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

Skopje, July 2011

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ABBREVIATIONS

BPP – Bureau of Public Procurements

SAO – State Audit Office

SCPPA – State Commission on Public Procurement Appeals

CA – contracting authorities

EO – economic operators

EPPS – Electronic Public Procurement System

EU – European Union

PPL – Public Procurement Law

RM – Republic of Macedonia

CCC – Centre for Civil Communications

KEY FINDINGS

Increasing is the trend among companies to compete in public procurements on the basis of their experience and size, rather than on the basis of bids submitted. Hence, companies' reference lists, number of employees, as well as contracts signed with other state institutions are given greater weight on the detriment of price and quality of goods and services bided. This inevitably leads to narrowed scope of companies that participate in tender procedures, whereas the lower competition therein leads to increase in value of public procurements.

20% of procedures are annulled, which – according to the current practices – is an extremely high share for the first quarter of the year given the fact that annulments tend to gain in intensity towards the second half of the year. Should this trend continue in the following months, likely is that this year the share of annulled procedure will exceed the last year's share of annulled procedure, which was already considered to be extremely high. Additional concerns are raised by the fact that tender procedures included in the monitoring sample are being repeatedly annulled.

The value of procurements made by means of direct negotiations in the first quarter of 2011 is by 130% higher compared to the same period last year. Procurement contracts in the total value of 527 million MKD (9.3 million EUR) were signed by means of non-transparent negotiation procedures without previously announced call for bids.

Only 36.6% of tender procedures used e-auctions, although they can result in lower prices of goods and services purchased or facilities constructed by means of public procurements. The Law stipulates that the share of e-auctions in total public procurements for the year 2011 should account for 70%.

The legal obligation for state institutions to provide detailed notifications to companies participating in the tender procedures and concerning the reasons behind the procurement decision taken is not complied with. In the absence of sanctions for failure to comply with the legal obligations, the contracting authorities

persist in their ignorance of the legal obligation stipulated under Article 168 of the Public Procurement Law.

Selection criteria still provide the possibility for subjectivity in the selection of the most favourable bid. The biggest problem occurs in relation to point-ranking of 'quality', as tender documents lack precise explanation of bid-evaluation and point-ranking method used, which – in turn – raises concerns related to possible subjective point-ranking.

Portion of tender documents continue to provide reference to specific products and thus enable favouring of certain companies. Cases were recorded where the technical specifications of the procurement subject were defined in a manner in which they provide reference to specific manufacturer or lead to favouring of certain companies and thereby violate the principle of equal treatment and non-discrimination among bidders.

Legally-stipulated deadlines for decision-taking on selection of the most favourable bid or on procedure annulment were not complied with by almost one quarter of institutions. Unduly delays in decision-taking are contrary to the principles of efficiency and cost-effectiveness in public procurement procedures.

Significant share of contracting authorities do not waive their requirements related to bank guarantees for bid submission. Bank guarantees were requested in 45% of procedures monitored, which can undoubtedly have negative impact on the competition in the tender procedure.

The positive trend on decreased number of public procurements that require the companies to settle the fee for tender documents continues. Issuance of tender documents was not subject to fee payment in 20% of procedures from the monitoring sample, which indicates that increasing is the number of contracting authorities that accept and comply with the recommendation on free-of-charge issuance of tender documents.

According to the survey results that included 345 companies, the three most concerning problems they face in relation to public procurements are:

imprecisely developed tender documents and technical specifications; poorly defined selection criteria on contract-awarding; and problems related to receivables collection from the contracting authorities.

GOALS AND METHODOLOGY

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

The analysis of the public procurement process in the Republic of Macedonia was performed based on the monitoring of randomly selected sample of public procurement procedures (40 per quarter). Monitoring activities start with the publication of calls for bids in the “Official Gazette of the Republic of Macedonia”, followed by attendance on public opening of bids and data collection on the procedure course, and use in-depth interviews and structured questionnaires submitted to the economic operators, as well as data obtained from contracting authorities by means of Freedom of Information (FOI) applications.

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

For each quarter, in addition to the monitoring findings, the report also includes analytical processing of other issues related to public procurements. Hence, the present quarterly report includes the results from the survey carried out with 345 companies and targeting public procurement-related issues. The survey was carried out in February 2011.

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

QUARTERLY PUBLIC PROCUREMENT MONITORING REPORT

- **Increasing is the trend among companies to compete in public procurements on the basis of their experience and size, rather than on the basis of bids submitted. Hence, companies' reference lists, number of employees, as well as contracts signed with other state institutions are given greater weight on the detriment of price and quality of goods and services bided.**

This situation is a result of the trend on applying increasingly stricter eligibility criteria for companies' participation in tender procedures, as well as the common practice on using reference lists of previously completed contracts, goods sold or works performed as evidence in support of the quality of bids.

This problem is equally present also in cases when the selection criterion for the most favourable bid is defined as 'lowest price'. Analysis shows that instead of providing precisely defined tender specifications and pre-defined quality that goods or services offered must demonstrate that would enable companies to compete only in terms of prices offered most procedures pursue the approach that implies high eligibility criteria for companies to meet in order to participate in tender procedures. Therefore, many procedures where the selection criterion is defined as 'lowest price' exclude from the bid-evaluation process the companies that submitted the most favourable bids in financial terms, notably under the auspices that these companies did not qualify for participation in the public procurement, i.e., did not meet the eligibility

criteria. Consequently, increasing is the number of companies that resort to lodging appeals in front of the State Commission on Public Procurement Appeals (hereinafter: SCPPA) wherein they indicate unjust assessment of their economic ability and unjustified exclusion from the tender procedure.

It should be noted that all appeals lodged in front of the State Commission on Public Procurement Appeals and concerning the public procurements included in the monitoring sample are related to problems faced by companies in regard to meeting eligibility criteria defined. For example, as part of the public procurement related to construction works on a major facility in Skopje, appeals were lodged by three foreign companies whose bids were considered more favourable compared to the bid submitted by the contracted company, but they were disqualified on the grounds of failure to provide an authorization for construction works performance issued by a state authority in the Republic of Macedonia. This is an authorization required under the Construction Law and provides a description of works that can be performed by a foreign legal entity in the Republic of Macedonia. Considering the fact that all three companies did not hold such authorizations, it can be concluded that foreign companies lack information as regards the need for such authorizations and approvals, which ultimately resulted in violation of their right to fair competition in the Republic of Macedonia. In that, as part of their appeals lodged in front of the SCPPA the said companies reiterated the fact that according to the tender documents they were not required to hold such authorizations/approvals, but to hold A-type licenses, which is a requirement they all met. The analysis of the indicated tender documents confirmed that they do not provide a precise stipulation whereby foreign companies are obliged to hold such authorizations. This leads to the conclusion that when developing tender documents state institutions must be extremely careful and precise in terms of formulations used, because on the contrary – as was this case – they would trigger increased concerns on the part of foreign companies and related to their discrimination for the benefit of in-country entities. This is distressing given the fact that in this case the SCPPS rejected the appeals lodged by the foreign companies and instead of referring to relevant tender documents it justified the decision taken by referring to the Construction Law. Such action on the part of SCPP transferred the burden of responsibility to foreign companies concerned and implies that they must be knowledgeable of all legal provisions in order to be able to compete for construction works contracted in the Republic of Macedonia.

