



Citizens for change!



MONITORING OF PUBLIC PROCUREMENTS IN THE REPUBLIC OF MACEDONIA

REPORT NO. 28

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ABBREVIATIONS

BPP – Bureau of Public Procurements

SCPPA – State Commission on Public Procurement Appeals

CA – contracting authorities

EO – economic operators

EPPS – Electronic Public Procurement System

EU – European Union

LPP – Law on Public Procurements

CCC – Center for Civic Communications

KEY FINDINGS AND RECOMMENDATIONS

- **In 2016, as high as 23% of tender procedures were fully or partially annulled, representing an increase by 3 percentile points compared to the previous year. Large-scale tender procedures were more frequently annulled compared to small-scale tender procedures. Monitoring activities recorded a series of examples for tender annulments that could be assessed as problematic.**

Recommendation: An obligation should be defined for the Bureau of Public Procurements for development and publication of annual analysis on annulled tender procedures, by indicating contracting authorities with the highest number of annulled tender procedures.

- **Bureaucratization of public procurement procedures with applications for approval from the Council of Public Procurements has not lost in intensity. In 2016, contracting authorities addressed the Council of Public Procurements with a total of 16,067 applications for approval, which costed them total of 1.8 million EUR.**

Recommendation: Recommendations from the European Union and SIGMA¹ on assessing benefits from the existence of the Council of Public Procurements should be implemented, followed by its cancellation and reallocation of activities that generate benefits to other existing institutions.

- **Almost every third tender procedure is marked by participation of one bidding company. In 2016, this situation was primarily a consequence of low competition observed in the first half of the year. Small, but unsatisfactory increase was observed in the second half of the year.**

Recommendation: Oversight and control on the overall process of public procurements should be introduced for the purpose of preventing and sanctioning illegal spending of public funds, ensuring implementation of public procurement procedures in compliance with the Law on Public Procurements and performance of public procurements in compliance with contracts signed.

¹ SIGMA is joint initiative of OECD and the European Union that works with the countries on improving systems of public governance and increasing capacity of public administration.

- **E-auctions were organized in only 54.5% of monitored procurement procedures. Institutions rushed the introduction of electronic procurements. In 2016, as many as 48% of procurements were implemented with full use of electronic means enabled by the Electronic Public Procurement System, thus exceeding the law-stipulated minimum of 30%.**

Recommendation: In the period 2017-2018, the Bureau of Public Procurements should organize a cycle of free training for microenterprises across the country in order to facilitate their participation in mandatory e-procurements. Mandatory organization of e-auctions should be revoked and their method of implementation of should be changed.

- **In 2016, total of 605 procurement contracts were signed without previously announced call for bids and their value amounted to 34.8 million EUR. Total value of these contracts is by 20% higher compared to 2015. The highest procurement contracts signed under this non-transparent procedure belonged to JSC Macedonian Power Plants and concerned excavation of coal and slag for the need of RU Mines, MEC Bitola, in the value of around 5.8 million EUR.**

Recommendation: The legal obligation on obtaining approval for use of this type of procedures should remain in effect even after the possible cancellation of the Council of Public Procurements. In that, the Bureau of Public Procurements should be obliged to develop and publish annual analyses of contracts signed by means of negotiation procedure without prior announcement of call for bids, enlisting also economic operators that have been awarded such contracts.

- **Among total of 18,444 tender procedures organized in 2016, companies have lodged 557 appeals, while contracting authorities have lodged 43 appeals against decisions taken by the Council of Public Procurements. The number of appeals is indicative of exceptionally small share of public procurement procedures appealed by companies, accounting for only 3%.**

Recommendation: Efforts are needed to raise awareness of the business sector towards greater use of legal protection in public procurements.

GOALS AND METHODOLOGY

From November 2008, the Centre for Civic Communications is continuously analysing the implementation of public procurements in the Republic of Macedonia, as regulated under the Law on Public Procurements. The analysis aims to assess the implementation of public procurements in the light of the new Law on Public Procurements and application of the underlying principles of transparency, competitiveness, equal treatment of economic operators, non-discrimination, legal proceedings, cost-effectiveness, efficiency, effectiveness and rational public spending, commitment to obtain the best bid under the most favourable terms and conditions, as well as accountability for public spending in procurements.

In the period November 2008 – June 2014, the monitoring activities were implemented on a quarterly monitoring sample comprised of randomly selected public procurement procedures; however, starting from the second half of 2014 the monitoring sample is defined on semi-annual level and includes random selection of 60 public procurement procedures. Monitoring activities start with the publication of procurement notices in the *“Official Gazette of the Republic of Macedonia”* and in the Electronic Public Procurement System, followed by attendance at public opening of bids and data collection on the course of procedures, and use in-depth interviews and structured questionnaires submitted to economic operators, as well as data collected from contracting authorities through EPPS and by means of Freedom of Information (FOI) applications. Some monitoring parameters (number, share and structure of annulled tender procedures, value of signed contracts per particular type of procedure and the like) are now analysed by processing all data submitted to EPPS.

The analysis presented in this report is performed on the basis of monitoring a randomly selected sample comprised of 60 public procurement procedures organized by contracting authorities on central level, whose public opening of bids took place in the period July-December 2016. Nevertheless, majority of findings presented here include data for the entire 2016 and integrate findings from the monitoring activities implemented in the first half of 2016. Portion of data has been secured by means of processing data available in the Electronic Public Procurement System.

