

MONITORING THE IMPLEMENTATION OF CENTRAL LEVEL

PUBLIC PROCUREMENTS IN THE REPUBLIC OF MACEDONIA

QUARTERLY REPORT

2010

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



 Center for Civil Communications
Центар за граѓански комуникации



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MONITORING THE IMPLEMENTATION OF PUBLIC PROCUREMENTS IN THE REPUBLIC OF MACEDONIA

Seventh Quarterly Report

2010

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Seventh quarterly report**

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



CONTENTS

- | | |
|----|---|
| 7 | Key Findings |
| 9 | Goals And Methodology |
| 11 | Quarterly Public Procurement
Monitoring Report |

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	Centre for Civil Communications

KEY FINDINGS

Economic operators cannot exercise the right to insight in documents related to public procurement procedures they have participated in. Preventing insight in documents related to the implemented public procurements only increases the impression on behalf of companies that the procedure in question failed to secure fair competition and validates their doubts on procedure irregularities.

The trend on decreased competition in public procurements continues. In as high as 47.5% of tenders monitored in the period July-September 2010, bids were submitted by only 1 or 2 companies. This indicates that public procurements are characterized by problems that prevent efficient competition between the suppliers.

22.5% of monitored procedures were annulled. In the period 2008 to 2010, the share of annulled tenders from the total number of implemented procurement proce-

dures has been increased by 2 and half times. In some procedures, the annulment decision was adopted two to five months from the day of the public opening of bids, which provides space for doubts on particular calculations or possible influences in the decision-taking process.

Some contracting authorities failed to comply with the new legally-stipulated deadline on decision-taking for the selection of the most favourable bid. The dynamics of tender implementation continues to be frivolously dictated by the contracting authorities.

Contracting authorities will not fulfil this year's legally-stipulated minimum requirement that 30% of procurements should be implemented by means of e-auctions, as an efficient mechanism for public saving. By September this year, the contracting authorities succeeded to im-

plement only 11.6% of announced public procurements by means of e-auctions.

The trend on increased number of contracts signed without published call for bids continues. In the period July-September 2010, a total of 574 million MKD (9.3 million EUR) were spent under this non-transparent contract-awarding procedure, which represents an increase by 14% compared to the same period last year.

Most contracting authorities value more the longer payment deadlines for the procurements rather than the quality of goods and services procured. Frequent use of the bid-evaluation element “payment deadline” continues and forces the companies to offer payment of invoices for public procurement contracts within a period of up to 300 days.

Technical specifications are used to favour certain bidders. In this period as well, economic operators referred to the violation of Article 36 from the Public Procurement

Law, notably by means of technical specifications, which in their opinion were adjusted to suit certain bidders and thereby violate the principle of equal treatment and non-discrimination of bidders.

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 new Public Procurement Law 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 procurements implemented. 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 attend-

ance 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 and local level contracting authorities, whose public opening of bids was performed in the period July-September 2010. In this quarter, the monitoring included public procurement procedures implemented by local level contracting authorities, i.e., municipalities or authorities under their jurisdiction. Indeed, local level public procurement-performing entities by far outnumber the central level contracting authorities, although most of them can be classified as small public procurement-performing entities in terms of funds at their disposal and the number of procedures implemented. In the third quarter, in compliance with the stipulated meth-

odology, monitoring was performed on 25 procedures implemented by central level contracting authorities and 15 procedures implemented by local level contracting authorities, notably in the municipalities Strumica, Stip, Kocani, Vinica, Kavadarci, Sveti Nikole, Probistip, Radovis and by the public enterprises established by them.

For each quarter, in addition to the monitoring findings, the report also includes an analysis of other public procurement-related issues. Thus, the present quarterly report also incorporates the comparative analysis of legislative solutions in the field of public procurements from the neighbouring countries, and specifically targeting the right of economic operators to insight in tender documents, as well as the sanctions stipulated for contracting authorities on the grounds of failure to implement the relevant legislative provisions.

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

QUARTERLY PUBLIC PROCUREMENT MONITORING REPORT

- Economic operators cannot exercise the right to insight in documents related to public procurement procedures they have participated in. Such erroneous application of the Public Procurement Law increases companies' doubts on procedure irregularities.

Documents on public procurement procedures become strictly kept secrets even for economic operators that have participated in these procedures. On their request to obtain insight in tender documents, economic operators were frequently answered by the contracting authorities that in compliance with the Public Procurement Law they are not obliged to provide such insight. Problems appear also in regard to the Commission on Public Procurement Appeals, where according to the companies they are rarely invited to review tender documents.

Worrying is the fact that contracting authorities justify the prevention of the right to insight in documents related to public procurements with the opinion they have obtained from the Bureau of Public Procurements which states that the law does not oblige them to do so.

Such attitudes on behalf of contracting authorities and on behalf of the two institutions competent to secure and protect the regular proceeding in public procurements is problematic because the companies most often request insight in documents related to implemented public procurements when they have doubts that the procedure in question has not been implemented in compliance with the Public Procurement Law. Therefore, preventing insight in documents on implemented public procurement procedures only increases the companies' impression that the procedure failed to secure fair competition and thereby justifies their doubts on procedure irregularities.

Why do contracting authorities, supported by the opinion provided by the Bureau of Public Procurements, say that they are not legally obliged to provide the companies insight in public procurement documents?