This problem was confirmed by another procurement procedure included in the monitoring sample. Notably, as part of its procedure on procurement of computers, printers and over-head projectors, one line ministry required the bidding companies to have 30 full-time employees. In the opinion of one bidding company that lodged an appeal, this requirement provides a much too high eligibility criterion that could lead to discrimination of companies or impose restrictions on market competition, and thereby requested the said requirement to be waived. SCPPA did not take any decision on the said appeal, in particular because it was lodged prior to the deadline set for submission of appeals related to tender document contents.

Tender requirements related to demonstration of bidding companies' eligibility were contested in another appeal lodged in front of the SCPPA. Namely, the contested tender documents required the companies to submit at least three contracts signed for similar procurements in the last three years. The company whose bid was cheaper compared to the one that was awarded the procurement contract failed to prove its eligibility for tender participation, although it submitted notifications on deliveries made and evidence in support of its status of authorized dealer for a foreign company in several countries from the region.

All these procedures contested in in front of the SCPPA unambiguously point to the fact that public procurement procedures are prepared in such manner as to overestimate previous work of companies, whereby newly established and smaller companies are pre-exempted from competition in procurement procedures. Such practices would inevitably lead to narrowing the list of companies that participate in tender procedures and to reduced competition, which – in turn - leads to more expensive public procurements.

Recommendation: Eligibility criteria for companies should not be misused with a view to limit the market of public procurements only to a specific group of companies. Bureau of Public Procurements (hereinafter: BPP) should address this problem as part of training it delivers for contracting authorities and, when possible, should provide relevant recommendations for both, national and local level institutions, in particular as regards the proper development of eligibility criteria for companies' participation in tender procedures.

- **20% of procedures are annulled, which – according to the current practices – is an extremely high share for the first quarter of the year**

given the fact that annulments tend to gain in intensity towards the second half of the year.

12.5% of procurement procedures included in the monitoring sample were annulled in full and 7.5% were annulled in part, whereby the total share of annulled procedures accounts for 20% in the monitoring period (January-March 2011).

Concerning is the fact that some tender procedures included in the monitoring sample are being repeatedly annulled. Most obvious example thereof is the tender on procurement of social science laboratory-equipment announced and implemented by the Ministry of Education and Science, which was yet again annulled. The conclusion inferred is that procedures on procurement of the said equipment have failed for the third year in a row. In that, the Secretariat for European Affairs was the contracting authority that announced the first call on equipment procurement in early 2009 and in the name of the University Faculties. Following the annulment of this tender procedure, this procurement was transferred under the jurisdiction of the Ministry of Education and Science. The analysis of tender documents related to equipment procurement for 11 social science laboratories announced in the first quarter of 2011 showed that procedures are repeatedly annulled on the grounds of same errors in tender documents. This provides the conclusion that state institutions are more prone to annul tender procedures rather than acknowledge suggestions put forward in the course of 2009 consultations, which aimed to enable efficient implementation of public procurements. Notably, during these consultations the companies reiterated the fact that the procurement subject in question cannot be secured by one company as it implied an array of different items, i.e., chairs and desks, computers and software, lighting and sound system to equip the premises, etc., and because no company disposes with the broadly-defined array of commodities subject to procurement. However, despite all indications made in that regard, the tender documents related to procurement of social science laboratory and office equipment which was implemented in the first quarter of 2011 again required one vendor to supply conference room furniture (chairs and tables needed to equip an amphitheatre, chairs and armchairs needed to equip a conference room), as well as LED overhead projector, camera, LCD screen, computer with video-conference configuration and UPS, lighting arrangements (five lighting fixtures with 4 fluorescent tubes), as well as sound system (amplifier, audio mixer, microphones, and like).

The call for bids related to equipping economy science laboratories included procurement items such as laptops, printers, air-conditioning equipment, bureau desks, chairs, office supplies (set of staplers, perforators, calculators, binders, folders and like), subscription to electronic scholar databases and software. Although this call was announced internationally, only one company expressed its interest to participate. This clearly indicates the existence of a serious problem and the need to change the approach pursued under such procurement procedures, rather than pooling human and financial resources to no avail.

The tender procedure on procurement of 16 newly manufactured public transport minibuses was characterized by multiple announcements of call for bids followed by decisions on procedure annulment (i.e., as many as 4 times). This provides the conclusion that contracting authorities fail to analyse problems that have led to procedure annulment and thereby fail to make efforts aimed to overcome problems identified. Such practices are considered ineffective, moreover considering the fact that frequent annulment of tender procedures creates an atmosphere of mistrust in the public procurement system and defers companies from participation therein. It is important to note that increasing is the trend among economic operators to lodge appeals in front of the SCPA, wherein they request decisions on tender annulment to be revoked. This is yet another significant aspect of public procurements that indicates the gravity of the problem related to annulment of procurement procedures. Data contained in the EPPS provide further evidence in support of this conclusion. Notably, in the first quarter of 2011, a total of 411 notifications on procedure annulment were submitted to the EPPS compared to 315 notifications submitted in the course of 2010. These figures provide the conclusion that the trend on procedure annulment is marked by a steady annual increase.

Overview of procedure annulments

Year	Share of procedures annulled
2008	10.5%
2009	17.0%
2010	26.2%

Should this trend on decision-taking to annul procurement procedure continue in the following months, likely is that this year's figures on procedures annulled will exceed last year's exceptionally high share - 26.2%.

Nevertheless, it remains to be seen whether the following months will bring forth the realization of suggestions made by the Bureau of Public Procurements, in particular those included in its 2010 Annual Report and related to public procurement system's improvements. The first suggestion from the list of proposals reads: "To reduce the number of annulled procedures and provide detailed rationale on reasons for procedure annulment (significant shortcomings in tender documents) with the aim to pursue direct and specific measures aimed to address the negative trend identified."

