

POLICY BRIEF

IMPROVING LEGAL PROTECTION IN PUBLIC PROCUREMENTS

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INTRODUCTION

Legal protection in public procurements should enable damaged bidding companies fast, efficient, transparent and non-discriminatory re-examination of the procedure and adequate legal remedies. This would not only facilitate exercise of one fundamental and constitutionally-guaranteed right, i.e. right to legal protection, but would also protect the integrity of public spending, in compliance with broader societal interests.

Analysis of state-of-affairs in public procurements imposed the need to re-examine efficiency of legal protection in Macedonia, under circumstances when the number of appeals is continuously declining despite the galloping growth of tender procedures announced and implemented. Furthermore, the efficiency of the legal protection system becomes more important in the light of the fact that public procurements in the country account for 12% of the Gross Domestic Product. On annual level, state institutions spend more than 900 million EUR on procurement of goods, services and works, notably by means of public procurement procedures, which account for as high as 35% of all central budget funds. This fact is indicative of the importance of public procurements not only in terms of normal functioning of the state, but also in terms of the overall economic activity.

Securing efficiency and integrity in public procurements is of crucial importance for delivery of quality public services by na-

tional and local authorities. Therefore, efficient public procurements mean better roads, modern schools, better-equipped hospitals and, in general, better services for the citizens. In this context, one must have in mind that institutions are not spending their money, but the money of taxpaying citizens. On this account, the authorities are obliged to purchase the necessary goods, services and works from the companies that have offered the best value for the money. In other words, one of the fundamental principles in public procurements is that state institutions should secure the best possible quality for the funds spent.

System of public procurements, characterized by insufficient transparency and low competition, is liable to corruptive practices. Therefore, public procurements must duly adhere to the fundamental principles and discourage corruptive behavior. Application of the principles of integrity, transparency, accountability, fair treatment and efficiency on the part of all entities involved in public procurements reduces the risk of corruption and increases economic, financial, and social benefits from public procurements. One of the most efficient ways to defend the basic principles in public procurements is establishment of affordable and efficient legal protection that would allow participants in public procurements to be more active in preventing malpractices and abuse of tender procedures.



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PROBLEMS THAT SHOULD BE ADDRESSED

CONTRARY TO THE INCREASING NUMBER OF TENDER PROCEDURES ANNOUNCED AND IMPLEMENTED, THE NUMBER OF APPEALS LODGED BY THE COMPANIES IN FRONT OF THE STATE COMMISSION ON PUBLIC PROCUREMENT APPEALS (SCPPA) IS MARKED BY A DECLINE. THIS TREND RAISES THE QUESTION ABOUT THE EFFICIENCY AND COST-EFFECTIVENESS OF LEGAL PROTECTION GUARANTEED BY THE LAW.

Need to re-examine the efficiency of legal protection in public procurements is, *inter alia*, supported by the fact that the number of appeals related to public procurements and lodged in front of the State Commission on Public Procurement Appeals is seriously declining for the past several years consecutively. This trend comes to prominence in the period when the number of announced tender procedures is marked by a major increase due to the lowered threshold for announcement of public procurements (all procurements whose value exceeds 500 EUR must be publicly announced).

In that, the number of public procurement procedures announced in 2012 has increased by 50.3%, and in 2013 - by 58.3%. Nevertheless, the number of appeals lodged by participants in public procurements has decreased by 15.2% in 2012 and by 8.9% in 2013.

ГОДИНА	INCREASE/ DECREASE	
	Tenders	appeals
2012	+50,3%	-15,2%
2013	+58,3%	-8,9%

More specifically, in 2013, a total of 18,654 tender procedures were announced and implemented, but SCPPA was presented with only 533 appeals. Simple computation of the number of tender procedures and the number of appeals provides the conclusion that less than 2.9% of all tender procedures have been contested (in some cases, several appeals have been lodged for the same tender procedure). In 2012, 5% of all tender procedures have been contested. In comparison, the share of contested tender procedures in Croatia for the year 2012 accounted for 8.9% (1,676 appeals versus 18,840 tender procedures announced).