It is true that the Public Procurement Law does not decisively grant economic operator's right to insight in documents related to public procurements before the procedure in question is in appeal procedure. Nevertheless, in the spirit of the legal system in the European Union, whose directives were used to develop the Macedonian Public Procurement Law, if the provisions related to actions needed in such cases are vague, the basis for action should be the goals and principles promoted and pursued in the field regulated by the legislative act in question. Hence, one of the basic principles in the field of public procurements is the principle of transparency (Article 2 from the Public Procurement Law). This means that economic operators are entitled to insight in documents. Laws should be enforced in compliance with the spirit they were adopted for. It should be reconsidered whether the application of the principle of transparency will cause

any damages. In this case it is a matter of what would be the possible damage inflicted to other participants in the procedure (bidders or the contracting authority) and to the society as a whole. There will be no damage, but on the contrary, the application of this principle could be beneficial for all stakeholders. On one side, the economic operators' interest is in developing argument-based and evidence-supported appeals, and thereby preventing illegal selection of the bidder or procedure annulment. But on the other side, the insight might defer them from lodging appeals and determining that the bid evaluation and point-ranking procedure were performed in the right manner. From this reason and for this purpose, the contracting authorities should allow insight. In that, the contracting authority will guarantee that the entire procurement procedure will not be unduly delayed with unnecessary appeals and will obtain a form of "external verification" that it has acted in the right manner. Finally, the societal interest will be satisfied by allowing transparency in the entire procedure and by right decision-taking on public spending.

Contracting authorities are obliged to protect only the data labelled by the companies as confidential (business secrets or intellectual property rights), and pursuant to Article 25 from the PPL these data should be treated as such and should be appropriately protected. Access to data labelled as business secret should not be disclosed to any party, except for the committee on public procurements that evaluates the bids and possibly the State Commission on Public Procurement Appeals and other authorities holding relevant legal competence as regards supervision and auditing of contracting authorities' operations. Nevertheless, this does not mean that the bid's entire contents and accompanying documents, especially the financial portion of the bid, are considered confidential.

Several articles from the law that regulates the specific types of procurement procedures protect the bid's confidentiality and its non-disclosure to other bidders during the procurement procedure, in particular as long as the negotiations are underway (procedure with negotiations and competitive dialogue) and until the selection deci-

sion is taken. Therefore, by analogy it can be concluded that secrecy and confidentiality of bids is not required after the decision has been taken. This means that contracting authorities are not entitled to prevent insight in documents that are an integral part of competitors' bids and - in compliance with the law - can and should provide insight therein.

Worrying is the fact that throughout the monitoring of public procurements we encountered situations when the companies are not by default allowed insight in relevant documents, even in the appeal procedure, although this is not prohibited by means of legal provisions. Notably, Article 223 from the Public Procurement Law allows insight in documents for all parties concerned, i.e., for the companies in the appeal procedure. The law requires the entire documents related to the appealed public procurement, including the bids, to be submitted to the State Commission on Appeals so that the said Commission can establish and work on the appeal case. Thus, at this stage, the appeal case documents include all documents from the public procurement file, but also the entire future sub-

missions and letters (appeal, answer to the appeal....). The bidder that lodged the appeal must be allowed insight in documents of the selected bid, as well as other bids, but also in the report on the procurement procedure implemented. Therefore, unclear remains why the State Commission on Public Procurement Appeals failed to accommodate the companies' requests in certain cases.

In that, for the purpose of developing an efficient public procurement system it is necessary to take into consideration that it is of key importance for the contracting authorities to enable companies' insight in the case-related documents before the case is in appeal procedure. This is the basic precondition for unsatisfied companies to be able to submit in front of the second-instance commission an argument-based and well-rationalized appeal. Notably, the monitoring of public procurements already confirmed that companies receive poor notifications on the decisions taken in tender procedures. This, in conjunction with the practices on preventing insight in case-related documents, prevents the unsatisfied companies to develop high quality and argument-based appeals, and also

prevents them to demonstrate that the procedure might have been illegally implemented, that a competing company has been favoured, that terms and conditions offered by the competitors are more unfavourable than the ones submitted by the company that lodged the appeal, etc.

Further tolerance of these two problems (preventing insight in documents by the contracting authorities and poor notifications on the procedure's outcome) raises questions related to the transparency in public procurements and thereby affects the companies' trust in the procedure's regularity.

The analysis of the manner in which the right to insight in tender documents has been regulated in the legislation of the neighbouring countries indicates that this right has not been decisively stipulated, but some countries pursue solutions similar to the Macedonian one, i.e., they indirectly suggest that companies have the right to insight.

Serbia

According to the Serbian Public Procurement Law, any entity that has participated in public procurement procedures is entitled to insight in data related to the public procurement implemented after the relevant decision has been taken by the contracting authority, for which it can submit a written request to the contracting authority within a period of 2 days from the day it obtained the decision, whereas the contracting authority in question is obliged to provide such insight within a period of 2 days from the receipt of the written request. Failure to enforce this right is liable to sanctions imposed to the contracting authorities.

Montenegro

According to the Public Procurement Law in Montenegro, the bidders that participated in the public procurement procedure are entitled to insight in and data on the implemented public procurement procedure after they have obtained the rationale/notification on contract-awarding.

Croatia

The Croatian Public Procurement Law does not contain explicit provisions on the right to insight. This right is indirectly derived from the provisions stipulating that the contracting authority must not allow insight in and must not forward information provided by the economic operators that are considered secret, and stipulates that these data in particular include technical or business secrets.

Slovenia

As was the case with the Croatian PPL, the Public Procurement Law in Slovenia also indirectly refers to the type of data available for the public and subject to insight. Notably, the law stipulates the obligation of the contracting authorities in the course of the public procurement procedure not to disclose data characterized by the economic operators as business secret or confidential. Without prejudice to the previously given provisions, bid prices, criteria for the selection of the economically most favourable bid, as well as data related to the bid-evaluation

process are open for the public, which indirectly refers to the fact that the participants in the public procurement procedure can also have the right to insight therein.