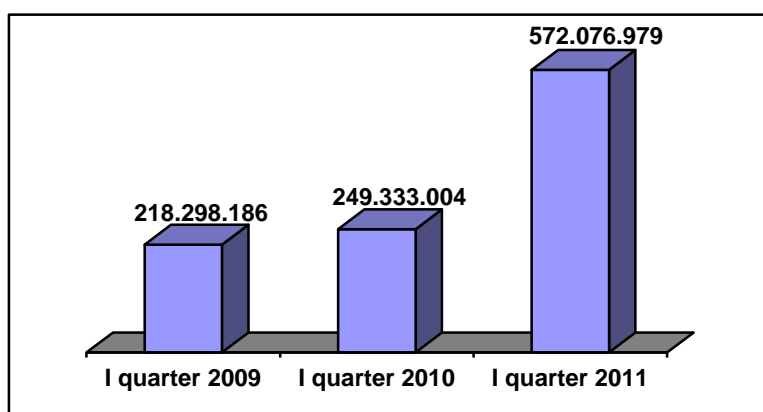
The recommendation made by the BPP came after a series of indications provided as part of the present monitoring of public procurements, which for several years now stresses the disadvantages and negative consequences of tender procedure annulments. Actually, frequent annulment of public procurement procedures raises doubts on the part of companies in regard to being misused by the contracting authorities, in particular for the purpose of avoiding to sign the public procurement contract with the company that submitted the best bid, but was not the company preferred by the contracting authority. In practice, the companies raise concerns in regard to the assumption that when contracting authorities fail to provide subtle advantages for their favoured company during the previous stages in the procedure and when the bid-evaluation process results in the selection of another company's bid - they resort to procedure annulment. In its last Progress Report for the Republic of Macedonia, the European Commission indicates public procurement annulment as the weakest aspect of the public procurement system.

Recommendation: Knowing that high number of procedures annulled raises serious doubts in malpractices related to legal provisions and based on unrealized expectations as regards the selection of the favoured bid, such events should alert the competent institutions, in particular the Bureau for Public Procurements, to take relevant actions. The Public Procurement Law should be amended with a view to limit and provide more rigid criteria on tender procedure annulment, including provisions on fines and sanctions imposed in cases of malpractice. One should make due consideration of the fact that reducing the number of tender procedures annulled will provide better enforcement of the legally-stipulated principles on efficiency and cost-effectiveness in public procurements.

- The value of procurements made by means of direct negotiations in the first quarter of 2011 is by 130% higher compared to the same period last year. Procurement contracts in the total value of 527 million MKD (9.3 million EUR) were signed by means of non-transparent negotiation procedures without previously announced call for bids.

Continuous is the trend on signing public procurement contracts by means of negotiations and without previously announced call for bids, although this procedure should be used only in exceptional cases. Total of 183 negotiations procedures were implemented only in the first quarter of 2011 and resulted in signed contracts with a total value of 572 million MKD, which is by 130% higher compared to the value of same type of contracts signed in the first quarter of 2010, and by 162% higher compared to the value of same type of contracts signed in the first quarter of 2009.

Value of contracts signed under direct negotiations (in MKD)



It is interesting to note that in parallel to increased value of contracts signed under direct negotiations in the first quarter of 2011, the number of such contracts signed is marked by a decrease, which implies smaller number of contracts with higher individual value.

Contracts signed under direct negotiations without previously announced call for bids (in MKD)

	I quarter 2010	I quarter 2011	Change
Number of contracts	193	183	-5.18%
Value of contracts	249,333,004	572,076,979	+129.44%

The previous reports on monitoring the implementation of public procurement procedures already indicated the risk related to use of such procedures. Notably, public spending by means of contracts signed in this manner is always accompanied with doubts as regards their justifiability and the dilemma whether this law-stipulated possibility is being misused on purpose. Very often, the contracting authorities justify the signing of procurement contracts under direct negotiations without previously announced call for bids with utter urgency or events that could not have been anticipated by and that are beyond the control of the contracting authority, even in cases when the procurement value does not allow the use of direct negotiations. All analyses carried out by competent institutions up to present failed to identify the reasons behind urgencies which occur at different contracting authorities in Macedonia and justify their public spending expressed in millions MKD without previously announced call for bids and away from the watchful eye of the public. In the year 2010 only, 16 million EUR were spent on the grounds of 'utter urgency'. Other commonly used reasons for signing procurement contracts under direct negotiations without previously announced call for bids include the following justifications: "no bids were obtained during the previously implemented open procedure" and "negotiations were used to sign annexes to the main contract, in particular related to additional works that were not duly anticipated". In the year 2010 only, the contracts signed under direct negotiations amounted to 2.1 billion MKD in total (35 million EUR), which is by 52% higher compared to the corresponding 2009 figure. It is expected that the value of this type of contracts signed in 2011 would be even higher, given the amount calculated only for the first quarter of 2011.

Recommendation: Considering that the last few years were marked by a continuous increase in the amount of public funds spent by means of contracts signed under direct negotiations and without previously announced call for bids, a mechanism is needed to monitor such procedures. This would reduce the possibility for signing this type of contracts and would identify eventual shortfalls from the legislation in effect that are conducive to this unfavourable trend.

- **Only 36.6% of tender procedures used e-auctions, although they can result in lower prices of goods and services purchased or facilities constructed by means of public procurements. The Law stipulates that**

the share of e-auctions in total public procurements for the year 2011 should account for 70%.

In the first quarter of 2011, e-auctions were used in 758 public procurement procedures and they account for 36.6% of the total calls for bids announced. Hence, the share of e-auctions implemented (which provide lower-price auctioning and should result in cheaper public procurements) accounted for almost half of the legally-stipulated threshold set at 70%. In general terms, none of the line ministries or municipalities complied with the legal obligation, although they were to provide an example for other contracting authorities. According to data available in the EPPS, the line ministries used e-auctions in 45% of total procedures for which they announced call for bids in the first three months of the year. This share is lower in regard to municipalities and accounts for approximately 37%. This outcome was expected given the fact that last year the institutions did not comply with the legally stipulated threshold for e-auctions set at 30% of all procurement procedures. However, the state supported this concept and the 2010 amendments to the Public Procurement Law raised the law-stipulated threshold for implementing e-auctions in at least 70% of calls for bids announced for open procedures, limited procedures, procedures with direct negotiations and prior announcement of call for bids and bid-collection procedure with prior announcement of call for bids. These amendments stipulated the legal obligation for contracting authorities to use e-auctions and tasked the Bureau for Public Procurements with taking measures aimed to ensure consistent enforcement thereof.

Application of e-procurements is also marked by slow progress. Although the relevant legislation does not stipulate a legal obligation for using e-procurements and does not set their share in total procedures, it should be noted that in the first quarter of 2011 such procedures were applied in only 11% of tender procedures. Considering the funds and efforts invested in the establishment of the electronic system, the present use thereof is considered insufficient.

Recommendation: Bureau of Public Procurements should pursue technical measures aimed to prevent inconsistent use of the electronic system. At the same time, greater efforts are needed on the part of the Government and aimed to comply with this obligation. The contracting authorities should more frequently use e-

procurements and e-auctions because, on one hand, they enable greater efficiency and budget savings, and, on the other hand, application thereof is regulated under the relevant legislation in effect.