DETAILED REPORT ON MONITORING OF PUBLIC PROCUREMENTS

- **In 2016, as high as 23% of tender procedures were fully or partially annulled, representing an increase by 3 percentile points compared to the previous year. Large-scale tender procedures were more frequently annulled compared to small-scale tender procedures. Monitoring activities recorded a series of examples for tender annulments that could be assessed as problematic.**

In 2016, the annual share of tender annulments in total number of tender procedures standing at 23% is the highest share recorded in the period 2013-2016. Reconsidered on semi-annual level, this share accounted for 23% in the first half and 24% in the second half of the year.

Annulment of tender procedures, per year

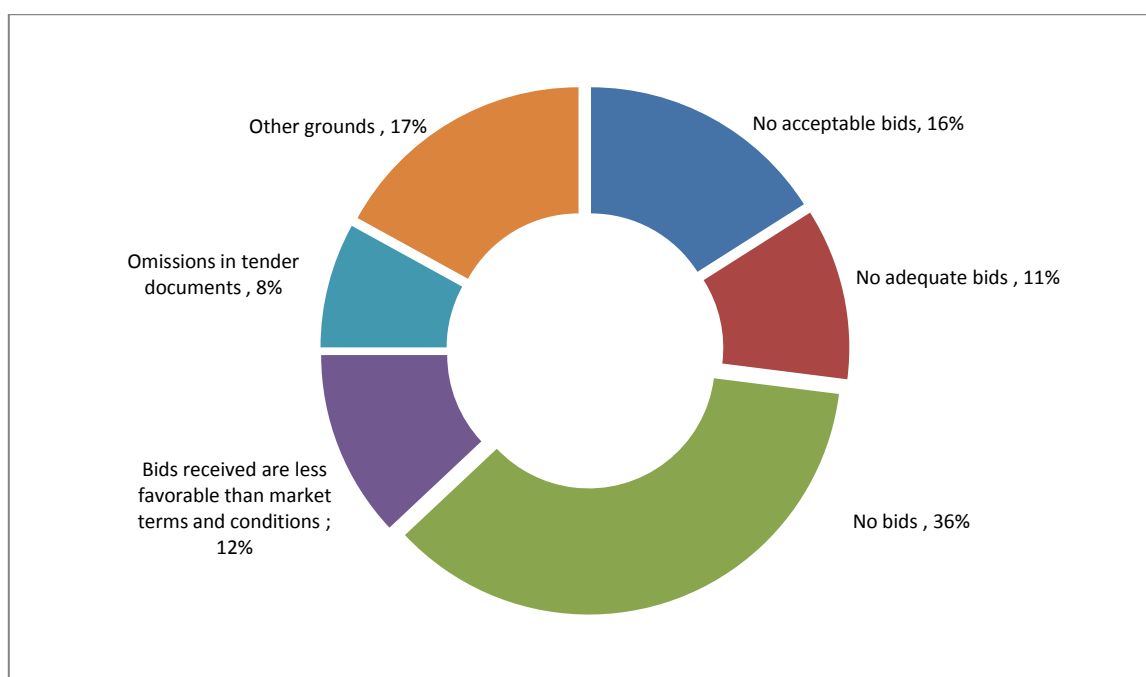
Year	Number of announced procurement notices	Number of decisions on tender annulment	Share of annulled tender procedures
2013	18,787	3,478	19%
2014	15,746	3,625	23%
2015	18,469	3,673	20%
2016	18,444	4,230	23%

In that, concerns are raised by the fact that the share of tender annulments in 2016 is increasing in proportion to increased value of individual tender procedures. Hence, 13% of public procurements in the value up to 5,000 EUR have been annulled, 29% of public procurements in the value ranging from 5,000 to 20,000 EUR have been annulled, while the relevant share among large-scale tender procedures in the value exceeding 20,000 EUR, which are subject of open procedures, accounted for as high as 32%. It can be concluded that large-scale tender procedures are more frequently annulled compared to small-scale tender procedures.

As regards reasons for failure of tender procedures to be completed with contract signing, it was noted that every third annulled tender procedure has not been

presented with any bids (36%). Next most frequently indicated reason for tender annulment implied the fact that contracting authorities have not been presented with any acceptable bids, which means that bids received are not in compliance with requirements defined in relevant tender documents (16%). In the case of 12% of annulled tender procedures it has been assessed that prices and conditions bided are less favourable than market prices and conditions.

Structure of reasons indicated for tender annulment*



*The structure of reasons indicated for tender annulment is based on processing of data from all notifications on tender annulments in 2016 submitted to EPPS.

Monitoring sample for the second half of the year included several cases of tender annulments that could be assessed as disputable.

One of them is the tender procedure implemented by state-owned enterprise for procurement of 639 office chairs, divided into three lots (89 rolling chairs with armrests, 200 rolling chairs and 350 non-rolling chairs). Total of five bids were submitted on this tender procedure.

The public procurement committee annulled the procedure by concluding that, on the basis of technical bids presented by five companies, it has been assessed that bids of all five bidding companies are not in compliance with defined technical

characteristics of the procurement subject, i.e. based on documents provided, the committee could not establish whether offered products possess technical features required under technical specifications. More specifically, this public procurement committee was comprised of three members and its report on implemented public procurement procedure included a remark by the committee chair indicating that all bidding companies have presented catalogues, i.e. images of the procurement subject and enlisted the type of products offered.

This position taken by the committee chair is justified, having in mind that bidding companies were requested to present catalogues that would serve as basis for establishment whether offered chairs fulfil the requested characteristics. Hence, it is more than clear that bidding companies acted in compliance with requirements from tender documents that were previously aligned with the Council of Public Procurements, which had been addressed with three applications for approval of tender documents within a period of two months. Doubts about motives behind this tender annulment are also raised by knowledge that the contracting authority, as part of the next tender procedure for procurement of chairs announced after annulment of the first tender procedure that was subject of monitoring, again requested bidding companies to present catalogues.