Albania

According to the Albanian Public Procurement Law, any relevant information in possession of the contracting authority shall be made available on request from the interested parties and upon the completion of the tender procedure. Information requests can be submitted at any time and the contracting authority is obliged to make the information in question available, i.e., to provide insight therein within a period of 5 days from obtaining the information request. As an exemption from the previously given provisions, the availability of information and insight therein does not concern those information whose disclosure is contrary to the law, would lead to violation of the law, would be contrary to the public interest or would be contrary to the principle of equal treatment of economic operators.

Romania

According to the Public Procurement Law in Romania, documents related to public procurements are considered to be of public character. Access to the information contained in the public procurement-related documents is exercised in a manner and procedure stipulated with the legislation on free access to public information (Freedom of Information Act). Access thereto can be limited only if certain information is classified as secret or in case of data that represent intellectual property. Unjustified limitation of access to information is subject to sanctions imposed to the contracting authorities.

Recommendation: To discontinue the practices on preventing insight in documents related to public procurement procedures, which undermine one of the basic principles from the Public Procurement Law – transparency. The Bureau of Public Procurement should develop an opinion and should forward it to all contracting authorities by means of which it shall indicate the contract-

ing authorities' obligation to enable insight in relevant documents for the companies. SCPPA should comply with Article 223 from the Public Procurement Law, which decisively guarantees the right to insight in documents during the appeal procedure. In the long run and for the purpose of avoiding vague provisions related to the exercise of the right to insight, the Public Procurement Law should include precise provisions that regulate this issue and thus overcome the different interpretations related to this issue. At the same time, sanctions should be stipulated for the contracting authorities that fail to enable the right to insight for the participants in the public procurement procedure.

- The trend on decreased competition in public procurements continues. This indicates that public procurements are characterized by problems that prevent efficient competition between the suppliers.

Competition in public procurements is important as it should result in lower prices and better quality of goods and services purchased and should create competition between the suppliers for the purpose of obtaining the best value for the money spent. Higher number of participants in the procurement procedures is also important in terms of reducing risks from manipulations as regards the selection of the most favourable bid.

However, despite all these benefits, competition between the companies in the tenders in Macedonia, both on national and local level, is marked by a continuous decline. In as high as 47.5% of procedures monitored in the period July-September 2010, sale offers for goods or services or contracted works for the state authorities were submitted by only 1 or 2 companies. This indicates the continued trend on decreased competition, as in the previous quarter (April-June 2010) 1 or 2 bids were registered in 40 % of procedures monitored. In that, it should be noted that small number of companies participating in tenders was registered on national and on local level.

Considering the fact that the small number of bids is not

a result of lack of information on public procurements announced, as the calls for public procurement contract-awarding are published in the “Official Gazette” and in the Electronic Public Procurement System, the reasons for poor competition should be sought in the other segments of the procurement procedures.

One of the most easily identifiable factors would be the high criteria on companies’ eligibility for tender participation (economic and financial ability, technical and staff requirements, as well as standards on quality assurance systems). Maybe the best example thereof is the tender for furniture equipping of three facilities in the amount of 814,000 EUR, where only two companies submitted bids, one of which submitted a bid for the entire procurement and the other submitted only a partial bid for certain lots from the call. If this information is considered in the context of the statements provided by the Chamber of Commerce in the Republic of Macedonia indicating that the furniture production industry in the country accounts for 500 companies, inevitable is the question: why only one company submitted a bid for all lots from the furniture

and equipment procurement announced by the state institution? The problem might be identified in the fact that companies were required to have at least 15 employees specialized in the procurement field in question, those being: 1 architect, 3 engineers on furniture and interior design technology with relevant B.S. degrees, 2 forestry engineers, 1 electricity engineer and 9 qualified workers in the field of wood industry and interior design. Moreover, the companies were required to own at least 3 machines on wood processing and furniture production and relevant premises. In order to demonstrate their technical or professional ability, the companies had to: have a turnover of at least 21 million MKD in the last three years; submit copies of at least three contracts in the value of minimum 3 million MKD from the last three years; provide recommendations on quality performance interior deliveries (furniture and equipment) from the last 10 years; provide reference list of works performed in the last 10 years, with indicated value, date and procurement party thereof; submit photographs of works performed; provide lists to demonstrate staff qualifications; provide list of responsi-

ble persons; provide list of persons responsible for quality control, etc. As for the quality standards, the companies had to own ISO 9001 standard on materials and equipment, as well as ISO 14001 on environment. The economic operators were also required to submit attestations on material and equipment quality, as well as to sub-contract a relevant technical authority to perform additional quality assurance and to determine the quality of materials installed and works performed.

Undoubtedly, all these requirements imposed by the contracting authorities represent a type of guarantee for quality performance of works, but also lead to reduced competition. Stressing companies' past experiences, insisting on large number of employees and minimum equipment logically narrow the circle of potential bidders to large companies with long-standing experiences and discourage large number of economic operators to participate in the tender. Hence, instead of stimulating competition, the call for bids reduced the intensity of competition and also the possibility for greater efficiency and cost-effectiveness of the procurement.

Of course, this does not imply lowering criteria on the detriment of quality performance of public procurement contracts, but attention must be paid in order to avoid criteria to become an instrument for discrimination. Actually, Article 144 from the PPL is decisive that the contracting authorities must not request fulfilment of certain minimum requirements related to the economic and financial ability and the technical and professional qualifications of the economic operators that are inproportional to the subject of the public procurement contract.

There are other examples of unrealistically high standards set, which can often be interpreted as tendentious. Thus, for example, the procurement procedure on physical security of state institution's facility required a high number of employees at the security agency (minimum 200 and minimum 200 security certificates); reference list that would include at least 7 clients, but also a certificate on environmental protection, although the need for such document in this type of procurement is disputable. Disputable is also the fact that this public procurement procedure defined the "lowest price" as the criteria

for the selection of the most favourable bid, but awarded the contract to a security agency that submitted a more expensive bid, after the agency that submitted a cheaper bid was disqualified on the grounds of failing to provide a certificate on environmental protection.