- **The legal obligation for state institutions to provide detailed notifications to companies participating in the tender procedures and concerning the reasons behind the procurement decision taken is not complied with.**

In the absence of sanctions for failure to comply with the legal obligations, and under circumstances when companies are unable to pursue legal remedies in front of the SCPPA because such activities on the part of contracting authorities do not constitute essential violation to provisions contained in the PPL, the contracting authorities persist in their ignorance of the legal obligation stipulated under Article 168 of the Public Procurement Law. This Article provides clear definition of contracting authorities' obligation to notify companies that participated in the public procurement procedure on their decision taken and reasons thereof. This is a serious problem, particularly in cases where the selection criterion used is 'economically most favourable bid' and where in addition to 'price' other bid elements are evaluated as well. For example, companies would like to know the manner in which the quality of goods bided was evaluated, as well as the reference lists, product's technical and operational characteristics, etc. This information is of great importance for the companies and enables them to estimate whether the bid-evaluation procedure was properly implemented or maybe there are grounds to contest the bid selection decision in front of the SCPPA. In practice, instead of detailed notifications, the companies are often presented with brief information indicating the name of the economic operator whose bid was selected, and – in the best case scenario – they are presented with summary information on the points allocated for their bid during the bid-evaluation process.

Recommendation: Contracting authorities should fully comply with their obligation stipulated under Article 168 of the Public Procurement Law, i.e., they need to provide detailed explanation on the reasons behind the selection of the most favourable bid or the reasons behind the rejection of certain bidders. BPP should make greater efforts for instructing the contracting authorities to fully comply with this legal

obligation, in order to eliminate doubts related to subjective bid-evaluation and favouring of certain economic operators.

- **Selection criteria still provide the possibility for subjectivity in the selection of the most favourable bid.**

The criterion 'lowest price' continues to dominate the selection of the most favourable bid, both in terms of procedures included in the monitoring sample, and public procurement procedures in general. Although this practice might point to raised awareness on the part of contracting authorities as regards cost-effective public spending, further efforts are needed with a view to develop the concept on clear definition of quality of goods or services subject to procurement. Namely, as indicated above, the analysis of the procurement procedures included in the monitoring sample for the first quarter provide the conclusion that tender documents lack clearly defined specifications on the quality required from good and services subject to procurement. Under the selection criterion 'economically most favourable bid', except for the bid element 'price', high number of points is allocated also to the bid element 'quality'. Nevertheless, this practice creates the greatest problem, i.e., there are no clearly defined sub-criteria for evaluation of the 'quality' element. Analysis of tender documents showed that certain procurement procedures lack evaluation sub-criteria for the 'quality' element, i.e., there is no explanation given on the manner in which quality will be assessed and ranked, and thereby imply risks related to subjective bid-evaluation and point-allocation. Moreover, tender documents for certain procedures indicate that quality-based points will be allocated on the basis of product samples obtained, but fail to explain the manner in which the public procurement commission will assess whether the quality of one sample is better compared against the others, which again imply risks related to subjective assessment thereof. The monitoring sample recorded a case where the contracting authority indicated that 20 from the total of 100 points will be allocated to the product's trademark. Unclear is also who will assess whether and to what extent one trademark is more valuable compared against the others and what type of references or rankings will be used to assess trademarks and allocate them points in the range from 1 to 20.

Despite the indications made as part of this monitoring, contracting authorities in the health care sector (Health Clinics) continue to rank bids on the basis of their previous

(positive or negative) experiences related to commodities offered. This approach is prone to subjective bid-evaluation and thereby raises major concerns.

Another recurring problem that cannot be considered an isolated event is the inclusion of one selection criterion in the call for bid and defining completely different criteria in the tender documents. Such practices would be marginal provided the contracting authorities resorted to their law-stipulated right and thereby corrected the call for bids. Hence unacceptable is the behaviour on the part of contracting authorities that continue to ignore the problem indicated and refrain from taking actions to harmonize the selection criteria defined in calls for bids and tender documents. Such practices mislead the companies interested to participate in the procurement procedure and often result in their withdrawal therefrom. An example of such practices was identified in one procurement procedure from the monitoring sample where the call for bids defined 'lowest price' as the selection criterion, whereas the tender documents referred to the criterion 'economically most favourable bid' with the following elements: price – 60 points, quality – 20 points and payment conditions and manner – 20 points. This raises the issue of missed opportunity knowing that some companies might have considered their bids eligible in terms of quality and payment deadline and not in terms of price bided, but because of the selection criterion defined have withdrawn from tender participation. Contracting authorities must refrain from their superiority over economic operators which leads them to refuse to correct errors made, in particular knowing that they require impeccable records from companies and exclude them from bid-evaluation even on the grounds of minor technical errors in their bids.

Recommendation: Contracting authorities that use 'economically most favourable bid' as the selection criterion and in that define 'quality' as bid-evaluation element must also define the evaluation sub-criteria in advance, i.e., as part of their call for bids, including the manner of point-allocation. In that regard, the BPP should develop recommendations and guidelines for contracting authorities, in particular related to alignment and accurate definition of criteria and their implementation.

- **Portion of tender documents continue to provide reference to specific products and thus enable favouring of certain companies.**

Contrary to Article 36 of the Public Procurement Law, tender documents included in this quarterly monitoring sample implied cases where technical specifications for the procurement subject were defined in a manner in which they provide reference to specific manufacturer or lead to favouring of certain companies and thereby violate the principle of equal treatment and non-discrimination among bidders. In particular, these are cases where the documents that describe or define features of products that are subject of procurement correspond only to a given type of product which is exclusively sold by one company, i.e., where one company appears as the authorized dealer of the product in Macedonia. Such actions are strictly prohibited by the PPL and provide grounds for procurement procedure annulment. Nevertheless, worrying is the fact that although in their answers provided to the questionnaires the interviewed companies reiterated this problem, they rarely decide to lodge appeals in front of the SCPPA. Most certainly, this is not favourable for the overall public procurement system because the contracting authorities that misuse technical specifications to favour certain companies go by unsanctioned, which results in companies' distrust in the overall public procurement system.

Recommendation: Failure to comply with Article 36 which strictly prohibits technical specifications to provide references for a particular product should be rigorously sanctioned because such practices prevent the application of two basic principles from the PPL, those being: competition among economic operators and equal treatment and non-discrimination of economic operators.

- **Legally-stipulated deadlines for decision-taking on selection of the most favourable bid or on procedure annulment were not complied with by 22.5% of institutions.**

Despite the amendments to the Public Procurement Law which stipulated a deadline for decision-taking on bid selection or procedure annulment, this provision is not complied with by 22.5% of contracting authorities whose procurement procedures were included in the monitoring sample for the first quarter of 2011. This share is identical with the share recorded in the last quarter of 2010. In average, the legally stipulated deadline for decision-taking on the selection of the most favourable bid is prolonged by 16 days.

Delays in decision-taking are contrary to the principle of efficiency and cost-effectiveness in public procurement procedures and increases bidders' uncertainty as regards the procedure outcome, which negatively affects their business plans. Such practices are contrary to the legal obligation stipulated under Article 162, paragraph 2 of the PPL, which obliges the contracting authorities to take decisions on bid selection or procedure annulment within a deadline not longer than the deadline set for bid submission. If last year the cases of noncompliance with this obligation could be justified by contracting authorities' lack of information or slower adjustment to the newly-established rules, today such practices can be contributed only to contracting authorities' straightforward disregard of this obligation.

