 2014, the Council of Public Procurements was addressed with as many as 5,725 applications for approvals concerning implementation of tender procedures. The relevant ratio of approvals issued and denied is 40:60. State institutions incurred a cost of around 600,000 EUR for requesting such approvals.**

For the purpose of this research, we used the Law on Free Access to Public Information and requested information from the Council of Public Procurements about the number of approval applications it was presented with in the period covered by this monitoring report, i.e. in the second half of 2014. Also, we requested information about the number of procedures covered by such approval applications (as there is legal possibility one and the same public procurement procedure to be addressed with several approval applications) and about the costs invoiced to contracting authorities and related to their approval applications.

In the second half of 2014, the Council of Public Procurements was presented with 5,725 approval applications submitted by contracting authorities on various grounds, as stipulated in the Law on Public Procurements. On the account of engaging experts in the decision-making upon approval applications submitted, the Council has invoiced contracting authorities in total amount of 35,715,500 MKD, i.e. 580,740 EUR. Costs invoiced to institutions depend on the number of engaged experts, the grounds on which approval was requested, and the concerned procurement's estimated value.

As regards the number of procedures for which approvals were requested, the Council responded that the electronic system on recording approval applications it disposes with does not allow collation of requested information.

Nevertheless, this information is necessary for a more detailed analysis of the number of procedures for which approval was requested, average number of approvals per tender procedure, type of procurement procedures for which approvals



are most often requested (approved or denied), as well as assessment of risks related to concentration of approval applications.

For comparison purposes, in the period July – December 2014 when the Council was presented with 5,725 approval applications, a total of 7,074 tender procedures were announced in EPPS. It remains unknown how many of tender procedures announced are covered by submitted approval applications.

Direct monitoring of tender procedures included in the sample for the same reporting period shows that contracting authorities more frequently resorted to market research compared to requesting approvals from the Council. Hence the high number of approval applications submitted to the Council of Public Procurements implies submission of several approval applications for one and the same procedure. In practice, contracting authorities emphasized this as one of the key problems they are facing. Moreover, they explained that every new approval application results in new remarks for submitted technical specifications or eligibility criteria for tender participation, considering the fact that new experts are engaged for any new approval application concerning the same tender procedure.

Moreover, this statement is further supported by the fact that the relevant ratio of approvals issued and denied by the Council of Public Procurement is 40:60. Notably, this means that in the case of 60% denied applications contracting authorities had to again address the Council until they receive the approval which is a precondition for implementing the tender procedure. This results in the need for a detailed analysis of the state-of-affairs and proposal of specific solutions that would reduce administrative and financial burden on the institutions for implementing tender procedures.

**Recommendation:** In cases when the contracting authority presents the Council of Public Procurements with evidence on having acted upon recommendations provided when the approval was not issued, the Council should by automatism issue the approval for the concerned tender procedure, without additional engagement of experts (Article 14 of the LPP). By doing so, the Council would avoid the obvious problem whereby several approval applications are submitted for one and the same tender procedure.

In that, under Article 36-a, paragraph (1) of the LPP the word “producers” should be replaced with the words “economic operators”. Under Article 36-a, paragraph (1), line (1) of the LPP, the conjunction “and” in the provision “three producers on the market in the Republic of Macedonia and three producers on the foreign markets” should be replaced with the conjunction “or”. These changes will reduce the scope of market research that often, due to the inability for being conducted, result in obligation for requesting approval from the Council of Public Procurements.

- **All tender procedures from the monitoring sample applied the selection criterion defined as “lowest price” – from procurement of foodstuffs, medicaments and equipment for the health care sector, to ICT equipment and construction works. Low prices, which during e-auctions result in absurdly low levels, bring under question the quality of public procurements.**

Acting in compliance with Article 160 of the Law on Public Procurements, all contracting authorities from the monitoring sample used the selection criterion defined as “lowest price”. This approach implies that quality of procurements is defined as part of technical specifications. It is unrealistic to expect this from contracting authorities, especially having in mind that, on one hand, that requires great knowledge and expertise for different types of procurements and, on the other hand, there is real pressure on contacting authorities not to draft too detailed technical specifications by means of which they would limit competition in tender procedures.