The fact that criteria for the economic operators' technical and professional ability, as well as the standards on quality assurance systems are often used as an efficient mechanism to favour certain bidders was confirmed with the appeals lodged by the companies in front of the State Commission on Public Procurement Appeals. In the monitoring period, one insurance company addressed the SCPPA with a direct accusation that a contracting authority has endangered competition and equal treatment of companies by requesting the potential bidders to have at least 2 vehicle insurance contracts whose individual value per contract should be at least 15 million MKD – a criterion which in the insurance company's opinion could be met by only one company with which the contracting authority that owns a large vehicle park cooperated in the past. Ultimately the tender was annulled, not because of

the appeal lodged by the insurance company which was rejected by the SCPPA, but by means of a decision taken by the contracting authority and indicating that the tender documents contained major shortcomings.

On the other hand, long is the list of monitored procedures where only one or two companies bided, and where the eligibility criteria for the companies have been highly unattainable. There was also a case when the companies that bided for the procurement of linen and shoes were required to demonstrate annual turnover of 50 million MKD for the last three years separately, whereas the procedure on the construction of an infrastructure facility required detailed description of employees' profiles, the value of individual contacts and types of equipment owned by the company. The fact that there was only one bidder in these two procedures should not come as a surprise. Thus, justifiable are the comments given by economic operators that some calls for public procurement contract-awarding prevent competition instead of stimulating it.

Nevertheless, problems that lead to reduced competition in public procurement procedures should not be ex-

clusively attributed to the high eligibility criteria for the companies to participate. Serious problem is also the different interpretation of the Public Procurement Law, the economic operators' increased mistrust in the system, as well as the legally granted possibility for the contracting authorities to delay payment of goods or service purchased, which was elaborated in detail as part of our previous quarterly monitoring report.

Recommendation: The Bureau of Public Procurement should undertake a comprehensive analysis of competition in public procurement procedures and should act in the light of limiting the possibilities for the contracting authorities to use eligibility criteria as a mechanism for discrimination and favouring certain bidders.

- 22.5% of monitored procedures were annulled. In some procedures, the annulment decision was adopted two to five months from the day of the public opening of bids, which provides space

for doubts on particular calculations or possible influences in the decision-taking process.

The share of annulled procedures in the monitored sample remains at high 22.5%. According to data from the Electronic Public Procurement System, in the period July-September 2010 a total of 378 decisions were taken on annulling public procurement procedures, which represents a significant increase compared to the same period last year, when 320 annulment decisions were taken. Such unfavourable, although expected movements (on the basis of previous monitoring findings) are confirmed with the summarized data on procedures annulled in the first nine months of 2010. Official EPPS data confirm that the share of procedures annulled compared to the number of total procedures announced has already exceeded 20%. In Macedonia, in the period 2008 - 2010 the share of procedures annulled from the total number of initiated procedures has been increased by two and half times, which certainly casts a shadow over public procurements and raises doubts on the justifiability of procedure annul-

ment. Having in mind that contracting authorities now show greater compliance as regards the submission of information to EPPS, the fact is that the share of annulled procedures is more objective compared to 2008 figures, when it might have been unrealistic. Nevertheless, these discrepancies in the information provided cannot deny the growing trend of annulments.

Trend on annulling public procurement procedures

Period	Number of calls announced	Number of decisions taken on procedure annulment	Share of procedures annulled
January-September 2008	4,982	392	7.87 %
January-September 2009	5,106	856	16.76 %
January-September 2010	5,295	1,084	20.47%

Source: Electronic Public Procurement System

As for the monitoring sample, the procedures were annulled by means of decisions taken by the contracting authorities. Reasons behind the procedure annulment, as indicated by the contracting authorities, were the following:

- the contracting authority's procurement needs have changed due to contingency and objective circumstances;
- the number of candidates was smaller than the minimum number required (only one bid was obtained in an open procedure for which the law does not stipulate the minimum number of bidders required);
- failure to obtain a single acceptable bid;
- tender documents contained significant shortcomings and weaknesses;
- bidders offered terms and conditions more unfavourable than the market terms and conditions.

Although these are legally-stipulated reasons for procedure annulment, with the exception of one, where the

contracting authority referred to non-existent legally-stipulated threshold for participants in the open procedure, the monitoring findings increase doubts as regards the justifiability of reasons for procedure annulment.

Thus, for example, the failure to award the contract to the economic operator which submitted the financially most favourable bid in the call where a total of 4 companies participated and which according to the selection criterion “lowest price” was to win the tender, indicates the tendentious annulment of public procurement procedures. Nevertheless, instead of signing the procurement contract, two months after the public opening of bids, the economic operator in question was notified that the tender was annulled on the grounds of changed needs of the contracting authority due to contingency and objective circumstances.

Unclear were the reasons for the annulment of a public procurement procedure five months after the public opening of bids, especially since the lowest price was set as a bid-selection criterion. Troublesome was also the

case where the decision for the selection of the most favourable bid was annulled after one and half month from its adoption.

Doubts as regards the justifiability of procedure annulment were raised by the participants in another tender, where the contracting authority excluded part of the bidding companies on the grounds of incomplete documents, whereas it assessed that the remaining bids were more unfavourable from the market terms and conditions.

An example worth to be analysed in the context of procedure annulment is the public procurement of sports equipment for schools. The first tender announced was annulled in April under the explanation that not a single acceptable bid has been obtained, and was re-announced in August 2010. The repeated procedure significantly reduced the requirements for the economic operators related to their financial status, as well as their technical and professional eligibility. Thus, instead of requiring evidence in support of companies’ creditworthiness, i.e., its eligibility for bank loans in the amount of at least 250,000 EUR, the repeated call required an amount of 100,000 EUR

and lowered the requirement on past experiences in relation to equipping from 10 to 5 sports halls. In the second round, the contract was awarded to a company that did not bid on the first call, most probably because it did not meet the minimum requirements as regards its economic and financial status and technical and professional ability. Dilemma raised here is whether the 18,000 EUR saved with the repeated call were a reason that justified the annulment of the first procedure, especially since the contract value was decreased on the expense of economic operator's increased risk as regards future problems related to project funding. Notably, the entire project is worth approximately 370,000 EUR, whereas the economic operator has guaranteed access to loans in the amount of only 100,000 EUR.