As regards the compliance with legal obligations, it should be noted that a portion of institutions continue to ignore also the legal obligation stipulating that they should submit the BPP notifications on contracts signed within a deadline of 30 days from their signing. Non-compliance with these obligations raises concerns in regard to reduced transparency of the public procurement system.

Recommendation: BPP should support the proposal on introducing sanctions for non-compliance with the Public Procurement Law. On the contrary, as was the practice so far, the contracting authorities will continue the selective application of provisions contained in the PPL, which creates a climate of distrust in the overall public procurement system.

- **Significant share of contracting authorities do not waive their requirements related to bank guarantees for bid submission, which can undoubtedly have negative impact on the competition in the tender procedure.**

Bank guarantees were requested in 45% of procedures monitored. In that, bank guarantees in the law-stipulated maximum threshold of 3% from the bid's value were requested in as much as 35% of procedures. This indicates that contracting authorities are reluctant to waive their bank guarantee requirements; although by doing so they increase companies' costs and negatively affect the competition, and ultimately defer smaller companies from participation in tender procedures.

Moreover, significant share of state institutions insist on bank guarantee collection, although such practices are uncommon because only few companies withdraw from tender participation. Notably, pursuant to Article 47 of the PPL, bank guarantees for bids submitted can be collected when the bid is withdrawn prior to the validity period indicated therein, when the successful bidder refuses to sign the public procurement contracts and like, which is unlikely to happen. This provides the conclusion that companies are unnecessarily burdened with additional costs related to securing the bank guarantee required.

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

- **Issuance of tender documents was not subject to fee payment in 20% of procedures from the monitoring sample, which indicates that increasing is the number of contracting authorities that accept and comply with the recommendation on free-of-charge issuance of tender documents.**

The positive trend on decreased number of public procurements that require the companies to settle the fee for tender documents continues. In 80% of procedures monitored, the interested companies obtained tender documents free-of-charge. As for the 20% of procedures monitored where the contracting authorities imposed a fee for issuance of tender documents, the fee collected amounted from 200 to 3,000 MKD. Such differences in the amount of fees imposed undoubtedly indicate that contracting authorities pursue discrepant and arbitrary practices when setting the fee for tender documents and in that breach the legal provision which stipulates that these fees should cover only the costs incurred for copying and/or submission of tender documents.

This issue gains in importance knowing that free-of-charge provision of tender documents can positively impact the competition among bidding companies. Therefore, efforts should be made to persuade all contracting authorities to abandon the practice of charging fees for tender documents issued.

In that, in order to maximize the positive effect of free-of-charge tender documents, the contracting authorities should also use the Electronic Public Procurement System for the purpose of making tender documents available to a broader scope of economic operators.

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

SURVEY ON COMPANIES' EXPERIENCE WITH PUBLIC PROCUREMENT PROCEDURES

Introduction

For the purpose of securing comprehensive data related to problems and irregularities faced by companies that participate in public procurement procedures, including the possible violations made to legal provisions and stakeholders' perception of legal remedies available, as well as for the purpose of inferring relevant conclusions on the basis of proposals and opinions expressed with a view to enhance the legal protection mechanisms and - ultimately - to improve the relevant legislation in effect, from November 2008 onwards the Centre for Civil Communications has continuously monitored and analysed the public procurement process in the Republic of Macedonia, notably by comparing actual practices against the legal provisions contained in the Public Procurement Law which provides the basic normative and legal framework for this matter.

In addition to regular monitoring activities pursued as part of this project, a company survey was carried out in February 2011 and targeted economic operators that appear as frequent participants in public procurement procedures. Survey results provided the baseline for the present analysis.

Interviewees

A total of 345 companies were surveyed, in particular those that regularly participate in public procurement procedures and are therefore considered to dispose with relevant experiences, which is particularly important in regard to adequacy of answers obtained. Distributed questionnaires were answered by company employees tasked with public procurement-related issues.

Results indicate that as much as 36.8% of companies interviewed participated in more than 24 public procurement procedures. 17.1% of companies interviewed participated in 13 to 24 procedures, followed by 24.65% of companies which participated in 6 to 12 procedure, whereas the share of companies that participated in up to 5 public procurement procedures accounts for 21.5%.

Following are the results obtained on the question related to the number of procurement contracts awarded to the companies interviewed:

- majority of them, i.e., 52.5% of companies interviewed were awarded one procurement contract per five bids submitted in different procedures;
- 26.4% of them were selected as the most favourable bidder in half of the procedure they participated in;
- share of companies whose bids were most frequently selected accounts for 13.0%; and
- 8.1% of them declared that they were never selected as the most favourable bidder in the public procurement procedures they participated in.

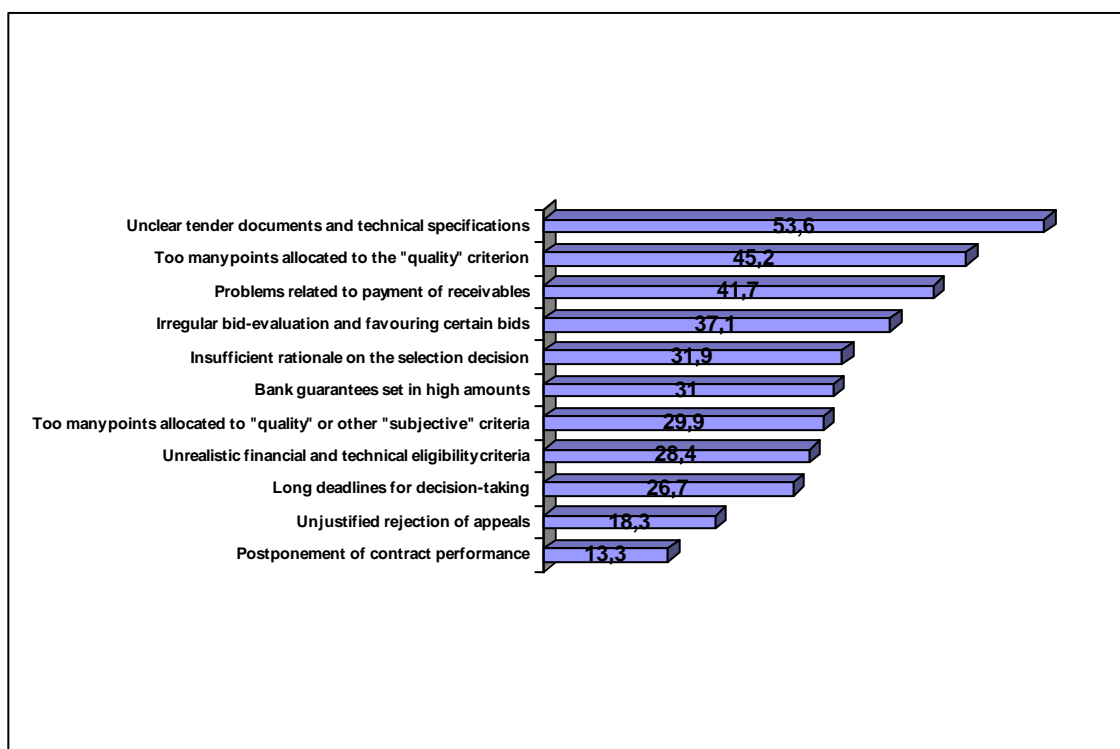
Main problems companies face in public procurement procedures

Statistical indicators confirm the conclusion that imprecisely defined tender documents and technical specifications are undoubtedly the most common problem faced by companies (as high as 53.6% of companies interviewed indicated this as the major problem). Comparison of survey findings against those inferred by the 2010 survey indicates that for the second year in a row this problem remains the most common one.