Quality of procurements is additionally brought under question with e-auctions. Namely, the monitoring activities identified several procurement procedures in which the downward bidding has reduced the prices by several times compared to initially offered prices and they are dramatically lower than procurements’ estimated value.

Several examples from the monitoring sample are particularly indicative of this phenomenon. The first example is the procurement procedure for legal services organized by a state public enterprise which concerns legal representation in 100 active court cases in the country for a period of 12 months. This procurement’s estimated value is set at 847,400 MKD without VAT. Three bids were submitted in the tender procedure in the value of 420,000 MKD, 718,135 MKD and 840,000

MKD. In the course of the e-auction, which started from the lowest price offered, in this case 420,000 MKD, the downward bidding resulted in final price of incredible 29,000 MKD offered by the law firm which initially offered the highest price. In this way, the contracting authority arrived to a price that is 30 times lower than the procurement's estimated value and almost 15 times lower than the e-auction's starting price. According to the documents presented for this tender procedure, the public enterprise has requested the law firm to provide an explanation for the unusually low price. The response thereto implied that the price is symbolic and a result of the team of attorneys' desire to have this public enterprise on its reference list, but they guarantee that the price will not affect the quality of services provided. The contract was signed in the value of 29,000 MKD without VAT. Be that as it may, a simple math exercise shows that the law firm will charge 290 MKD per court case when the calculation is based only on 100 active court cases enlisted in the tender documents and, of course, does not exclude the possibility that the contracting authority might be involved in new court cases. Given the fact that initially the contracting authority requested bank guarantees for quality contract performance, and later changed the tender documents and revoked this requirement, the question is raised about what gives the concerned public enterprise certainty that the contract will be performed in quality manner, except for the promise made by the service provider.

In another tender procedure organized for procurement of system with interactive boards, bidding companies reacted that the contract is signed under an unrealistically low price and lodged an appeal in front of SCPPA. The contracting authority was presented with 7 bids, whose prices ranged by several thousand MKD below or above the procurement's estimated value of 3,000,000 MKD. Nevertheless, during the e-auction the price was reduced by 70% and the bid with the price of 848,250 MKD was selected as the most favourable one. A participant in this tender procedure lodged an appeal claiming that due to the exceptionally low price attained at the e-auction there are reasonable doubts that the offered equipment comprised of 17 interactive boards from the selected bidding company does not fulfil the required characteristics, having in mind market prices for such equipment in Macedonia and worldwide. In its response to the appeal, the contracting authority indicated that the price offered is not significantly lower than the actual market price and does not give raise to doubts as to whether the contract will be performed. Additionally, the

procurement-making entity stressed that the supplier had been requested to provide bank guarantees for quality contract performance. SCPPA rejected the appeal and the contract in estimated value of 3 million MKD without VAT was signed in the value of around 850 thousand MKD.

Significant reduction of prices by around 70% compared to the lowest initially offered price, as well as compared to the procurement's estimated value, was noted in the procedure for procurement of services defined as modernization, expansion and adaptation of the interoperability system. In this case as well, two from the three bidding companies lodged appeals in front of SCPPA, inter alia, claiming that the lowest price offered is not even close to actual market prices and therefore it is unclear what the bidding company offering the lowest price will deliver. Appeals were rejected and the contract was signed with the economic operator that offered the lowest price. Having in mind these examples, the conclusion is inferred that major price reduction achieved at e-auctions is justified and in the interest of rational public spending only in procedures where quality of procurement subjects is standardized and clearly defined. On the contrary, giving weight to price on the detriment of quality undermines the basic principle of public procurements, i.e. to obtain the best value for the money spent. In the long run, procurements of poor quality could generate much greater costs than savings.