Trends observed in regard to appeal procedures in Macedonia raise the question whether participants in public procurements are sufficiently knowledgeable and aware of their rights in public procurement procedures and whether the available legal protection is efficient and cost-effective, especially in regard to deadlines and

charges for initiation of appeal proceedings. Here we refer to the deadline for lodging an appeal by dissatisfied parties and the deadline for competent authorities to decide upon the motion for legal protection. Another important issue in this regard are costs for initiation of appeal proceedings that should be settled by the party seeking legal protection, having in mind that they should not be a burden that renders this procedure more expensive and an obstacle to exercising legal protection in cases when the party believes that its rights have been violated by the contracting authorities that have acted contrary to the law.

LAW ON PUBLIC PROCUREMENTS STIPULATES SHORT DEADLINES FOR LODGING AN APPEAL

According to Article 216, paragraph (2) of the Law on Public Procurements, an appeal is lodged within a deadline of eight days, i.e. within a deadline of three days in the case of public procurements organized as bid-collection procedures, applicable in several stages of the procedure (starting from the receipt of relevant minutes from the technical dialogue, announcement of the procurement notice, opening of the bids, expiration of the deadline for taking the selection or tender annulment decision, and learning about illegal activities in the procedure).

Comparison of deadlines stipulated in the Macedonian legislation (eight and three days, respectively) against the deadlines stipulated under relevant legislation in the neighboring countries and some EU Member-States provides the conclusion on major deviation from the generally accepted standards. Other countries have defined deadlines of ten days in the case of open procedures, limited bid-collection procedures and negotiation procedures and deadlines of five days in the case of small-scale procurements. Serbia is among the countries that have defined a deadline of three days in the case of small-scale procurements, but only for appeals concerning the procurement notice or the tender documents, whereas in the case of appeals concerning the selection or tender annulment decision, the deadline is five days.

METHOD OF SETTING THE CHARGE FOR INITIATION OF APPEAL PROCEEDINGS RENDERS LEGAL PROTECTION IN LARGE-SCALE TENDER PROCEDURES MORE AFFORDABLE COMPARED TO LEGAL PROTECTION IN SMALL-SCALE TENDER PROCEDURES WHOSE VALUE DOES NOT EXCEED 5,000 EUR.

According to Article 229 of the LPP, in addition to the administrative fee, the party seeking legal protection in public procurements is obliged to pay a charge in the amount of 100 to

400 EUR for initiation of appeal proceedings, depending on the amount of its bid submitted in the procurement procedure.

PROCUREMENT'S VALUE	CHARGE
up to 20,000 EUR	100 EUR
20,000-100,000 EUR	200 EUR
100,000-200,000 EUR	300 EUR
above 200,000 EUR	400 EUR

This method of setting the charge for initiation of appeal proceedings raises concerns about the cost-effectiveness of appeal proceedings in the case of small-scale procurements. Namely, it seems that the party seeking legal protection in cases of tender procedures in the value of 500-5,000 EUR has to pay 100 EUR, which accounts for at least 2% to 20% of the procurement's value. On the other hand, in the case of large-scale tender procedures whose value exceeds 200,000 EUR, the charge is set at maximum 0.1% of the procurement's value and is proportionally decreasing with the increase of the procurement's value.

This provides the straightforward conclusion that costs related to legal protection in public procurements are much lower in the case of large-scale tender procedures compared to small-scale tender procedures. This method is utterly unfavorable, given the fact that small-scale procurements in the value of 500-5,000 EUR accounted for 51.24% of all public procurements organized in 2013.

INSUFFICIENT KNOWLEDGE AMONG PARTICIPANTS IN PUBLIC PROCUREMENTS ABOUT THEIR RIGHTS IS BEST REPRESENTED BY THE FACT THAT AS MANY AS 17.8% OF APPEALS HAVE BEEN REJECTED BY SCPPA ON THE GROUNDS OF BEING INADMISSIBLE OR UNTIMELY.

Even in the cases when they do lodge appeals in front of SCPPA, companies demonstrate insufficient knowledge about their rights. Notably, the category of rejected appeals is predominantly comprised of appeals lodged prior to the stipulated deadline, assessed as premature, and appeals lodged after the stipulated

deadline, assessed as untimely. Six years after the Law on Public Procurements entered in effect, the high number of rejected appeals is indicative of the fact that companies are not sufficiently aware and knowledgeable about their rights and liabilities in public procurements.