Second most distressing problem is related to inappropriate criteria on contract awarding, i.e., too many points are allocated to the selection criterion 'price' (this problem was indicated by 45.2% of companies interviewed).

Moreover, survey findings emphasize the trend on increasing problems related to collection of receivables from state institutions, notably for the goods and services delivered. 41.7 % of answers obtained indicated this problem.

What are the main problems you face in public procurement procedures? (several answers are possible)



Irregular bid-ranking and favouring of certain bidders, which are contrary to legal provisions, were indicated by 37.1% of companies interviewed. Analysis of data related to state of affairs and problems faced by participants in public procurement procedures, inter alia, indicates that these issues are of critical importance in public procurements. Answers obtained from companies interviewed indicate the relatively frequent practice on favouring certain companies although all bidding companies provided equal terms and conditions, prices, deadlines and quality. Notably, this is pursued by imposing impossible requirements and unrealistic guarantees in order to disqualify other participants or by defining specific criteria as part of tender documents that blatantly favour one economic operator. Common are also cases of procedure annulment made for the purpose of favouring certain bidders on the repeated call for bid announced by the contracting authority. Moreover, the companies indicated cases where they are requested to present different approvals and/or authorizations that have not been referred to in the Public Procurement Law. Another problem is identified in the fact that tender participants do not receive notifications with a rationale on the selection decision taken (in 31.9 % of cases), which is contrary to the legal provisions, in particular those that explicitly stipulate that contracting authorities are obliged to provide detailed rationale on the reasons behind the selection decision taken, the decision to reject certain bids, as well as an

explanation on why the selected bid was considered the most favourable one. Current practices pursued by the contracting authorities “prevent” the economic operators from obtaining a clear image as regards the manner in which the selection decision was taken, and thereby raise doubts in subjective bid-evaluation. In addition, such practices deprive dissatisfied economic operators of legal grounds to contest the decision. In that regard, due consideration should be made of the possibility to sanction practices that violate this obligation, including the cases where the competent institutions tolerated such occurrences.

On the basis of survey findings, it can be concluded that bank guarantees set in high amounts are considered serious problem faced by 31% of companies interviewed. According to the legal provisions in effect, contracting authorities can request a bank guarantee or deposit and should indicate such requirements in their tender documents. In that, the amount of the bank guarantee should not exceed the threshold set at 3% from bid’s total value, VAT excluded. Unfortunately, experiences show that the amount set for the bank guarantee is the maximum stipulated one, i.e., 3%, which puts most economic operators in unfavourable position, in particular those that participate in several tender procedures at the same time.

Hence, justified is the request for bank guarantees not to be defined as formal requirement for tender participation, or - in cases when bank guarantees are required - efforts to be made in regard to setting their amount below the legally-stipulated threshold of 3%.

Interviewees’ dissatisfaction with inappropriate point-allocation, i.e., awarding too many points to ‘quality’ or other “subjective” criterion is relatively lower and was indicated in the answers given by 29.9% of companies. Remarks and comments made by the companies interviewed and related to violation of PPL provisions provide a significant source of information in support of the statement that irregularities have been identified in terms of inappropriate point-allocation for the criteria ‘price’ and ‘quality’, malpractices related to evaluation of the ‘quality’ criterion, inappropriate (or arbitrary) use and evaluation of this criterion, etc.

Unrealistic and unattainable are also the criteria governing economic operators’ economic and technical eligibility (28. 4%). Practices identified indicate that contracting authorities misuse these criteria as mechanism to limit competition between the companies, and to favour bigger suppliers, and even a particular supplier. However, one should not underestimate the fact that inappropriate, tendentiously detailed, and sometimes unattainable eligibility criteria for companies’

participation in tender procedures impose serious obstacles in regard to enabling greater competition.

Companies also identified the following as problems they face in public procurement procedures: long deadlines for decision-taking on selection of the most favourable bid (26.7%); unjustified rejection of appeals lodged (18.3%) and delayed performance of contracts awarded (13.3%).

According to the statements given by economic operators when asked to indicate the most common violations to legal provisions, the following (illegal) actions and behaviours on the part of contracting authorities frequently raise concerns: non-compliance with the obligation on submitting notifications related to dates scheduled for e-auctions; bids selected by means of e-auctions on the grounds of lower price often lack any economic justification¹; announcement of call for bids for already preformed contracts; re-announcement of tender procedures until the contracting authority can award the contract to the favoured company; pre-arranged tender participation, i.e., agreed tender participation with partner companies with the aim to lower the procurement price, followed by rotation of contract-awarding among these companies; allocation of ranking-points to long-term cooperation and tender annulment for the purpose of surveying prices bided by the competitors. Remarks related to the expertise of public procurement commission members are equally concerning. In that context, some interviewees indicated that such practices are quite common and include cases when the commission members lack basic knowledge of the Public Procurement Law, or resort to arbitrary interpretations of provisions contained therein. Some of them indicated the need for the establishment of a system for anonymous reporting of violations made to legal provisions.

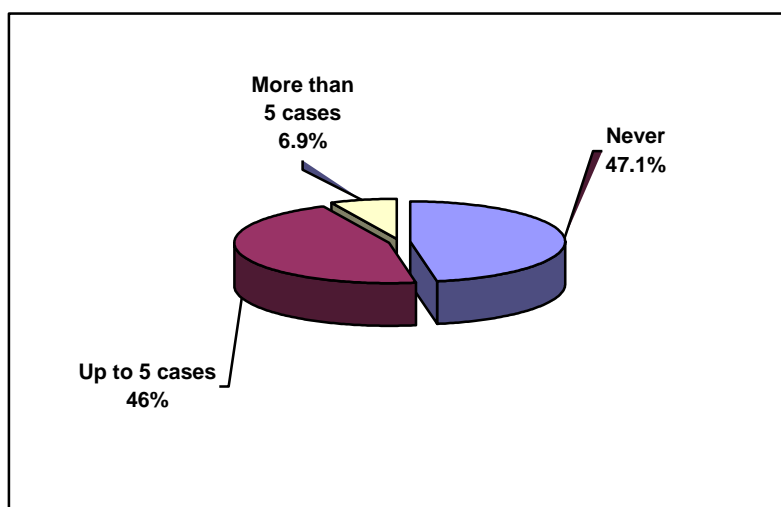
In summary, the above indicated actions represent serious and flagrant breach of provisions contained in the PPL, and thereby contribute to intensified dissatisfaction among participants in public procurement procedures.