**Recommendation:** To abandon the concept of bid evaluation exclusively on the basis of prices bided. Such practices are contrary to the most recent EU Directives in the field of public procurements according to which contracting authorities, when awarding public procurement contracts, should rely on the criterion defined as “economically most favourable bid”. Although the EU Directives will enter in effect in April 2016, for the time being there are no announcements in Macedonia for abandoning application of the concept of “lowest price” as the single selection criterion. At the same time, for the purpose of protecting contracting authorities from poor performance of contracts signed under exceptionally low prices compared to market prices, an instrument should be introduced for guaranteeing quality performance in cases when bank guarantees are not used. This could be done in the form of the statement on quality contract performance, with similar character and weight of the statement on serious intent.

- **Mandatory approval from the Council of Public Procurements for organization of negotiation procedures without prior announcement of call for bids has reduced the number of these non-transparent procurement procedures. In the second half of 2014, this type of procedures was used to award procurement contracts in cumulative amount of 22 million EUR, whereby the annual amount of procurement contracts awarded in this manner reached 56 million EUR.**

In the second half of 2014, negotiation procedures without prior announcement of call for bids were used to sign 328 contracts in total value of around 1.4 billion MKD, i.e. around 22.4 million EUR. In that, the value of contracts signed by means of direct negotiations is almost halved compared to the same period in 2013. Reasons behind the decreased use of this type of procedures can be located in the newly introduced legal obligation, in effect during the second half of 2014, whereby contracting authorities must obtain approval for organization of negotiation procedures without prior announcement of call for bids in the following cases:

- organization of this type of procedures after two unsuccessfully organized procedures with prior announcement of call for bids;
- organization of this type of procedures on the grounds of urgency;
- organization of this type of procedures for additional services (annex contracts for procurement of services); and
- organization of procurement procedure for additional works (annex contracts for procurement of construction works).

After this obligation was introduced, main reasons indicated for awarding this type of contracts include: urgency and cases in which due to technical or artistic reasons or due to protection of exclusive rights (patents and the like) the contract can be signed only with a specific company.

On annual level, a total of 826 contracts have been signed by means of this type of procedures in total amount of around 3.5 billion MKD, i.e. 56.3 million EUR. In that, for the first time after several years, the trend on continuous increase of this type of non-transparent contracts has been discontinued and they are marked by a reduction of 30% compared to the 2013 figures.

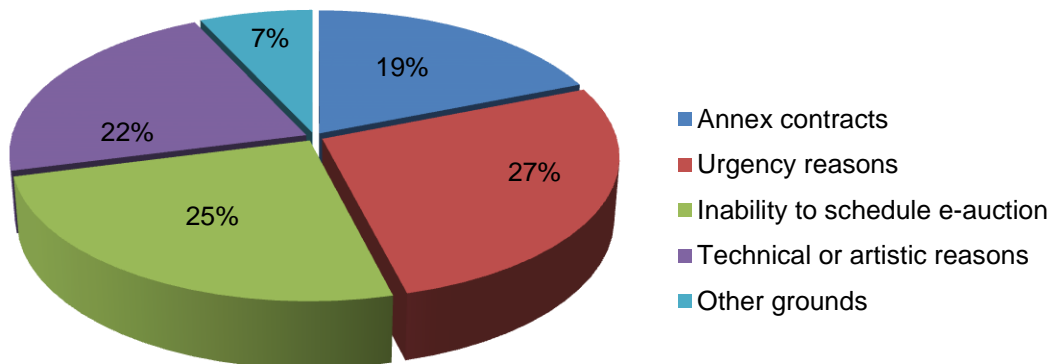
**Overview of the total value of contracts signed by means of negotiation procedures without prior announcement of call for bids**

<b>Year</b>	<b>Number of contracts signed</b>	<b>Contracts' value [in million EUR]</b>	<b>Difference</b>
2011	904	41.4	+18.96%
2012	1,162	71.7	+73.19%
2013	1,368	80.6	+12.41%
<b>2014</b>	<b>826</b>	<b>56.3</b>	<b>-30.14%</b>

Calculations are based on data available by March 2015.