At the same time, another disputable aspect of this tender procedure is the fact that relevant tender documents enlisted: “during the warranty period, bidding companies are required to provide servicing of rolling chairs with armrests. In case the servicing activity establishes need for replacement of parts that are not covered by the warranty, said parts will be charged according to the pricelist, which the economic operator is obliged to submit in attachment to the bid, for all parts of office chairs that are not covered by the warranty. Prices of individual parts should include installation thereof”. Having in mind that lowest price was defined as the selection criterion for the most favourable bid, it is unclear what would the committee have done with requested data on prices for spare parts given that, in spite of their range, they would not have been included in the bid-assessment process.

Next example concerns public procurement procedure for health insurance of economic promoters. This tender procedure was presented with two bids and formal shortcomings have been established for both of them. In that, the two bidding

companies had been denied their proxy letters issued by the legal entity's responsible person and concerning authorization of another person to endorse bid documents, as the bidding companies submitted copies of proxy letters. It is unclear why the contracting authority deemed the copies unacceptable and why, having doubted their reliability, it has not requested them to provide the original letters. In addition, one of the bidding companies had its "statement on independent bid" contested on the grounds that in addition to the responsible person, this statement was signed by two other people. Given that the legal entity in question is organized as joint stock company, the possibility of linked signatures should not be excluded, but the contracting authority did not request explanation why this statement was signed by three people and whether the first signature would have been invalid in the absence of remaining two signatures.

Another annulled tender procedure from the monitoring sample in the second half of 2016 concerned construction of water supply system in the Municipality of Zelino, III stage, system of pressure pipes, supply pipeline section, supply pipeline for village Zelino and reservoir tank. It was assessed that tender documents contain significant omissions or shortcomings only 30 minutes prior to the deadline for submission of bids. After the monitoring team performed insight in documents, additional concerns were raised by the fact that the decision on tender annulment does not include more detailed explanation of the type of omissions identified in tender documents, except for quotation of the law-stipulated ground for tender annulment: "[the public procurement committee] has assessed that tender documents include major omissions or shortcomings by the scheduled public opening of bids (Article 169, paragraph 1, line 7 of LPP).

The same could be established for the procurement procedure organized for intercity bus transport. In that, the contracting authority did not disclose relevant documents for this tender procedure requested by the monitoring team, in spite of its legal obligation. Therefore, the monitoring team does not dispose with more detailed information whether the decision includes detailed explanation of major omissions identified in tender documents and enlisted in the notification on tender annulment, submitted to the Electronic Public Procurement System.

The monitoring sample included procurement of medical materials, divided into 7 lots, which was annulled in full as result of the fact that no bids were received for six

lots and one bid was received for one lot, but the public procurement committee has assessed that bided prices are higher than actual market prices.

The monitoring sample included another annulled tender procedure which concerned design, installation and implementation of fully-functional software solution for integrated information system intended for state agency. One interested bidding company lodged an appeal against discriminatory eligibility criteria for economic operators. Ex officio, the State Commission on Public Procurement Appeals annulled this tender procedure and established that in compliance with LPP the contracting authority should have, but failed to obtain an approval from the Council. In particular, the contracting authority has conducted market research for developed eligibility criteria and obtained responses from 12 economic operators, 5 of which were from Macedonia. However, according to Article 36a, paragraph 2 of LPP, the contracting authority had to secure at least 6 economic operators on the domestic market that fulfil the eligibility criteria defined. This example of tender annulment leads to the conclusion that institutions are still unaware of their obligations arising from the Law on Public Procurements in cases when they are obliged to seek approval from the Council of Public Procurements.

Recommendation: An obligation should be defined for the Bureau of Public Procurements for development and publication of annual analysis on annulled tender procedures, by indicating contracting authorities with the highest number of annulled tender procedures. Findings from such analyses could be used as baseline for the Bureau of Public Procurements to take relevant measures and improve systemic solutions in the field of public procurements.

- **Bureaucratization of public procurement procedures with applications for approval from the Council of Public Procurements has not lost in intensity. In 2016, contracting authorities addressed the Council of Public Procurements with a total of 16,067 applications for approval, which costed them total of 1.8 million EUR.**

Introduction of standard tender documents and technical specifications for nine products,² whose use does not necessitate approval from the Council of Public Procurements, has not reduced the bureaucratic pressure on contracting authorities. Although the number of applications for approval submitted to the Council of Public Procurements has been insignificantly reduced, it still remains exceptionally high. In the second half of 2016, the Council was presented with 7,707 applications for approval, accounting for only 653 applications less compared to the first half of the year. In 2016, contracting authorities addressed the Council with total of 16,067 applications for approval, which costed them 1.8 million EUR. The Council did not disclose requested information on legal grounds indicated in approval applications or data on the number of tender procedures covered by requested approvals. However, based on the monitoring sample it can be concluded that requested approvals concern significantly lower number of tender procedures because approvals were issued after the second or third application. In that, there are cases, such as the monitored tender procedures for procurement of meat and meat products when the contracting authority submitted as many as 6 applications for approval, 3 of which concerned technical specifications and 3 concerned eligibility criteria for economic operators.

Approval applications submitted to the Council of Public Procurements in 2016

Period	Number of procurement notices	Number of approval applications	Value of costs incurred by the Council of Public Procurements (in EUR)
January-June 2016	9,220	8,360	877,595
July-December 2016	9,224	7,707	928,354
Total 2016	18,444	16,067	1,805,949

Compared against 2015, the number of approvals sought has been reduced by 17.5%.