Finally, it is important to note that the annulment of an open procedure under the auspices that only one company participated in the tender is contrary to the Public Procurements Law. Pursuant to Article 137 thereof, the commission for public procurement was to perform the public opening of bids despite the fact that only one bid

was submitted. Notably, open procedures do not require minimum number of bidders, which is obligatory under the limited procedure, competitive dialogue and negotiating procedure with prior announcement of the call for bids.

Recommendation: Given the large number of procedures annulled, serious doubts are raised in regard to the misuse of legal possibilities due to unrealized expectations for the selection of the favoured bid. Such phenomena should alert the competent institutions, in particular the Bureau of Public Procurements, to initiate amendments to the Public Procurement Law in order to limit and strictly define the possibilities for procedure annulment, including sanctions to be imposed in cases of misuse, which would operationalize the legally-stipulated principles of efficiency and cost-effectiveness in public procurements.

- Some contracting authorities failed to comply with the new legally-stipulated deadline on decision-

taking for the selection of the most favourable bid. The dynamics of tender implementation continues to be frivolously dictated by the contracting authorities.

The legislative solution introduced from the end of July 2010 stipulates that the deadline for decision-taking on the selection of the most favourable bid cannot be longer than the period passed from the announcement of the call until the public opening of bids. Such solution was welcomed as the problem it solves was reiterated in all our previous public procurement monitoring reports.

The frivolous approach of contracting authorities as regards their compliance with the legal decisions is best illustrated by the case from the monitoring sample where the contracting authority in question adopted the selection decision 96 days from the public opening of bids submitted by the economic operators, instead of taking the decision within the legally-stipulated deadline of 26 days. According to the statements provided by the employees, the decision on the selection of the most favourable bid

in the said procurement procedure was to be approved by the relevant line minister and therefore the actual decision-taking was delayed for additional 50 days. Clearly, this case illustrates the situation related to delaying tender procedures. Given all procedure stages and their duration, 6 months after the call was announced this tender is far from contract-signing.

Moreover, this procedure was appealed in front of the State Commission on Public Procurement Appeals and the appeal procedure is underway. One of the participants in the public procurement procedure lodged an appeal against the decision to be excluded from the bid-evaluation process that was justified in the decision with the rationale that certain documents provided by the operator were considered outdated on the day the decision was taken. The economic operator motioned tender annulment on the grounds of its exclusion from the procedure which was a result of the contracting authority's failure to implement the procedure in due time. Namely, the documents provided by the economic operator for the

purpose of demonstrating its status, i.e., the receipt on settled taxes, contributions and other liabilities issued by the competent taxation authority, became obsolete. This case unambiguously points to the fact that contracting authorities apply narrow interpretation of provisions from the Public Procurement Law governing the obligations of the companies, but fail to do the same when it comes to the provisions stipulating their obligations. Such behaviour on behalf of contracting authorities sends an utterly negative message to the business community, and thereby results in economic operators' mistrust.

In addition to the non-enforcement of the law, such practices significantly affect the efficiency of public procurements and increase the uncertainty of bidders' business plans.

Contracting authorities' failure to abide to the legally-stipulated solutions enhances the need for the introduction of penal provisions that impose sanctions for any non-compliance with the Public Procurement Law. Notably, in Macedonia most sanctions imposed on the grounds of violations to the public procurement proce-

dures are of criminal and legal nature and are stipulated under the Criminal Code. The Public Procurement Law does not stipulate sanctions for violations that have not been defined as criminal act, but concern the contracting authorities' non-compliance with their legally-stipulated obligations.

Experiences from the neighbouring countries provide arguments in support of the need for introduction of misdemeanour sanctions in the Public Procurement Law. Notably, without exceptions the relevant legislation in the neighbouring countries stipulates fines in cases of failure to comply with the legally-stipulated obligations. In that, due consideration must be made of the fact that the relevant laws in these countries have also been aligned with the solutions and recommendations given under EU directives.

Croatia

A fine in the amount of 50,000 to 1,000,000 HRK (6,772 to 35,450 EUR) shall be imposed to any legal entity, local or

regional government for a misdemeanour act – PPL violation, while the responsible person at the legal entity or the responsible person at the state authority, local or regional government shall be fined in the amount of 10,000 to 100,000 HRK (1,354 to 13,545 EUR).

Serbia

A fine in the amount of 100,000 to 1,000,000 RSD (931 to 9,310 EUR) shall be imposed to the procurement-performing entity (contracting authority) on the grounds of violation of provisions contained in the law. A fine in the same amount (from 100,000 to 1,000,000 MKD, i.e., 931 to 9,310 EUR) shall be imposed also to the bidder for misdemeanour acts stipulated in the PPL. For the same misdemeanour acts, the responsible person at the bidder shall be fined in the amount of 20,000 to 50,000 MKD (186 to 465 EUR).

Montenegro

A fine in the amount of thirty to two hundred minimum wages in the country (4,800 to 32,000 EUR) shall be im-

posed to the legal entity that performs public procurements on the grounds of specifically defined violations to the PPL. For the same misdemeanour, the responsible person at the procurement-performing entity shall be fined in the amount of five to twenty minimum wages in the Republic of Montenegro (800 to 3,200 EUR). A fine in the amount of thirty to two hundred minimum wages in the country (4,800 to 32,000 EUR) shall be imposed to the bidding party (economic operator), while the responsible person at the bidder shall be fined in the amount of five to twenty minimum wages in the country (800 to 3,200 EUR). The natural person in the capacity of bidder shall be fined in the amount of five to twenty minimum wages in the Republic of Montenegro (800 to 3,200 EUR).