On annual level, as shown on the chart below, the number one reason for this type of contracts is urgency, followed by tender awarding due to inability to organize electronic auction (legal basis that was revoked in January 2014, but had been used in the first several months of 2014 in cases of tender procedures whose procurement notices were published in 2013). The most expensive contract awarded in 2014 was signed on this ground and by means of negotiation procedure without prior announcement of call for bids. It actually concerns the tender procedure organized for procurement of services defined as project design and construction of six-seats cable-car for the Ski Centre "Popova Sapka" in the value of 581 million MKD, i.e. around 9.5 million EUR, and the contract was awarded by making reference to previously failed tender procedure organized in 2013 for the same procurement.

**Overview of contracts awarded by means of the negotiation procedure without prior announcement of call for bids, January – December 2014\***



*\*The structure of reasons indicated for contracts awarded by means of negotiation procedure without prior announcement of call for bids is based of detailed processing of all 826 notifications on contracts signed in the period 1 January – 31 December 2014 submitted to EPPS by March 2015.*

**Recommendation:** To maintain the trend of reduced organization of negotiation procedures without prior announcement of call for bids.

- **In the second half of 2014, every fourth tender procedure was annulled, most often on the grounds that the contracting authority did not receive any bids or did not receive a single acceptable or adequate bid. On annual level, 23% of all tender procedures announced in the course of 2014 have been annulled.**

Annulment of tender procedures becomes one of the most serious problems in 2014 affecting the field of public procurements. 3,659 from the total of 15,738 public procurement procedures announced in the course of the year have been fully or partially annulled. The share of annulled tender procedures in the total number of tender procedures announced continues to be high, especially among large scale tender procedures organized as open procedure (for procurements whose value exceeds 20,000 EUR in case of goods and services and 50,000 EUR in case of

construction works). Accordingly, every third large scale tender procedure has been annulled, but the overall annulment rate of 23% on annual level is a result of the smaller share of annulled tender procedure in the rank of small scale procurements. As shown in the table below, the 2014 tender annulment rate is by 0.6 percentile points higher than the relevant rate calculated for the previous year.

### Overview of tender annulments, per year

Year	Number of announced procurement notices	Number of decisions on tender annulment	Share of annulled tender procedures
2011	7,801	1,431	18.3%
2012	11,726	2,818	24.0%
2013	18,654	4,236	22.7%
2014	<b>15,738</b>	<b>3,659</b>	<b>23.3%</b>

Calculations are based on data available by March 2015.

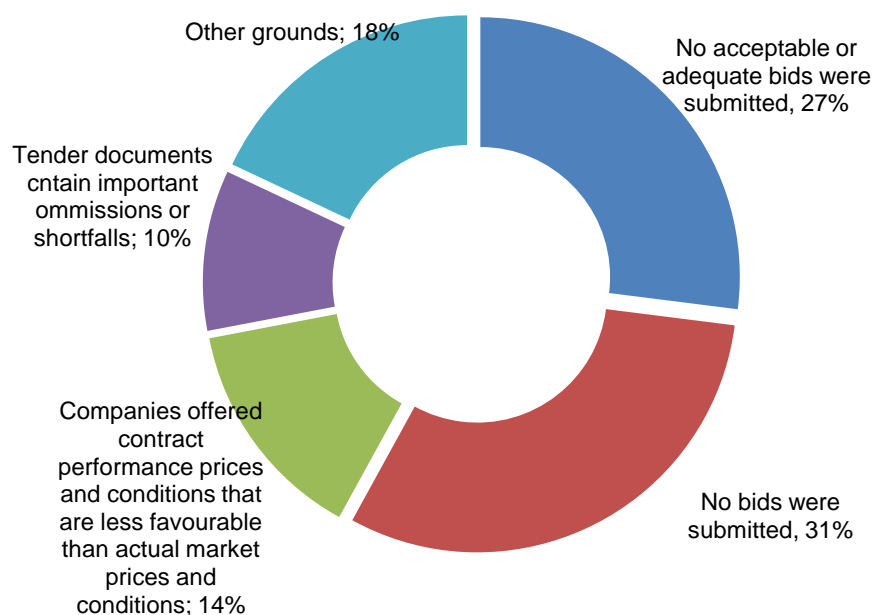
Analysis of reasons indicated for tender annulment shows that in 2014 tender procedures were most often annulled on the grounds that there were no bids submitted.