² Official Gazette of the Republic of Macedonia no. 79 from 19th April 2016

Approval applications submitted to the Council of Public Procurements, per year

Year	Number of procurement notices	Number of approval applications	Value of costs incurred by the Council of Public Procurements (in EUR)
2015	18,469	19,475	2,200,788
2016	18,444	16,067	1,805,949
Change	-0.14%	-17.50%	-17.94%

As regards decisions taken, in the second half of 2016 the Council has decided upon 7,660 applications for approval and the ratio between positive and negative opinions is 46%:54%. More specifically, the Council issued approvals for 3,544 applications and did not issue its approval for 4,116 applications. Compared to the first half of 2016, the share of negative opinions issued is increased. On annual level, the Council adopted 15,670 decisions, and the ratio between positive and negative opinions is 48%:52%.

Structure of opinions issued by the Council of Public Procurements

Period	Number of approvals issued	Number of negative opinions
January-June 2016	3,976	4,034
July-December 2016	3,544	4,116
Total 2016	7,520	8,150

On annual level, the Council of Public Procurements adopted more negative opinions in 2016 compared to 2015 (the ratio of approvals issued and negative opinions accounted for 50%:50%), which is unexpected having in mind that, in the meantime, i.e. from establishment of the Council in May 2014, contracting authorities have acquired certain experience in terms of procedure and elements which, according to requirements from experts contracted by the Council, should be included in tender documents and technical specifications.

Structure of opinions issued by the Council of Public Procurements, per year

Year	Number of approvals issued	Number of negative opinions
2015	9,795	9,680
2016	7,520	8,150

Although in the case of certain tender procedures experts engaged by the Council of Public Procurements have reconsidered descriptions of products that are subject of procurement in detail, they still failed to remark significant limiting factors for bidding companies, which in essence is the ultimate goal of requested approval from the Council of Public Procurements. Namely, in the procurement procedure for furniture and equipment intended for administrative building in estimated value of 500,000 EUR, without VAT, in addition to the bid with prices and technical specifications for all types of furniture items, companies were required to present certificate/test report issued by laboratory to demonstrate characteristics defined in technical specifications. Having in mind that the list is comprised of 85 types of furniture items (work desks, desk drawers, cabinets, tables, armchairs, kitchen, various types of chairs, etc.), in the assessment of one bidding company, participation in this tender procedure would have necessitated at least two dozen certificates from the Furniture Testing Laboratory at the Faculty of Furniture and Interior Design and Technologies in Skopje, each priced up to 500 EUR. In order to secure certificates (EN 527) for all types of products requested, bidding companies had to spend a significant amount of money. Hence, the question is raised about economic justifiability of requesting furniture tests (EN 527) for items that should be manufactured according to given dimensions and characteristics that meet the needs of the procurement-making entity. Most certainly, requirements related to quality guarantees from chartered institution are justifiable, but only from the procurement holder and in cases of furniture delivery, instead of requiring such certificates in

advance and from all bidding companies. The requirement for economic operators to submit these certificates together with their bids is logical only in the case of standardized furniture, not in the case of specialized furniture. Consequences from definition of such discriminatory and limiting conditions are best represented by the fact that three bids were submitted in this procedure for procurement of furniture, two of which had been rejected as result of non-compliance with technical specifications and submitted certificates. The procurement contract was signed with the company that submitted the only acceptable bid, without reduction of the initially bided price. The contract was signed in the value of 650,000 EUR, VAT included.

The Council of Public Procurements continues its practice on merit-based decision-making. In the monitored procurement procedure on software maintenance and upgrade services for centralized IT system and web-portal of health care institution, in the value exceeding 300,000 EUR, the Council of Public Procurement issued an approval for defined eligibility criteria, although two of the three experts contracted assessed that portion of said criteria are discriminatory and favouring. The approval was obtained after submission of second application to the Council. Only one bid was submitted in this tender procedure by the same company that was previously contracted to design the software solution. Having in mind the exceptionally high value of the contract on software maintenance and upgrading, this procurement procedure could be taken as argument that, in the future, software solutions should be procured together with maintenance and upgrading services. That would allow knowledge about total cost of said software solution from the very beginning, thereby avoiding the risk of signing maintenance and upgrading contract in the later stages with the same company, but under prices that are not attained by means of competitive process.

Monitoring of public procurements observed series of tender procedures which have obtained approval from the Council of Public Procurements, but still lacked competition. For example, the procedure on procurement of terrain vehicle, for which the Council of Public Procurements issued approval for technical specifications used only after the third application, was presented with only one bid. Same number of bids was noted in the procurement procedure for immunology tests, calibrators, controls and disposable materials by allowing free-of-charge use of the immunology analyser.

Recommendation: Recommendations from the European Union and SIGMA³ on assessing benefits from the existence of the Council of Public Procurements should be implemented, followed by its cancellation and reallocation of activities that generate benefits to other existing institutions. The purpose thereof is to unburden the system of public procurements from inefficient and expensive bureaucratic mechanism that imposes obligation on obtaining prior approval from the Council for series of legal grounds established by the law in case of failure to demonstrate existing competition on the market.

- **Almost every third tender procedure is marked by participation of one bidding company. In 2016, this situation was primarily a consequence of low competition observed in the first half of the year. Small, but unsatisfactory increase was observed in the second half of the year.**

In the second half of 2016, the share of tender procedures marked by satisfactory level of competition (three and more participants) accounted for 58% compared to the share of 37% reported in the first half of the year, while 4% of monitored tender procedures were not presented with any bids, and 22% of them were presented with only one bid. As shown in the table below, the situation in the second half of 2016 is indicative of certain improvement compared against the same period in 2014 and 2015.