Albania

The Public Procurement Agency is competent to initiate an investigation procedure in the cases where it deems that a violation to the PPL has been made. The director of the Agency can impose fines on the grounds of violation to the PPL and to the public procurement rules in the

amount of 50,000 to 100,000 ALL (350 to 700 EUR) and can initiate an administrative and disciplinary procedure against the officer at the contracting authority.

Bosnia and Herzegovina

The Office for Public Procurement Appeals is competent to initiate misdemeanour or criminal procedure in front of competent court on the grounds of violations to the PPL or to impose fines in the amount of up to 4,000 BAM (2,045 EUR) to the officer at the contracting authority.

Kosovo

The PPL stipulates criminal responsibility for persons who have violated the provisions from the law. The Public Procurement Regulatory Commission (established in addition to the Public Procurement Agency and holds a status of an independent body) is competent to impose a fine in the amount of at least 5,000 EUR to any contracting authority that failed to comply with the decisions taken by this commission. Civil servants, employees and responsible persons at contracting authorities shall be dismissed

and fined in the amount of at least 1,000 EUR. In addition, these persons cannot be re-employed as civil servants, employees or responsible persons at contracting authorities for a period of 3 years after their employment has been terminated on these grounds.

Recommendation: Sanctions should be introduced for non-compliance with the deadlines on decision-taking or the selection of the most favourable bid. The need for such legal interventions was not raised solely on the grounds of the above indicated behaviour on behalf of the contracting authorities, but also based on the experiences from other European countries.

- Contracting authorities will not fulfil this year's legally stipulated minimum requirement that 30% of the estimated procurements' value should be implemented by means of e-auctions. By September this year, the contracting authorities

succeeded to implement only 11.61%¹ of announced public procurement calls by means of e-auctions.

Although the third quarter of 2010 is considered to be the most successful in terms of the number of e-auctions and e-procurements implemented, it will not suffice to attain the legally required minimum of e-auctions. In the period July-September 2010, a total of 264 e-auctions were implemented, meaning that 17.4% of the calls announced in this period anticipated the implementation of e-action in the final stage of the procurement procedure. In the same period, only 99 e-procurements were implemented, which accounts for only 6.5% from the total number of calls announced in that period.

These figures indicate the trend on modest increase of e-procurements and significant increase in the utilization of e-auctions compared to previous quarters. Noticeable

is the increased number of authorities that started implementing e-procurements and e-auctions. Notably, if the previous quarters were characterized by an average number of 20 contracting authorities that benefited from these procedures, their number in this quarter has increased by several times.

Nevertheless, despite the increased number of e-auctions implemented and the increased number of authorities that implement them, the legally stipulated threshold for this quarter, and in particular the threshold for the first 9 months of 2010, has not been attained, while the number of authorities (primarily small public procurement-performing entities) that have not implemented a single e-auction remains high.

In the period January-September 2010, a total of 258 e-procurements were implemented, which accounts for only 4.87% from the total calls announced in that period. In summary, a total of 615 e-auctions were implemented in the first nine months of the year, which accounts for 11.61% from the total calls announced. These shares do

¹ The legal obligation of 30% e-auctions does not refer to the number of calls announced, but the share of planned funds for public procurements, which currently cannot be measured and can only be calculated by the relevant authorities.

not suffice in the light of attaining the legally stipulated threshold of 30%, and thereby it will be impossible to compensate the discrepancy in the shares attained and required in the last quarter of the year.

Knowledgeable of the advantages brought by the use of e-auctions and e-procurements (budget savings and reduced risks from malpractices), unclear is why the contracting authorities act contrary to the general interest.

Unanswered remains the question why the contracting authorities do not opt for e-auction in the final stage of procurement procedures where the price is set as a single criterion for the selection of the most favourable bid, given that e-auctions provide possibilities for reducing bidders' initial prices, and thereby enable budget savings. Having in mind that in 2011 e-auctions should account for 70%, it can be concluded that the contracting authorities fail to comply with the legally-stipulated dynamics and make due preparations to answer the new challenges (in 2011, the share of e-auctions will be calculated according to the total number of calls announced, instead of the value of procurements). Notably, a contracting authority can

now attain the legally required minimum of e-actions by implementing fewer procurements but with higher value, which will not be possible in the next year, when the share of 70% will be calculated according to the total number of public procurement procedures, regardless of their value. In that, worrying is the insufficient use of EPPS in the public procurement contract-awarding (use of electronic equipment on data processing and storing), which enables safe communication and exchange between contracting authorities and economic operators. At the same time, it is important to note that the EPPS enables savings in public spending as it reduces prices and eliminates all possibilities for corruptive practices in this field.

Recommendation: The competent authorities, in particular Bureau of Public Procurements, should have been seriously alerted by the continuous non-compliance with the legal obligation to use e-auctions. Therefore, amendments to the Public Procurement Law need to be adopted for the purpose of introducing sanctions for violations of the law.

Due to the insufficient utilization of EPPS, the Bureau of Public Procurements should determine a legally-stipulated threshold for e-procurements as well. By doing so, EPPS's use will no longer depend on the contracting authorities, which are obviously unwilling to apply this system despite the advantages it brings.

- Most contracting authorities value more the longer payment deadlines for the procurements rather than the quality of goods and services purchased.

In the selection of the most favourable bid, the contracting authorities continue to use elements which should not be used for bid-evaluation, but as technical and professional eligibility criteria for the companies as regards tender participation. These elements include reference lists, company's technical ability, secured servicing, number and age of vehicles owned by the economic operator and like.