In that, analysis of SCPPA decisions showed that majority of appeals are rejected as inadmissible, i.e. premature. This is often due to the fact that bidding companies wishing to contest or remark the tender documents lodge their appeals immediately after they have obtained insight in these documents. As illogical as it may seem, Article 216, paragraph (2) of the Law on Public Procurements stipulates that appeals concerning the tender documents should be lodged within a deadline of eight days, i.e. within a deadline of three days in the case of bid-collection procedures from the public opening of bids.

Errors are mainly due to the fact that economic operators start from the logic that the right to appeal tender documents arrives from the publication of the procurement notice, including the publication of tender documents. Nevertheless, according to the LPP, if potential bidders have remarks about terms and conditions enlisted in the tender documents (eligibility criteria, selection criteria, technical specifications, etc.), they have to wait for the public opening of bids and then within a deadline of eight or three days, respectively, can lodge their appeals in front of SCPPA. This is most certainly confusing and complicates the entire process, and prevents potential bidders to react at the beginning, i.e. when the tender documents are published. Here, it should be noted that appeals usually concern favoring tender documents or technical specifications, eligibility criteria that are discriminating or prevent fair competition, knowledge about important shortfalls in the tender documents that imply major violations of the LPP, and the like. One must also distinguish between economic operators' remarks about tender documents wherein the contracting authority has defined high and disproportional eligibility criteria and remarks related to verification whether their documents submitted as evidence on fulfilment of eligibility criteria are complete and valid. In the first case, the appeal deadline starts from the public opening of bids, while in the second case it starts from the receipt of the decision on the selection of the most favorable bid.

In practice, it has been noted that some economic operators do not distinguish between these two situations.

HIGH SHARE OF TENDER PROCEDURES ANNULLED BY SCPPA IMPLIES THE RISK OF SERIOUS VIOLATIONS OF THE LAW.

After having admitted the appeal, SCPPA can take two types of decisions: the first, on revoking the decision on the selection of the most favorable bid and returning the case for repeated bid-evaluation, and the second, on complete annulment of the public procurement procedure. Analysis showed that decisions on tender annulment have been increased in the last several years, which is indicative of the fact that serious violations of the law have been recorded and cannot be eliminated by repeated bid-evaluation.

In 2011, SCPPA adopted decisions on tender annulment in 39% of the total number of appeal procedures led. In 2012, this share accounted for 47%, and in 2013, it accounted for 52%

YEAR	SHARE OF TENDER ANNULMENT DECISIONS FROM TOTAL NUMBER OF ADMITTED APPEALS
2011	39%
2012	47%
2013	52%

This is indicative of the increasing number of essential violations of the Law on Public Procurements. In that, majority of cases in which SCPPA has annulled the tender procedure imply contracting authorities' non-compliance with the legal provision contained in the LPP when drafting their tender documents and failure to create conditions for legal and objective selection of the most favorable bid from the procedure's onset.

Trend on increased number of cases in which serious violations of the LPP made in the course of implementing procurement procedures that cannot be corrected by repeated bid-evaluation is partially a result of missed opportunities on the part of participants in public procurements.

PROPOSALS TO IMPROVE LEGAL PROTECTION IN PUBLIC PROCUREMENTS

Recommendations include amendments to the Law on Public Procurements in regard to legal protection and enabling conditions for adherent implementation of the law.

DEADLINES FOR LODGING AN APPEAL ANTICIPATED UNDER THE LPP NEED TO BE EXTENDED, IN PARTICULAR THOSE APPLICABLE TO BID-COLLECTION PROCEDURES.

For the purpose of improving the legal protection and providing participants in public procurements more efficient protection of their rights, Article 216, paragraph (2) of the Law on Public Procurements needs to be amended with a view to extend deadlines for lodging an appeal. Current deadlines of eight, i.e. three days in the case of bid-collection procedures, should be extended to ten, i.e. five days.

Need for extended deadlines is supported by the fact that dominant share of tender procedures in the country is implemented by means of bid-collection procedures (in 2013, as high as 75% of all tender procedures announced were implemented by means of this procedure), which practically means that in most cases the deadline for lodging an appeal is only three days. This right has been rightfully assessed as too short and prevents companies to adequately prepare and lodge their appeals in front of SCPPA.