Companies' views on the appeal procedure

¹ As a reminder, the Public Procurement Law includes a provision according to which as of 1 January 2011 the contracting authorities should use e-auctions in at least 70% of the total number of calls for bids announced for open procedures, limited procedures and bid-collection procedures with prior announcement of call for bids, and as of 1 January 2012 they should use e-auctions in 100% of the total number of calls for bids announced for open procedures, limited procedures and bid-collection procedures with prior announcement of call for bids. Previously, the legal provisions stipulated that as of 1 January 2012 the contracting authorities should use e-auctions for at least 50% of the estimated value of planned public procurement procedures, Article 24, paragraphs 2 and 3 from the Law on Amending the Public Procurement Law, "Official Gazette of the Republic of Macedonia" no. 130/2008.

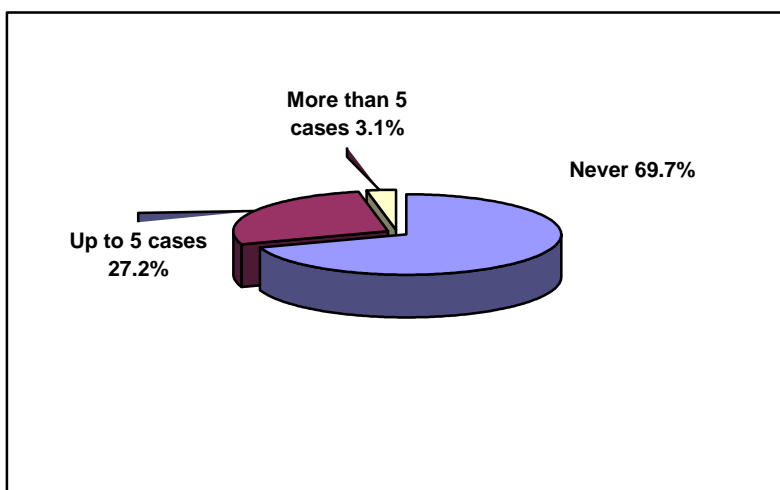
In the context of the present analysis, special attention should be given to appeal procedures, i.e., companies' preparedness to lodge appeals in front of the State Commission on Appeals, main reasons that defer them from contesting decisions taken by public procurement commissions, as well as proceedings pursued and decisions taken as part of the appeal procedure. A total of 47.1% of companies interviewed never lodged an appeal in front of the SCPPA.

In how many cases have you contested the decision on bid selection, in front of the State Commission on Appeals?



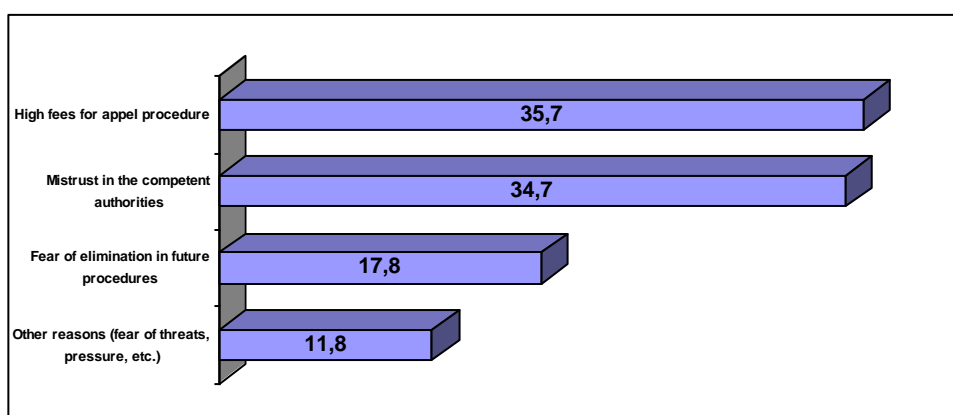
As regards the outcomes of appeals lodged, as high as 69.7% of companies interviewed indicated that the State Commission on Public Procurement Appeals had not admitted any of their appeals lodged against decisions on bid selection. The share of companies that provided answers indicating that their appeals were admitted in up to 5 cases accounts for 27.2%, whereas 3.1 % of them answered that the Commission admitted their appeals in more than 5 cases.

In how many cases did the State Commission approve your appeals?



As for the reasons on the grounds of which the dissatisfied participants rarely resort to legal remedies available for public procurement procedures, which ultimately raises concerns in the operation of the legal protection system in public procurements, the survey shows that the biggest problem in that regard are costs related to the appeal procedure (35.7%). Mistrust in the second-instance authority competent to take decisions on appeals was indicated by 34.7% of companies interviewed. Equally important is the fact that in 17.8% of cases economic operators do not lodge appeals because they fear elimination from all future public procurement procedures organized by the contracting authority. Other reasons (fear from threats, pressures, etc.) were indicated by 11.8% of companies interviewed.

What are the reasons that defer you from contesting decisions taken by public procurement commissions, in front of the State Commission on Appeals?



As part of the present analysis we also targeted the companies' preparedness to motion administrative disputes in front of the Administrative Court, notably for the

purpose of contesting the decision taken by the State Commission on Appeals to reject their appeal.² Following are the results obtained:

- 92% of companies have not initiated administrative disputes in front of the Administrative Court for the purpose of contesting SCPPA's decision on rejecting their appeal; and
- 8 % of them decided to motion an administrative dispute in 1 to 3 cases.

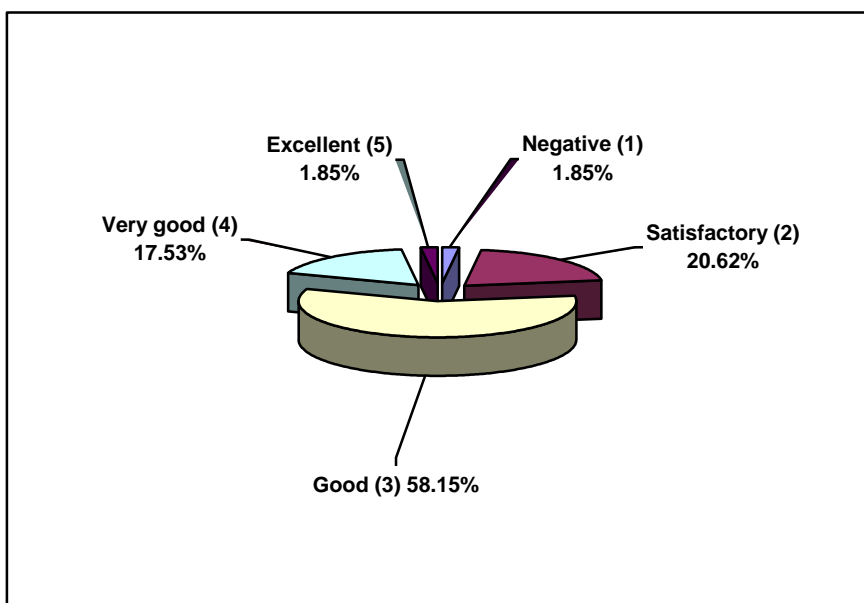
The conclusion is inferred that one of the main arguments that prevents the companies from exercising their legal protection is the frequently quoted formulation in SCPPA's decisions that reads: „ ... appeal allegations are considered to be unreasonably grounded; the tender procedure was implemented in full compliance with the provisions contained in the Public Procurement Law “, followed by a brief rationale on why the appeal is considered to be unreasonably grounded, i.e., why it has been determined that the concerned public procurement commission had taken proper actions as regards its bid-evaluation process. It seems that such formulations are insufficient for the unsatisfied parties to identify the reasons behind the appeal's rejection. In other words, such practices on the part of SCPPA limit the possibilities for the appealing parties to motion an administrative dispute and to indicate precisely which portion of SCPPA's decision is contested and on which grounds. Such behaviour demonstrated by the SCPPA is contrary to the Law on General Administrative Procedure, which clearly stipulates that the decision taken by a second-instance body must provide a detailed rationale.