Competition in tender procedures on semi-annual level*

Period	No bidders	1 bidder	2 bidders	3 and more bidders
July-December 2014	2%	30%	20%	48%
July-December 2015	2%	26%	20%	52%
July-December 2016	4%	22%	16%	58%

*Calculations are based on the monitoring sample.

³ SIGMA is joint initiative of OECD and the European Union that works with the countries on improving systems of public governance and increasing capacity of public administration.

Nevertheless, despite improvements in the second half of 2016, on annual level the share of tender procedures with satisfactory level of competition (three and more participants) accounts for only 48% of monitored procurement procedures. The share of tender procedures with only one bid is on the highest level from 2014 and accounts for 31%.

Competition in tender procedures on annual level*

Period	No bidders	1 bidder	2 bidders	3 and more bidders
January–December 2014	3%	29%	15%	52%
January–December 2015	3%	26%	20%	51%
January–December 2016	4%	31%	17%	48%

* Calculations are based on the monitoring sample.

In that, based on monitoring findings (competition level is calculated on the basis of data secured by means of attendance at public opening of bids) it can be assessed that low competition is additionally worsened in the further course of procurement procedures, in particular by excluding bidding companies from the bid-evaluation process.

Additionally worrying is the fact that, even in tender procedures marked by higher number of bidding companies, contracting authorities select the company with which they have signed contracts for the same type of procurements in the previous years. Low number of bids in public procurement procedures; signing of procurement contracts with same supplies for number of years; as well as high value concentration of public procurements with small number of companies are all indicators of corruption in public procurements. Therefore, it is necessary to take systemic measures to address problems of growing distrust among bidding companies in the system of public procurements.

Recommendation: Oversight and control on the overall process of public procurements should be introduced for the purpose of preventing and sanctioning

illegal spending of public funds, ensuring implementation of public procurement procedures in compliance with the Law on Public Procurements and performance of public procurements in compliance with contracts signed.

Oversight and control functions should be entrusted to the Bureau of Public Procurements, by expanding its competences. For that purpose, special organization unit on oversight and control should be established within the Bureau and given the following competences:

- to control ongoing public procurement procedures and performance of procurement contracts on the basis of risk analysis system, at own initiative or after being presented with information;
- to adopt and submit decision on elimination of identified irregularities and in case contracting authorities fail to eliminate them, to motion misdemeanour procedures in front of competent bodies;
- to notify the competent prosecution office in cases of reasonable doubt for existence of criminal offences.

The Bureau of Public Procurements should present the Government of the Republic of Macedonia with reports on identified systemic problems and make them publicly available.

By-law needs to be drafted and adopted in order to define the subject and scope of oversight and method of its implementation.

Introduction of oversight and control for public procurements will ensure alignment of LPP with Article 83 of the EU Directive on Public Procurements which anticipates monitoring of application of public procurement rules.

- **E-auctions were organized in only 54.5% of monitored procurement procedures. Institutions rushed the introduction of electronic procurements. In 2016, as many as 48% of procurements were implemented with full use of electronic means enabled by the Electronic Public Procurement System, thus exceeding the law-stipulated minimum of 30%.**

Low competition in tender procedures is negatively reflected on organization of electronic auctions. In the second half of 2016, e-auctions were held in 58.6% of monitored tender procedures, compared to 50.4% in the first half of the year. On

annual level, as a result of low competition, as well as exclusion of companies that have submitted bids, although planned, e-auctions were not organized in 45.5% of monitored tender procedures. The risk imposed by high share of procurement procedures that were not completed with e-auctions is seen in the unwritten rule whereby companies, in anticipation of planned e-auctions, offer higher prices at the public opening of bids that would be reduced in the course of downward bidding. Therefore, there is actual risk for tender procedures signed with the single bidding company and without organization of e-auction to be awarded at prices that are higher than actual prices.

According to the Law on Public Procurements, in 2016 all contracting authorities should have implemented at least 30% of their announced public procurements as electronic procurement by using EPPS. Based on monitoring findings and analysis of data secured from EPPS, it can be concluded that contracting authorities have significantly exceeded this target, especially in the second half of the year. In the first half of the year, 34.3% of procedures were implemented as electronic procurements, while in the second half their share accounted for high 62.1%. Therefore, 2016 annual share of electronic procurements accounted for 48.2%.

Overview of e-procurement procedures in 2016

Period	E-procurement procedures	Paper-based procedures	Share of e-procurement procedures
January-June 2016	3,160	6,060	34.3%
July-December 2016	5,732	3,492	62.1%
January-December 2016	8,892	9,552	48.2%

The question whether, by exceeding the law-stipulated minimum, contracting authorities have actually rushed implementation of electronic procurements remains open, having in mind that previous research was not conducted by any competent institution about preparedness of the business sector for this novelty. Use of electronic means for implementation of public procurements is much simpler for

institutions as they benefited from training for years, but the question is raised whether smaller companies are prepared for such significant step forward. In that, it should be noted that the Bureau of Public Procurements did not organize any free-of-charge training aimed to prepare small companies for this change.

Recommendation: In the period 2017-2018, the Bureau of Public Procurements should organize a cycle of free training for microenterprises across the country in order to facilitate their participation in mandatory e-procurements. Training sessions should be organized on regional level (in several towns across the country), in order to make them more accessible to economic operators doing business on local and regional level. Said training will represent one form of implementation of the requirement from the 2014 EU Directive on ensuring free-of-charge assistance for application of relevant rules, which should be delivered by competent body and should be intended for participants in public procurements. Implementation of this measure is in compliance with competences of the Bureau of Public Procurements stipulated under the current Law on Public Procurements and does not imply legislative changes.