If there are dilemmas that extended deadlines for lodging an appeal will increase the duration of tender procedures, a model can be introduced of different deadlines for lodging an appeal depending on the relevant procedure stage. By doing so, the current deadlines of eight, i.e. three days for lodging an appeal concerning procurement notices, tender documents and opening of bids, could be still in effect, but a deadline of ten, i.e. five days can be introduced for lodging an appeal concerning the selection or tender annulment decision. This model is acceptable, having in mind that the analysis of SCPPA decisions showed that majority of appeals lodged by companies concern their exemption from the bid-evaluation process due to non-fulfilment of eligibility criteria or due to non-fulfilment of terms and conditions defined in the technical specifications, i.e., in the stage that necessitates longer deadlines for lodging an appeal.

DEADLINES FOR LODGING AN APPEAL CONCERNING TENDER DOCUMENTS SHOULD START FROM THE DAY PROCUREMENT NOTICE AND TENDER DOCUMENTS ARE PUBLISHED.

Current solution stipulated under Article 216, paragraph (2) of the Law on Public Procurements whereby appeals concerning actions related to tender documents should be lodged after the public opening of bids must be abandoned. Based on this legal provision, Macedonia deviates from the general rule, according to which deadlines for lodging an appeal concerning tender documents starts from the announcement of procurement notice and relevant tender documents. When the LPP did not include an obligation for mandatory publication of tender documents in the Electronic Public Procurement System (EPPS) there was a risk of misunderstandings in terms of the start of deadlines for lodging an appeal, i.e. from the publication of procurement notice or obtaining a copy of relevant tender documents. Nevertheless, from 1 January 2014, all tender documents must be published in EPPS and, therefore, there are no valid arguments to justify the legal solution whereby the deadline for lodging an appeal starts from the public opening of bids.

Given the above indicated, it is necessary to introduce legal possibilities for lodging an appeal concerning the terms and conditions defined in the tender documents immediately after the procurement notice is published. By doing so, the business sector will be encouraged to protect their rights that have been limited by means of favoring tender documents. This amendment to the LPP is logical, especially having in mind that series of measures are taken to improve tender documents (introduction of technical dialogue between contracting authorities and possible bidders, as well as revision of documents by the Council of Public Procurements), but companies are still not allowed to timely intervene in relation to tender documents by lodging appeals in front of SCPPA.

NEW METHOD OF SETTING CHARGES FOR INITIATION OF APPEAL PROCEEDINGS SHOULD BE INTRODUCED IN THE LPP WITH A VIEW TO ENABLE PROPORTIONAL LEGAL PROTECTION FOR ALL PARTICIPANTS IN PUBLIC PROCUREMENTS.

Method of setting the charge for initiation of appeal proceedings in front of SCPPA (Article 229 of the LPP) should be changed.

The current method of setting charges brings under question cost-effectiveness of seeking legal protection in the case of small-scale tender procedures, especially in the case of tender procedures whose value does not exceed 5,000 EUR. This implies that legal protection is more available and affordable for big companies, i.e. participants in large-scale public procurements compared to smaller companies which traditionally participate in small-scale tender procedures. Due consideration should be made of the possibility to introduce new, more righteous, model of setting this charge that would be defined as share of the procurement's value. This would result in more equitable costs and would correct the current situation in which the appeal procedure is the most expensive for the most dominant type of tender procedures (bid-collection procedures in the value of 500-5,000 EUR). Definition of the charge amount as share of the procurement's value should include all relevant stakeholders, primarily the competent authorities and the business sector.

GREATER EDUCATION IS NEEDED FOR PARTICIPANTS IN PUBLIC PROCUREMENTS, AIMED AT BETTER FAMILIARIZATION AND KNOWLEDGE OF THEIR LEGAL PROTECTION-RELATED RIGHTS.

Given the continuous trend on decreased number of appeals, as well as the high share of inadmissible and untimely appeals submitted by participants in public procurements, further efforts are needed to educate companies about their right to appeal. Continuous education of participants in public procurements is more important having in mind that the legislation governing public procurements is exceptionally complex and is subject to frequent amendments (2007 Law on Public Procurements has been subject to eight rounds of amendments in the last six and a half years).

In addition to education, efforts are needed to create a stimulating climate for participants in public procurements to protect their rights as a precondition for attaining broader societal goals. Notably, starting from the viewpoint that citizens are, directly or indirectly, end beneficiaries of procurements and given the fact that, by their nature, public procurements have a significant effect on the economy, efforts are needed to raise the public awareness that efficient legal protection is a guarantee for law-compliant and efficient public spending.