Average assessments for public procurements

325 of the total of 345 companies interviewed gave an assessment for the public procurement process in general. The average assessment accounts for 2.97 (on the scale from 1 to 5) and was calculated on the basis of individual assessments made by the companies interviewed. In conclusion, the average assessment indicates insignificant improvement made compared to the situation recorded in 2010 when the average assessment was 2.80, but almost equal to 2009 assessment – 2.93.

How do you access the public procurement process?

² The provision contained under Article 230 of the PPL stipulates the possibility for initiating an administrative dispute against the decision taken by the State Commission in front of the competent court. Moreover, the court competent for administrative disputes should take its decision in an emergency procedure when reconsidering cases related to public procurements (paragraphs 1 and 2).



These indicators confirm that problems identified in the public procurement system remain to be widespread and result in unsatisfied participants. It seems that despite legislative and institutional efforts made with a view to improve the state of affairs in this field, the practices continue to imply the so-called vicious circle of repeating past mistakes.

Companies' proposals to amend the Public Procurement Law

The present analysis is based on data obtained by the companies surveyed and related to their opinions and proposals aimed to improve the legislative framework in effect.

Evident is the fact that solid share of them are committed to streamlining and reducing scope of documents needed for participation in public procurements; elimination of biased criteria and abandonment of bank guarantee requirements for certain types of public procurements; as well as abandonment of bank guarantees for contract performance as requested from the company selected as the most favourable bidder. Moreover, the companies requested introduction of measures aimed to prevent subjective decision-taking, as well as establishment of an appropriate mechanism on sanctioning commission members who have purposely performed erroneous point-allocated and reject any complaints on that ground. Greater transparency is needed on the part of contracting authorities, in particular related to providing insight in the complete tender documents of competitors. Moreover, efforts are needed to eliminate unfair competition.

It seems that majority of companies interviewed indicate problems related to inappropriate point-ranking and therefore stress the fact that practices related to defining 'lowest price' as the main selection criterion, in particular on the detriment of quality, should be abandoned. As regards the selection criteria, certain companies stressed the importance of introducing the quality - price ratio, as well as the introduction of mandatory point-allocation for the 'quality' element where at least 40% of total points should be allocated thereto on the basis of previously defined specifications. As concerns the need for greater attention to be paid to quality of commodities and service bided, some interviewees stressed the fact that criteria governing the selection of bids and applied as part of e-procurements pressure economic operators into offering goods and services of lower quality, and often result in companies failing to win the tender procedure because of unrealistically low prices bided by competitors, in particular as part of e-auctions.

Specific proposals put forward by the companies include:

- Legal provisions to be more precisely defined and clarified;
- To abandon practices where certain economic operators are favoured by means of tender documents and thus create space for participation of more economic operators in procurement procedures;
- Eligibility criteria for companies' participation in tender procedures to be more liberal in terms of economic and financial requirements, i.e., companies should not be required to present documents on their liquidity for the last three years, in order to enable newly established companies (i.e., those that are active on the market in the last one or two years) to participate in tender procedures as well;
- Amendments to be made to certain legislative acts, notably with the view to enable new companies to participate in tender procedures, as well as with a view to enable introduction of new commodities. Higher penalties to be imposed to procurement-performing entities when they fail to realize the procurement contracts signed (i.e., when they fail to take goods procured). The contracting authorities to make due payments for contracts performed and the payment deadlines to be set in the range of 30 to 90 days, instead of 120 - 365 days. Bank guarantees should not be requested in cases when the bid's value is lower than 1,000,000 MKD;

- Public enterprises should not be allowed to act as level-playing competitors with other participants in public procurement procedures;
- A commission to be established and tasked with random attendance on meetings for public procurement contract awarding. Their attendance should not be announced in advance;
- BPP's representative to attend the public opening of bids, and relevant training to be delivered to members of public procurement commissions, in particular related to leading the session on public opening of bids;
- Companies that submitted the most expensive and the cheapest price should be eliminated at the start of the public procurement procedure. This proposal is inferred on the basis of cases where unrealistically low prices are bided and selected by the contracting authority, despite the obvious lack or poor quality of goods bided;
- Enhanced supervision is needed over decisions taken by public procurement commissions;
- For the purpose of preventing corruptive action, instead of public procurement commissions established at contracting authorities these procedures should be performed by people employed at independent agencies and they should be properly reimbursed;
- Point-allocation for the 'quality' element should be defined in advance;
- Economic operators that failed to perform contract-stipulated obligations in a manner and to an extent considered appropriate should be black-listed, and the list should be made available to all contracting authorities;
- Changes should be made to certain legal regulations with a view to stipulate higher penalties for procurement-performing entities when they fail to perform procurement contracts signed, delay the payment for goods and services delivered. Payment deadlines should be set in the range from 30 to 90 days, instead of 120 - 365 days. Highest penalties and sanctions should be imposed in cases of pre-arranged tender procedures;
- Procurement-performing entities to be subjected to external control, including the proceedings on selection of the most favourable bidder;

- Decisions on the selection of the most favourable bids to be accompanied with detailed rationale thereof, including an explanation in cases when the procurement procedure is annulled;
- Possibilities should be reduced for the State Commission on Appeals to make essential changes to the procedure implemented, in particular on the basis of subjective assessments;
- PPL does not stipulate supervision over the course of contract performance once the procurement contract is signed, i.e., it is considered to be one-sided because it stipulates one type of guarantees, i.e., bank guarantees;
- Economic operators to be given certain rights in regard to accessing tender documents;
- Duration of procurement procedures that use e-auctions should be shortened;
- In general, the PPL is considered to provide solid legal framework, however only 50% of contracting authorities fully comply with the provisions stipulated therein. Fees related to lodging appeals are too high, especially in cases when appeals are lodged on the grounds of irregularities identified in terms of announced call for bids, i.e., appeal fees are calculated on the basis of procurement's total value which is not stipulated in the law;
- Sanctions should be imposed in cases of non-compliance with the law. The law is solid; however its enforcement raises many concerns, in particular because of contracting authorities' arbitrary interpretation of legal provisions contained therein.