The current legal solution on mandatory organization of e-auction in almost all public procurements procedures and for almost all procurement subjects should be revoked and instituted as legal possibility (option) in almost all public procurement procedures and for almost all procurement subjects, as anticipated under the EU Directive from 2014. Nevertheless, on the grounds of ten-year experience in use of e-auctions and certain positive effects it creates (budget savings), due reconsideration should be made for e-auctions to be mandatory only for procurement subjects of unified character (technical specifications can be defined in precise and detailed manner) and procurement subjects marked by actual market competition. Said procurement subjects should be established by the Bureau of Public Procurements, by means of by-law, and could be subject of annual revision. (Similar solution is integrated in the Slovenian Law on Public Procurements: *In cases when deemed necessary, the government shall stipulate procurement subjects and categories of contracting authorities for which they should be obliged to organize e-auction*).

New technique(s) should be introduced for implementation of e-auctions, in order to address existing anomalies related to irrational reduction of prices. Possible

techniques include: establishment of lower threshold for downward bidding or limiting the number and method of price reduction. In case of public procurement for which e-auction is organized, the relevant procurement notice should not enlist estimated value. Non-publication of procurement's estimated value would prevent "inflation" of initially bided prices that are considered starting point for downward bidding during e-auctions and provide somewhat false image in calculation of budget savings.

The module on submission of final price should be abandoned, because its previous saving effects are insignificant and it contributes to delayed procurement procedure.

- **In 2016, total of 605 procurement contracts were signed without previously announced call for bids and their value amounted to 34.8 million EUR. Total value of these contracts is by 20% higher compared to 2015. The highest procurement contracts signed under this non-transparent procedure belonged to JSC Macedonian Power Plants and concerned excavation of coal and slag for the need of RU Mines, MEC Bitola, in the value of around 5.8 million EUR.**

Increased value of contracts signed under negotiation procedure without previously announced call for bids in 2016 has discontinued the two-year trend on reduced use of this procedure. Decreased values registered in 2014 and 2015 were a result of the introduced legal obligation for obtaining approval from the Council of Public Procurements for signing this type of contracts.

As shown in the table below, the number of these contracts signed in 2016 is lower compared to 2015, but the total value of contracts is obviously much higher.

The highest individual contract awarded under this type of procedure concerned excavation of coal and slug for the needs of RU Mines, MEC Bitola, in the value of around 5.8 million EUR, with the following explanation: *due to reasons of urgency caused by events that could not be anticipated by or attributed as omission to the contracting authority, the law-stipulated deadline for announcement of open*

procedure, limited procedure, bid-collection procedure or negotiation procedure with prior announcement of call for bids cannot be applied.

The list of contracts signed under this non-transparent procedure include 19 contracts signed by the Ministry of Education and Science for purchase of primary and secondary education textbooks and additional teaching and working materials for adapted textbooks from abroad for the school year 2016/2017, in total value of around 10 million EUR (detailed overview of all so-called direct contracts is available on the website opendata.mk on the following link:

<http://opendata.mk/Home/JavniNabavkiDetails?Category=2016>).

Overview of the value of contracts signed under negotiation procedures without prior announcement of call for bids, per year

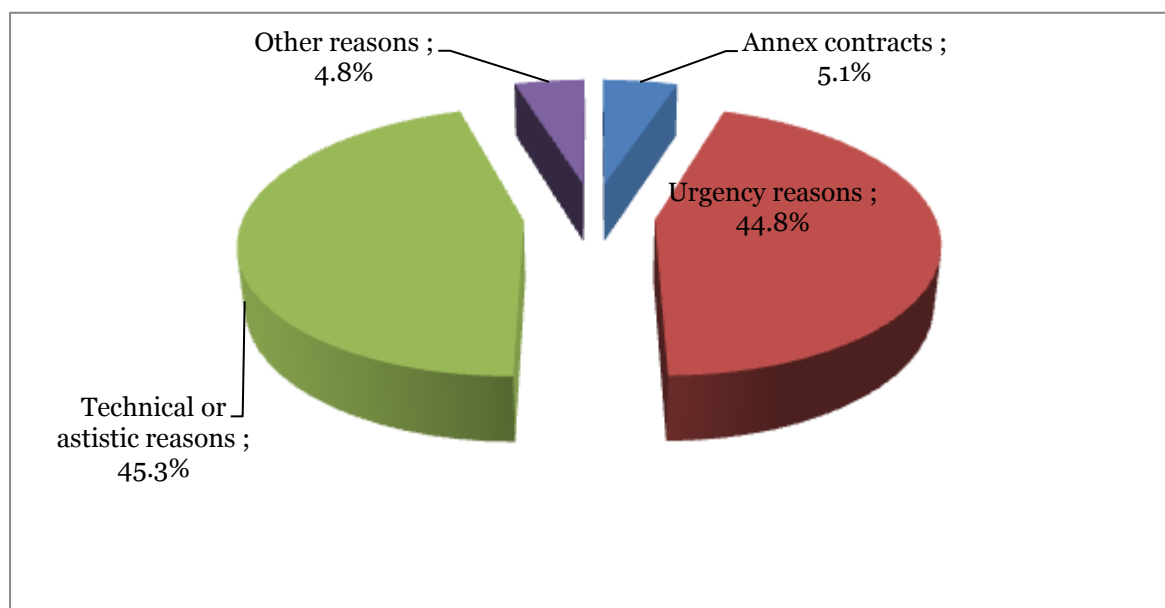
Year	Number of contracts signed	Value of contracts signed (in million EUR)	Change in annual value
2013	1,491	97.3	+34.2%
2014	834	56.4	-42.0%
2015	951	29.0	-48.6%
2016	605	34.8	+20.0%