Second most frequent reason for tender annulment is that there were no acceptable or adequate bids submitted. Amendments to the Law on Public Procurements from November 2014 introduced an obligation for the institutions to make clear and precise statement whether the bids they have received were unacceptable or inadequate. Unacceptable are bids that do not fulfil the requirements enlisted in the relevant technical specifications or the bidding companies do not fulfil the eligibility criteria for tender participation. Inadequate are bids for which the bidding company has indicated a price higher than the tender's estimated value or beyond the contracting authority's financial capacity. Differentiation and separation of these two reasons into separate grounds for tender annulment would allow more precise identification of problems, i.e. whether they are result of tender documents or



inadequate planning of procurement's value, or they are result of unrealistic bids submitted by companies.

### Overview of reasons indicated for tender annulment in the course of 2014\*



*\*The structure of reasons indicated for tender annulment is based on processing data from all 3,659 notifications on tender annulments submitted to EPPS in the course of 2014 and available by March 2015.*

Among tender procedures from the monitoring sample, most frequently indicated reason implied unacceptable or inadequate bids. Several cases were noted in which tender procedures have been annulled on the grounds that even after the organized e-auction the lowest prices attained were still higher than procurements' estimated value and that contracting authorities did not have additional budget funds to compensate this difference.

**Recommendation:** Frequent annulment of large scale tender procedures imposes the need for regular monitoring of this problem by the competent institutions at the

level of contracting authorities for the purpose of obtaining a detailed overview of the state-of-affairs and taking measures to sanction possible abuses and malpractices. Moreover, contracting authorities should make additional efforts in the stage on planning public procurements, especially with a view to make more realistic estimated values of procurements. In cases of small deviations between procurement's estimated value and the lowest price bided, due consideration should be made of the possibility to introduce a general threshold, i.e. range of values that would imply mandatory acceptance of bids, ultimately resulting in successful tender procedures. Such practices would result in saved money, human resources and time for repeated organization of annulled tender procedures.

- **Monitoring activities observed decreased use of bank guarantees for bids, contrary to increased use of bank guarantees for quality performance of contracts.**

Bank guarantees for bids were required in 22% of monitored tender procedures, while guarantees on quality performance of contracts were required in 53% of monitored tender procedures. Despite the legal possibility companies to be required to provide a statement on serious intent as guarantee that they would not withdraw their bids, in one fifth of monitored tender procedures contracting authorities continue to request bank guarantees for bids. Such practices are indicative of the fact that contracting authorities are not led by the idea of stimulating competition among companies, but – tendentiously and by inertia – use old mechanism that create costs for companies.

Recommendations put forward in the previous monitoring reports suggested greater use of bank guarantees for quality performance of contracts, something that was more frequently complied with on the part of contracting authorities for the purpose of protecting themselves from non-quality performance of contracts under conditions of unusually low prices bided by companies. Nevertheless, for the purpose of stimulating greater competition in tender procedures and securing equal treatment of all bidding companies against issuance of negative references, the need is imposed to replace bank guarantees with statements on quality contract performance. This would overcome the problem emerging in tender procedures

when companies are not requested to provide bank guarantees for quality performance of contracts and in which suppliers that default on their contracts can be issued negative references. Since this mechanism is already available for sanctioning defaulting companies, it must ensure equal treatment of all economic operators.

**Recommendation:** Bid guarantees (in the form of bank guarantees or deposits) referred to in Article 47 of the LPP should be revoked and replaced with “statement on serious intent”. Guarantees for quality performance of contracts (in the form of bank guarantees) referred to in Article 48 of the LPP should be a mandatory requirement in all public procurements whose value exceeds 500,000 EUR in MKD counter value.

