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MONITORING OF PUBLIC PROCUREMENTS

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KEY FINDINGS

- » Old habits are stronger than the new Law on Public Procurements. Lowest price and electronic auctions remain unchallenged practices in the first three months after the law entered in effect.
- » In the first half of 2019, competition in public procurements has deteriorated compared to the previous two years. The average number of bids in the monitoring sample stands at only 2.74 bids per tender procedure, while high 35% of monitored public procurements were awarded with only one bid.
- » In most cases, contracting authorities do not indicate the estimated value in their procurement notices, which is in compliance with novelties introduced in the law. However, insight in bids submitted to monitored tender procedure reveals high number of cases in which offered prices are symptomatically close to the procurement's estimated value which bidding companies were unable to learn from tender documents.
- » Every fourth tender procedure (25.8%) is fully or partially annulled. In addition to commonly indicated legal grounds for tender annulment, the new law added another possibility for tender procedures to be annulled upon instruction from the Bureau of Public Procurements, after having conducted administrative control. This ground was indicated for annulment of large-scale tender procedure from the monitoring sample.
- » In the first half of 2019, non-transparent negotiation procedures without prior announcement of call for bids were used to award contracts in the value of 9.6 million euros, which is by 11% less compared to the same period last year.
- » Analysis of monitored public procurements organized by local institutions show that these tender procedures are implemented as if the new Law on Public Procurements is not adopted and has not entered into effect. Hence, monitoring activities observed numerous shortcomings; lowest price is still used as the single selection criterion and e-auctions were organized in 70% of tender procedures, although when they were mandatory, both elements were criticized as the main reasons for problems in public procurements. Frequency of tender annulments has not receded, and competition has decreased.

GOALS AND METHODOLOGY

The Center for Civil Communications (CCC) regularly monitors and analyses implementation of public procurements in the country since 2008, i.e. when the Law on Public Procurements drafted in compliance with the European Commission's Directives entered in effect. The overall purpose of this endeavour is to assess whether and to what extent state institutions comply with the underlying principle in public spending stipulated under the law, as follows: competition among companies, equal treatment and non-discrimination of companies, transparency and integrity in implementation of public procurements, cost-effective and efficient public spending.

Subject of CCC's monitoring activities are procedures organized and implemented by all state institutions in the country, both at central and local level of government. Selection of the monitoring sample is made upon publication of procurement notices in the Electronic Public Procurement System and "Official Gazette of RNM".

Monitoring activities include collection of primary and secondary data, by means of attendance by CCC monitors at public opening of bids, discussions with bidding companies, browsing and researching data available in EPPS, browsing information on appeals lodged and decisions taken by the State Commission on Public Procurement Appeals available on its official websites, and submission of requests under the instrument for free access to public information in respect to information that are otherwise unavailable. Questionnaires and other templates used as part of this monitoring effort are structured in a manner that facilitates the most effective method to monitor implementation of public procurements in terms of their compliance with relevant legislation in effect and the fundamental principles that govern public procurements.

Implementation of public procurements is analysed on the basis of all information and datasets obtained, previously structured and inputted in specially designed matrix and compared against indicators on compliance with above-enlisted principles and efforts to obtain the most favourable bid, including accountability for funds spent.

Data analysis provides basis for development of reports that outline key findings from monitoring and analysis of public procurements, recommendations to address problems and weaknesses identified in the system of public procurements, and detailed elaboration of observed state-of-affairs.

This report is developed on the basis of monitoring and analysis of the selected sample comprised of 60 procurement procedures implemented by central and local institutions in the period from 1st January until 30th June 2019.

* * *

The Center for Civil Communications (CCC) was established in 2005 as non-governmental, non-profit and non-partisan association of citizens.

CCC monitors, analyses and strengthens societal processes in the country and the region in the field of anticorruption and good governance, media and economic development.

Thus far, CCC focuses its work on two groups of interrelated activities, as follows: (1) monitoring of state institutions and recommending measures and policies aimed to promote their performance and narrow space for corruptive practices; (2) capacity building for journalists and special role played by the media and non-governmental organizations in fight against corruption.

Hence, CCC has developed and proposed several hundred specific recommendations for measures aimed to promote legislation and practices in order to ensure more transparent, accountable and responsible operation on the part of central and local authorities, has trained more than five hundred journalists from national and local media outlets and civil society representatives, and has published more than hundred analyses, research studies and manuals.

ANALYSIS OF MONITORED PUBLIC PROCUREMENTS AT CENTRAL LEVEL

- » **Old habits are stronger than the new Law on Public Procurements. Lowest price and electronic auctions remain unchallenged practices in the first three months after the law entered into effect.**

Despite the fact that, according to the new Law on Public Procurement which is in effect since 1st April 2019, lowest price is no longer defined as mandatory selection criterion, in practice, it still remains institutions' first choice. A total of 3,221 public procurements were announced in the period April-June 2019, and 3,148 of them, accounting for high 98.04%, have used lowest price as the selection criterion for the most favourable bid.