Detailed overview of these contracts is available on the official website of CCC, opendata.mk

Law on Public Procurements anticipates 10 grounds for use of negotiation procedure without prior announcement of call for bids. However, as shown in the chart below, institutions predominantly enlist two reasons: due to technical or artistic reasons, i.e. reasons related to protection of exclusive rights, patents, etc. implying that the contract could be performed only by particular economic operator (45.3%); and due to urgent reasons, i.e. when the public procurement must be signed immediately (44.8%). Third important ground for use of this procedure includes annex contracts and accounted for 5.1% of total value of this type of contracts.

As shown in the chart, other grounds for use of negotiation procedure without prior announcement of call for bids account for 4.8% of total funds spent by means of this type of procedures.

Overview of contracts awarded by means of the negotiation procedure without prior announcement of call for bids, January – December 2016



Recommendation: The legal obligation on obtaining approval for use of this type of procedures should remain in effect even after the possible cancellation of the Council of Public Procurements. In that, the Bureau of Public Procurements should be obliged to develop and publish annual analyses of contracts signed by means of negotiation procedure without prior announcement of call for bids, enlisting also economic operators that have been awarded such contracts.

- **Use of bank guarantees for bids and for quality performance of contracts is marked by increase. Intensified use of bid guarantees is irrational and contrary to efforts aimed at increasing competition in tender procedures.**

Bank guarantees for bids were requested in 22% of monitored tender procedures in 2016, representing an increase by 5 percentile points compared to the previous year.

On the contrary, guarantees for quality performance of contracts were requested in 53% of monitored tender procedures, representing an increase by 6 percentile points compared to the previous year.

Increased frequency of bank guarantees for bids is utterly illogical, having in mind that the introduction of “statement on serious intent” represents an adequate replacement thereof. Hence, these guarantees imply creation of financial barrier for potential bidding companies.

As regards guarantees on quality performance of contracts, it could be assessed that they are acceptable in all tender procedures of higher value, as they represent safeguard mechanism for institutions when the single selection criterion is defined as lowest price (i.e. quality is not required and assigned ranking points) and when e-auctions are marked by major reduction of prices, which often results in signing of contracts at prices that deviate from market prices and increase the risk of poor quality of contract performance.

Recommendation: Contacting authorities should avoid requirements for bidding companies to present bank guarantees for bids, and instead use the statement of serious intent. As regards bank guarantees for quality performance of contracts, which are more justifiable, they should be used whenever the procurement’s value and nature requires such guarantees, in order to avoid the risk of turning them into financial barrier for bidding companies.

Contracting authorities should analyse the relevant market and in particular seriousness of market participants, and should assess whether there are greater or smaller risks of poor quality and untimely contract performance. In case of serious market participants and small risks, contracting authorities should not request guarantees for quality performance of contracts, instead they should design and integrate relevant penalty fines in the procurement contract as main safeguard against procurement holders that do not perform their obligations according to what has been agreed.

- **In 2016, 77 negative references were issued. Most negative references were issued to companies that have refused to sign the contract after their bids have been selected as the most favourable.**

In the second half of 2016, contracting authorities have issued 48 negative references which, together with 29 negative references issued in the first half of the year, account for total of 77 references for the entire year. The list of companies prohibited to participate in tender procedures is subject of continuous changes, with enlistment of new companies and deletion of old ones after expiration of relevant bans.

Most frequent reasons for issuance of negative references in 2016 included:

- bidding companies failed to present documents demonstrating their legal status;
- activation of guarantees for quality performance of contracts; and
- bidding companies have not signed the public procurement contract.

The law-stipulated possibility for institutions to issue negative references, i.e. prohibit companies to participate in all tender procedures in the Republic of Macedonia for a period of 1 to 5 years, is not in compliance with legal regulations adopted by the European Union.

Recommendation: Instead of “negative references”, contracting authorities should be given the possibility to prohibit particular economic operator to participate in their public procurements for given period of time, on the grounds of unsatisfactory performance of previous contracts. This proposal implies cancellation of “negative references” and possibility for contracting authorities to ban economic operators only in cases of documented significant or consecutive underperformance under previously awarded contracts. The prohibition could concern only participation in tender procedures organized by the contracting authority that has issued it. The period of exemption could be set in duration of 1 to 5 years, depending on the repetition of unsatisfactory contract performance.

ANALYSIS OF PROCEDURES LED IN FRONT OF THE STATE COMMISSION ON PUBLIC PROCUREMENT APPEALS IN THE PERIOD JANUARY-DECEMBER 2016

- Among total of 18,444 tender procedures organized in 2016, companies have lodged 557 appeals, while contracting authorities have lodged 43 appeals against decisions taken by the Council of Public Procurements. The number of appeals is indicative of exceptionally small share of public procurement procedures appealed by companies, accounting for only 3%.

Mild increase of the number of appeals lodged by companies in front of the State Commission on Public Procurement Appeals (SCPPA) continued last year's trend on increasing number of appeals in tender procedures. In the first half of the year, SCPPA was presented with 322 appeals, and in the second half – with 235 appeals, or 557 appeals in total, which represents an increase by 6.5% compared to 2015.