- **In the second half of 2014, a total of 19 negative references were issued, by means of which 18 companies for the first time found their place on the so-called black list. Total of 72 companies are now prohibited to participate in tender procedures. Practices on selective application of this measure on the part of contracting authorities were observed in this monitoring period as well.**

Most frequent reason for issuing negative references in the second half of 2014 is companies' refusal to sign the public procurement contract (42%). Second in frequency is activated bank guarantee on quality performance of contracts (32%). Less frequent, but still present, grounds for prohibiting companies to participate in tender procedures is their failure to provide guarantees on quality performance of contracts (16%) and withdrawal of their bids (10%).

Selective approach pursued by contracting authorities in terms of issuing negative references was observed in the monitored tender procedure for procurement of services provided by a mobile operator. One of the two bidding companies in this procedure withdrew the bid and lodged an appeal in front of the State Commission on Public Procurement Appeals, dissatisfied with tender documents used in the procurement procedure. By withdrawing its bid, the mobile operator violated the

statement on serious intent provided. Although the tender procedure in question was annulled by means of decision taken by SCPPA, worrying is the fact that in the course of the tender procedure and the appeal process nobody referred to issuance of negative reference, neither the contracting authority nor the second bidding company or even SCPPA. Such actions are contrary to Article 47, paragraph (5) of the LPP which stipulates that “in cases when bid guarantees are activated, deposited funds are withheld or the statement on serious intent is violated, the contracting authority shall publish a negative reference in EPPS resulting in exemption of the concerned bidding company from participation in all future public procurement contract awarding procedures for a period of one year from the day the first negative reference is issued, and shall inform the concerned bidding company thereof...” Selective application of legal provisions on issuance of negative references does not only bring under question justifiability of this mechanism for sanctioning companies, but increases companies’ distrust in the public procurement system as well.

**Recommendation:** Negative references from Article 47, paragraph (5) of the LPP should not be issued in cases when bidding companies withdraw the bid prior to the expiration of its validity and when bidding companies fail to sign the public procurement contract in compliance with the terms and conditions from relevant tender documents and bids submitted. Issued negative references from Article 47, paragraph (6) of the LPP should result in exemption of the concerned bidding company from participation in future public procurement contract awarding procedures organized by the contracting authority issuing the negative reference. Also, it is recommended to immediately align application of negative references in Macedonia with generally accepted rules in the EU.

## ANALYSIS OF PROCEDURES LED IN FRONT OF THE STATE COMMISSION ON PUBLIC PROCUREMENT APPEALS IN THE PERIOD JANUARY-DECEMBER 2014

- **Contracting authorities joined the appeal process in the field of public procurements. 109 from the total of 612 appeals lodged to the State Commission on Public Procurement Appeals in the course of 2014 were motioned by institutions implementing tender procedures and contest decisions taken by the Council of Public Procurements. With only 503 appeals lodged by companies in the course of 2014, the multiannual trend on reduced number of appeals motioned by companies in front of the State Commission is continuing.**

In the second half of 2014, companies lodged lower number of appeals (203) compared to the first half of the year (300), whereby the total number of appeals lodged by companies continues to decrease. Total number of appeals lodged by companies accounts for 503 in 2014 and is by 13.4% lower than their relevant figure in 2013.

### Overview of the number of public procurements announced and the number of appeals lodged by companies in front of SCPPA

Year	Number of tender procedures	Difference (%)	Number of appeals submitted to SCPPA	Difference (%)
<b>2011</b>	7,801	+10.0%	856	+0.1%
<b>2012</b>	11,726	+50.3%	633	-26.1%
<b>2013</b>	18,654	+59.1%	581	-8.2%
<b>2014</b>	15,738	-15.6%	503	-13.4%

Calculations are based on data about appeals submitted to SCPPA, available on the institution's website.

Decline in the number of appeals is bigger than the decrease recorded in 2012, but it occurs in the year also marked by decreased number of public procurement procedures. Therefore, in order to obtain a clear image about the unfavourable decline in number of appeals lodged by companies in relation to tender procedures it would be best to indicate that in 2014 the share of appeals in the total number of

tender procedures accounts for only 3.2% contrary to 2011 when this share accounted for 10.1%.