Frequent use of the bid-evaluation element "payment deadline" continues and forces the companies to offer

payment of invoices for public procurement contracts within a period of up to 300 days. This will most certainly affect the liquidity of companies, and in the long run will endanger their cost-effective operation if - due to deferred payments - they are forced to fund their current operations with commercial bank loans.

Worrying is the frequent use of elements such as "performance deadline" or "delivery deadline" which - due to the poor supervision over public procurement contracts' performance - in a later stage of the procurement performance are not necessarily abided to and because of that manipulation-prone possibility they offer become a legitimate manner to favour certain bidders in the bid-evaluation stage.

It should be noted that the element "quality" was used for bid-assessment in only 45% of public procurement procedures, and was given lower primacy compared to other elements, such as "payment deadline" or "performance deadline" or other elements that should not be used in the bid-evaluation stage, but for assessing companies'

eligibility for tender participation. At the same time, most contracting authorities fail to include precisely determined sub-criteria in tender documents for evaluation of the element “quality” and thereby provide space for greater subjectivity in bid-evaluation.

The “price” was the single criterion for the selection of the most favourable bid in 45% of procedures.

As for the analysis of criteria set for the selection of the most favourable bid, unavoidable is the impression that criteria used are void of any common logic or rules which only increase the risk that was continuously stressed from the very begging of the monitoring process: the contracting authorities adjust the bid selection criteria to favour certain companies.

Recommendation: The contracting authorities should not use manipulation-prone elements as part of the criterion “economically most favourable bid” for the purpose of favouring certain bidders and discriminating others. If “quality” is used as the selection criterion, by default the contracting authority should define relevant sub-criteria

in the call for bids or at least provide detailed description on the manner in which the criterion will be ranked. In this context, the Bureau of Public Procurements should intervene, notably by developing recommendations and guidelines for contracting authorities, for the purpose of harmonized and aligned definition of selection criteria and adherent application thereof.

- Technical specifications are used to favour certain bidders.

In this period as well, economic operators referred to the violation of Article 36 from the Public Procurement Law, notably by means of technical specifications, which in their opinion were adjusted to suit certain bidders and thereby violate the principle of equal treatment and non-discrimination of bidders. For example, the tender specifications for the procurement of used waste collection vehicles included detailed description of vehicle characteristics that obviously referred to a specific bidder, while in another procedure the tender specifications contained

specific technical characteristics for water supply and sewage pipeline materials, whose purpose was to enable elimination of some bidders.

Although economic operators often complain that tender documents and specifications are discriminatory, in practice they rarely use these problems as reasonable grounds in their appeals lodged in front of the State Commission on Public Procurement Appeals. Given that the deadline of 8 days to lodge a complaint related to the tender documents starts on the day of the public opening of bids, the companies fail to use this opportunity: some due to ignorance, but most of them in the hope that their bid might be selected. Once the tender decision is taken, it is already late to lodge complaints related to tender documents and in this stage of the procurement procedure the companies can appeal only the bid-evaluation process or the results thereof.

Recommendation: Economic operators should be encouraged to lodge complaints in front of SCPPA whenever they have identified that the technical specifications favour certain goods or bidders. At this moment, this is not a common practice and the companies rarely lodge complaints on the grounds of disputable tender documents. .

- The trend on increased number of contracts signed without published call for bids continues. In the period July-September 2010, a total of 574 million MKD (9.3 million EUR) were spent under this non-transparent contract-awarding procedure, which represents an increase by 14% compared to the same period last year.

As regards public spending, the contracting authorities should limit the use of procedures on contract-awarding by means of negotiations without prior announcement of call for bids. Nevertheless the practices continue to indicate increased value of contracts signed under this procedure.

The problem with these procedures lies in the fact that they do not provide any transparency that would guarantee cost-effective public spending, but they offer more manipulation-prone possibilities. Contracting authorities can purposefully create situations for the implementation of public procurements without prior announcement of call for bids (emergency, additional works that cannot be technically or economically separated from the basic procurement contract, works needed to complete the basic contract).

In the period June-September 2010, a total of 161 contracts of this type were signed (commonly referred to as "four eyes agreements") in a total value of 574 033 568 MKD, which compared to the same period last year indicates a minimal reduction of the number of contracts, but significant increase of the value thereof.

Contracts signed with negotiations without prior announcement of call for bids
(in MKD)

	01.07.2009 - 30.09.2009	01.07.2010 - 30.09.2010	change
Number of contracts	162	161	-0.62%
Contract value	503 416 759	574 033 568	+14.03%

The comparison of the value of contracts signed without prior announcement of call for bids in the period January-September for the years 2009 and 2010 reveals that a smaller number of contracts were signed this year, but their value is much higher and accounts for 1.196 billion MKD, which is by 23.7 % more compared to last year figures.

Contracts signed with negotiations without prior announcement of call for bids
(in MKD)

	01.01.2009 – 30.09.2009	01.01.2010 – 30.09.2010	change
Number of contracts	585	526	-10.09%
Contract value	972 024 188	1 196 242 833	23.07%

This comparison indicates that with the years contracting authorities sign higher value public procurement contracts with direct negotiations, and thereby complete eliminate competition and the idea behind the Public Procurement Law that competition should be encouraged among the companies that would result in higher quality goods and services under lower prices offered to the state.

It has to be noted that the use of direct negotiations is disputable even in the cases when the basic public procurement contract is increased by 30% by means of sign-

ing annexes to the contract, which ultimately puts under question the purposefulness of the entire public procurement procedure. Such practices exist because there are no guarantees that the annex to the contract which increases its value was not planned in advance. Such doubts cannot be eliminated because of the poor scope of supervision of public procurement procedures performed by the State Audit Office, and the high number of contracting authorities subject to such audits and supervisions.