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

Year	Number of tender procedures	% of change	Number of appeals lodged in front of SCPPA	% of change
2014	15,738	-15.63%	503	-13.4%
2015	18,469	+17.35%	523	+3.98%
2016	18,444	-0.14%	557	+6.50%

Calculations are based on processing of data about appeals lodged in front of SCPPA and published on its official website.

In the course of 2016, SCPPA adopted decisions upon 555 motions for appeal. In that, it approved/admitted 264 appeals, representing 47.6%. Total of 180 appeal motions were rejected as ungrounded, representing 32.4% of all motions lodged. The share of denied appeals accounted for 7.6% and they concern appeals that were not reconsidered by SCPPA because they were lodged beyond the strictly stipulated

deadlines from the Law on Public Procurements or appealing parties have failed to settle fees for initiation of appeal procedure. Appeals withdrawn by companies that have lodged them account for 5.0%, while in 7.4% of cases appeal proceedings were discontinued because contracting authorities acknowledged allegations put forward by appealing parties before SCPPA had the opportunity to issue its opinion.

Structure of decisions taken by SCPPA in the course of 2016

Structure of appeals before SCPPA reconsideration	Number of appeals	Share in %
Approved appeals	264	47.6%
Rejected appeals	180	32.4%
Denied appeals	42	7.6%
Withdrawn appeals (procedure is discontinued)	28	5.0%
Appeals acknowledged by the contracting authority (procedure is terminated)	41	7.4%
Total	555	100%

Calculations are based on processing of data related to decisions taken by SCPPA and published on its official website.

Compared against the previous years, the structure of decisions is increasingly more favourable for companies that have decided to protect their rights in front of SCPPA. Growth of admitted appeals in 2016 accounts for entire 4 percentile points compared to the previous year and 5.2 percentile points compared to 2014. The share of rejected appeals in 2016 is higher than the relevant share calculated in 2015 by 5.1 percentile points and is almost identical with the relevant share in 2014. As shown in the table below, in 2016 the share of appeals denied by SCPPA is reduced compared to previous years, but the share of appeals for which proceedings were terminated or discontinued was increased.

Thorough analysis of appeals admitted by SCPPA showed that the trend on increased number of decisions on full tender annulment was discontinued in 2016. More specifically, in 2016 the State Commission admitted 264 motions and in the case of 138 appeals has taken decisions on full annulment of tender procedures (52%), while

in the case of remaining 126 admitted appeals it has adopted decisions on revoking the selection decision and returning the procurement procedure for repeated bid-evaluation (48%).

Comparison data on the structure of decisions taken in appeal procedure

Type of decision	2014	2015	2016
Approved appeals	42.4%	43.6%	47.6%
Rejected appeals	32.3%	37.3%	32.4%
Denied appeals	15.4%	11.5%	7.6%
Discontinued/terminated appeal procedures	9.9%	7.6%	12.4%
Total	100%	100%	100%

Calculations are based on processing of data related to decision taken by SCPPA and published on its official website.

When these data are compared against previous years, it can be concluded that the share of decisions on full annulment of tender procedures taken by the State Commission has been reduced by 13 percentile points compared to 2015 and by 8 percentile points compared to 2014. This piece of information indicates that, based on SCPPA decisions, essential violations of the Law on Public Procurements have been reduced as this commission adopts decisions on tender annulment in cases when illegal activities taken in the course of the procurement procedure could not be addressed by means of changed decision, and the overall procedure has to be annulled and start anew.

Comparative overview of the structure of approved appeals, per year

Type of decision taken upon approved appeals	Share of approved appeals		
	2014	2015	2016
Revoked decision	40%	35%	48%
Annulled tender procedure	60%	65%	52%
Total	100%	100%	100%

Calculations are based on processing of data related to decisions taken by SCPPA and published on its official website.

Analysis of contents of appeals lodged in front of the State Commission shows that dominant share of appeals, i.e. 70% of them have been lodged against decisions on selection of the most favourable bid. In these appeals, companies claimed that the public procurement procedure has not selected the most favourable bid because:

- the committee has awarded the contract to the bidding company that does not fulfil conditions or eligibility criteria anticipated in the public procurement; or
- the committee has exempted from bid-evaluation the appealing company indicating that the latter has failed to fulfil anticipated conditions and criteria.

Next important ground for lodging appeals - accounting for 12% of all appeals – concerns contesting decisions on tender annulment taken by contracting authorities, while around 9% of appeals were lodged against tender documents. All other appeal grounds account for insignificant shares and concerned remarks for procurement notices, minutes from technical dialogue performed for tender procedures of higher value, e-auctions, etc.

With the establishment of the Council of Public Procurements in 2014, contracting authorities that are unsatisfied with opinions/decisions of the Council are also entitled to lodge appeals in front of SCPPA. Hence, in the course of 2016 contracting authorities lodged 43 appeals against decisions of the Council of Public Procurements and, at its sessions held in 2016, SCPPA has taken decisions upon 38 appeals against the Council. This is indicative of significant reduction of appeals against decisions of the Council of Public Procurements from 90 appeals lodged in 2015 to only 43 appeals in 2016.

Analysis of the structure of decisions taken by SCPPA shows that it has rejected 31 appeals and admitted only 7 appeals against decisions of the Council. Such unfavourable ratio between rejected and admitted appeals in 2016 (82%:18%), which was also observed in 2015 (81%:19%), has discouraged institutions to seek protection in front of SCPPA. Most often, SCPPA decisions on admitting appeals lodged by contracting authorities concerned violation of the procedure stipulated by the Law on Public Procurements. Actually, SCPPA does not engage in material assessment of Council decisions issued on the basis of opinions provided by experts, as institutions had initially expected.