According to the analysis of data available on its official website, in 2014 SCPPA adopted 554 decisions upon appeals lodged by companies. Of course, these decisions also concern appeals lodged in 2013 but reconsidered and decided upon in 2014.

For the first time, most numerous are decisions whereby the State Commission approves the motions for appeal lodged by companies. As shown in the table concerning the structure of decisions taken by SCPPA in 2014, the share of approved appeals is 42.4%, 32.3% of all motions for appeals were rejected, while 15.4% of them were denied as inadmissible or untimely.

#### **Structure of decisions taken by SCPPA in 2014**

Type of decision	No. of appeals	Share (%)
Approving motion of appeal	235	42.4%
Rejecting motion of appeal	179	32.3%
Denying motion of appeal	85	15.4%
Withdrawn appeals (tender procedure is terminated)	30	5.4%
Appeal approved by the contracting authority (tender procedure is discontinued)	25	4.5%
Total	554	100%

Calculations are based on data about decisions taken by SCPPA, available on the institution's website.

Compared to relevant figures from the previous year, it could be concluded that from one to another year the share of approved appeals is significantly increasing. The share of approved appeals in 2014 compared to the previous year is increased by 10.8 percentile points, and compared to 2011 is increased by high 17 percentile points. On the account of increased number of approved appeals, the number of rejected appeals is lower. Such favourable development for companies in terms of types of decisions taken upon appeals can be directly linked to continuous decrease of the overall number of appeals lodged. It seems that companies decide to lodge appeals only in cases when they are faced with more significant violations of the Law on Public of Procurements. At the same time, analysis of the appeal process shows that a small share of companies deciding to protect their rights by lodging appeals in front

of the State Commission are pursuing this avenue very frequently. Therefore, one should have in mind that throughout the years these companies have acquired the necessary knowledge for lodging appeals contesting procedures and decisions of contracting authorities taken in the field of public procurements.

### **Comparison of types of decisions taken in the appeal process**

<b>Type of decision</b>	<b>2011</b>	<b>2012</b>	<b>2013</b>	<b>2014</b>
<b>Approved appeals</b>	25.4%	33.5%	31.6%	42.4%
<b>Rejected appeals</b>	42.0%	37.4%	41.7%	32.3%
<b>Denied appeals</b>	17.6%	18.8%	17.8%	15.4%
<b>Terminated/discontinued appeal process</b>	15.0%	10.3%	8.9%	9.9%
<b>Total</b>	100%	100%	100%	100%

Calculations are based on data about decision taken by SCPPA, available on the institution's website.

As shown in the table above, for the entire analysed period 2011-2014, the share of denied appeals remains high. They range from 17.6% in 2011 to 15.4% in 2014. It is a matter of appeals lodged in advance of the law-stipulated deadlines and assessed as inadmissible, or lodged after deadlines' expiration and 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. With such legal solution, Macedonia deviates from the general rule governing the deadline for appeals related to tender documents whose expiration period starts from 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. This deadline for lodging appeals is confusing because under conditions when tender documents are published together with the procurement notice in EPPS unclear is why the expiration period for lodging appeals contesting the procurement notice starts from its publication, but is not applied in the case of tender documents. Discouragement is seen in the fact that submission of appeals in the stage of already submitted and opened bids increases negative implications on the tender procedure and results in widespread fear among companies that their appeals might be counted to their

detriment and would be considered reason to deteriorate business relations between the company and the institution organizing the tender procedure. It seems that pursuit of this approach demonstrates unpreparedness on the part of competent institutions, instead of establishing the Council of Public Procurements, to encourage companies to defend themselves against favouring tender documents that are discriminatory and limit competition.