Recommendation: Due to the trend on increased value of negotiated contracts, the BPP should establish a monitoring mechanism. At the same time, it is necessary to analyse the scope, legal proceedings, transparency and competition of these procedures and if it is determined that such practices are used for lucrative purposes, the BPP should propose limits as regards the flexibility to use negotiation procedures without announced call for bids.

- Contracting authorities continue to disregard the legal obligation on submitting detailed notifications on the selection of the most favourable bid to companies.

This quarter was also characterized by the continued practices on failing to submit detailed rationale for the decisions taken by the contracting authorities (reasons for the selection of the most favourable bid, but also for the rejection of the bid submitted by any company, or the reasons for its lower ranking). Such actions are in direct violation to Article 168 from the Public Procurement Law, which requires the contracting authorities to provide detailed rationales on the decisions taken.

Companies obtained detailed rationales on the selection made in only 3 from the total of 40 procedures monitored. The reasons for the need of detailed rationales on decisions taken for the selection of the most favourable bid are important. Notably, if the companies that participated in the procedures do not receive high quality notifications on the decisions made, those that are unsatisfied with the

decision are prevented from lodging a quality and well-grounded appeal in front of the second-instance commission.

Therefore, referral to the lack of detailed notifications on the selection decision made is not accidental and raises companies' doubts as regards the subjective bid-assessment and unequal treatment of bidders, but also indicates the lack of legal remedies (appeals) for the unsatisfied parties.

Recommendation: The ignorant attitude on behalf of contracting authorities as regards this obligation, as well as the inability of competent institutions, make the need for introducing sanctions for the violation of this legal provision more urgent.

- Different interpretation and application of the Public Procurement Law as regards the documents that companies should submit in order to qualify for tender participation.

Some contracting authorities do not comply with Article 140, paragraph 3 from the Public Procurement Law, according to which when verifying the completeness and validity of documents submitted and related to bidder's eligibility and when evaluating bids submitted the public procurement commission can request the bidders to provide clarifications or complement the documents submitted in cases of significant deviations from the documents requested.

Information in the field indicate that some contracting authorities, due to ignorance or purposefully, exclude incomplete bids from the evaluation process without previously requesting the bidding company in question to complete the documents submitted. Thus, while some contracting authorities provide an additional deadline for the companies to submit the document lacking, other contracting authorities only state that a certain document has not been submitted and exclude the bid from the evaluation process.

Most often it is a matter of documents needed to demonstrate the company's status (Article 147 from the PPL),

such as: statement of the economic operator that it has not been issued an enforceable ruling against participation in criminal organization, corruption, fraud or money laundering in the last five years; confirmation that the company has not initiated a bankruptcy procedure issued by the competent bodies; confirmation that the company has not initiated a liquidation procedure issued by the competent bodies; confirmation on settled taxes, salary contributions and other public fees issued by the competent body in the country where the economic operator is registered, etc. The different approach pursued by contracting authorities was also noted in the monitoring process and includes cases when it is a matter of documents needed to demonstrate economic operators' economic and financial ability (Article 150 from the PPL), such as: relevant bank statements; balance sheet certified by the competent body, i.e., audited balance sheet, etc.

In some procedures, the contracting authorities allow additional time for the companies to submit the authorizations needed, but in others they do not. The problem concerns the different application of PPL, and in particular of

Article 140 therein, by means of which bidding companies are subjected to unequal treatment.

Recommendation: Contracting authorities' different attitude towards the documents needed for tender participation can be interpreted as insufficient knowledge and understanding of the Public Procurement Law. This is a problem that should be addressed with training and distribution of educational materials, and would limit the contracting authorities' possibilities to purposefully deny this right of the companies.

- The positive trend on reducing tender documents fees was discontinued.

Fees in the amount of 500, 1000, 1500, and up to 3000 MKD were imposed for tender documents in 55% of procedures monitored compared to 45% recorded in the previous quarter. In that, obvious is that tender document fees are more common among local level contracting authorities. This trend unambiguously indicates that contracting au-

thorities continue to underutilize the legal possibility on uploading tender documents in electronic form.

Given the low competition in public procurement procedures, greater consideration should be made of the free distribution of tender documents for the purpose of encouraging companies to submit bids and increase the scope of economic operators that participate in procurement procedures.

Recommendation: The number of tender documents published in the EPPS and of tender documents for which no fees are imposed should be increased. BPP should continue to supervise, guide and prevent the contracting authorities to charge high fees for tender documents, which are inproportionate to the actual costs they have incurred.

- The positive trend on reduced bank guarantee requirements continues.

Although bank guarantees protect the contracting authorities against unserious bids, considering the low

competition in tender procedures and the deteriorated liquidity indicated by the companies, the trend on reduced bank guarantee requirements is assessed as positive. The problem related to bank guarantee requirements in the bidding process stems from the fact that contracting authorities most often set the bank guarantee in the amount of the legally stipulated maximum threshold of 3% from the bid's value, which – of course – is a significant cost for the companies that aspire to participate in several tenders.

In this reporting period, the bank guarantees for bid submission were required in 40 % of procedures monitored compared to the second quarter of this year when this share accounted for 42.5% and to the 45% noted in the first quarter. Nevertheless, in most cases common is the negative practice on setting the guarantee at 3%, which is the legally stipulated maximum threshold.

While bank guarantee requirements are marked by a decrease in the bid submission process, their use is more frequent in cases when the contracting authorities need them as protection for quality performance of contracts

awarded, which is useful in terms of efficient public spending. Bank guarantees for quality performance of contracts awarded was required in 52.5% of procedures monitored, and were set within the legally stipulated 5% to 15% of the contract's value.

Recommendation: Bank guarantees should not be set as formal eligibility criteria in all public procurement procedures, whereas in the cases when guarantees are needed, they should be set in lower value from the legally stipulated maximum threshold of 3%.