Analysis of decisions taken by the State Commission in cases of approved motions for appeal lodged by companies shows that in 2014 dominant are decision by means of which tender procedures are fully annulled (60%) compared to decision on revoking the selection decision and returning the tender procedure for repeated bid evaluation (40%). This ratio is indicative of increased essential violations of the Law on Public Procurements, i.e. illegal actions taken in the course of tender procedures cannot be addressed by changing a particular decision, but the entire tender procedure must be annulled and organized anew. Most often it is a matter of cases in which institutions do not comply with provisions contained in LPP when drafting their tender documents and thereby fail to make legal and objective selection of the most favourable bid. Increased share of tender procedures annulled by the State Commission, as observed in the last 4 years, is significant and ranges from 32% in 2011 to high 60% in 2014.

#### **Comparison of types of decisions taken upon approved appeals, per year**

<b>Type of decisions taken upon approved appeals</b>	<b>Share of approved appeals</b>			
	<b>2011</b>	<b>2012</b>	<b>2013</b>	<b>2014</b>
<b>Revoked selection decision</b>	68%	53%	45%	40%
<b>Annulled tender procedure</b>	32%	47%	55%	60%
<b>Total</b>	100%	100%	100%	100%

Calculations are based on data about decisions taken by SCPPA, available on the institution's website.



In terms of the appeal process, Council of Public Procurements' start of operation (1 May 2014) was followed by appeals lodged by contracting authorities contesting decisions taken by the Council. In that, in a period of 7 months from the Council's start of operation, SCPPA was presented with 109 appeals from state institutions on national and local level. Analyses show that most often appeals concern decisions taken by the Council on denied approval for proposed technical specifications for procurement of particular products, followed by appeals lodged against decisions of the Council on denied approval for used eligibility criteria for tender participation. Small number of appeals lodged by contracting authorities concerns decisions taken by the Council on denied approval for organization of negotiation procedure without prior announcement of call for bids, while the lowest share of them concerns decisions on denied approval for using the selection criterion "economically most favourable bid".

In 2014, SCPPA adopted decisions for 106 from the total of 109 appeals lodged. Analysis of SCPPA's decisions upon appeals lodged by contracting authorities contesting decisions taken by the Council of Public Procurements shows that 83 from the total of 106 appeals lodged have been rejected and 23 of them have been approved. Accordingly, the ratio of rejected and approved appeals lodged against decisions taken by the Council is 78% to 22%. Such unfavourable ratio is most certainly a result of the fact that in its decisions the Council relies on opinions provided by experts and contesting such views and positions necessitates significant expertise in different fields on the part of SCPPA members, so they would be able to engage in material discussions about decisions taken by the Council. Therefore, decisions whereby SCPPA approved appeals lodged by contracting authorities most often concern violations of the procedure stipulated by LPP.

Having in mind previous monitoring findings and for the purpose of improving legal remedies and enabling more efficient legal protection of the rights of participants in public procurements, the following recommendations are valid:

- Deadlines for lodging appeals stipulated in the Law need to be changed, i.e. extended (Article 216, paragraph 2 of the LPP). Current deadlines of eight days, i.e. three days, depending on the type of procurement procedure organized, should be replaced with ten days, i.e. five days.

- Deadline for lodging appeals against tender documents should start from the publication of relevant tender documents. The current solution stipulated under Article 216, paragraph 2, line 2 of the LPP should be abandoned, as it implies that appeals related to activities concerning tender documents should be allowed only after opening of bids.
- Changes are needed to the calculation method for the fee charged for initiation of appeal procedure in front of SCPPA (Article 229 of the LPP). Due consideration should be made of the possibility to introduce new and fairer calculation method for this fee that should be set as share of the procurement's value. That would enable proportionality of costs imposed and would address the current situation whereby the appeal procedure is most expensive for the most dominant type of tender procedures (bid collection procedures in the value of 500 to 5,000 EUR).
- Greater education is needed for participants in public procurements for the purpose of getting better familiarized with their rights and legal remedies available. Given the continuous trend on reduced number of appeals and the high share of inadmissible and untimely appeals lodged by participants in tender procedures, efforts aimed at education of companies about their right to appeal are considered necessary. Continuous education of participants in public procurements become increasingly important due to the fact that legislation in the field of public procurements is exceptionally complex and subject to frequent changes (in the last years the Law on Public Procurements adopted in November 2007 was subject to ten rounds of amendments).
- 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.