Number of public procurements according to the selection criterion for the most favourable bid (April – June 2019)



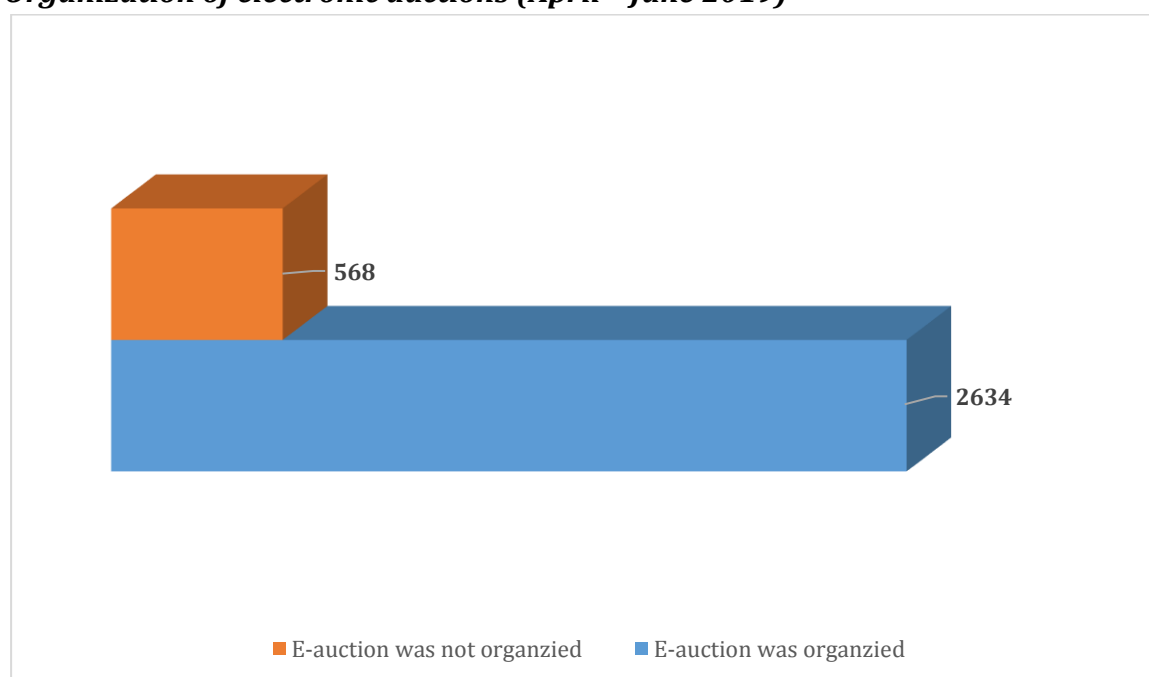
This situation is highly unexpected having in mind that mandatory use of lowest price for selection of the most favourable bid had been subject of fierce criticism by both, institutions and companies. For many years, surveys conducted among companies have indicated lowest price as problem no.1 in public procurements. On the other hand, institutions justified poor quality of their procurements with mandatory use of lowest price.

In the monitored period, although unexpected, price was used as single criterion for selection of the most favourable bid in food procurements at hospitals, kindergartens, but

also in procurements that, to great extent, determine the quality of services which institutions provide to citizens. In that, low use of the selection criterion defined as “best price-quality ratio” is accompanied with bid-evaluation elements that put the weight on bidding companies’ experience instead of the quality of their bids.

Electronic auction was heavily used in the first three months of this year. Hence, 82.31% of implemented public procurements organized downward bidding, while the share of tender procedures without e-auctions stands at 17.69%.

Organization of electronic auctions (April – June 2019)



By using lowest price and electronic auction, institutions have actually failed to introduce changes in implementation of their tender procedures. This attitude, to great extent, is mainly due to their unpreparedness to apply the new rules from the Law on Public Procurements, which is unfavourable and shows that the postponed enforcement of the new legal solution was not used in adequate manner.

In part, reasons for this could be sought in increased awareness of the public about corruption risks in public procurements, which creates pressure on institutions. Hence, the institutions’ departments on public procurements find it easier to defend themselves from potential criticism if they use lowest price than to actually use other selection elements. Evidently this represents incorrect interpretation of state-of-affairs and is understandably far from the reality because corruption is generated by series of actions in public procurements not just by the selection criterion. In particular, serious problems with corruption in public procurement have not receded in spite of the fact that, for many years, lowest price was the single selection criterion.

Recommendation: Benefits created by non-mandatory character of lowest price and e-auction should be used in order to ensure efficient public spending.

- » **Same law, different enforcement - this is how institutions' attitude towards some issues in implementation of public procurements could be described. Although reasons for different enforcement could be sought in lack of knowledge, corruptive motives or something else, evident is that these practices create insecurity for bidding companies and cast a shadow on the overall process of public procurements.**

Different interpretation of the law is best reflected in monitored tender procedures organized for procurement of airline tickets. All three institutions whose procurement procedures were monitored have taken diametrically different actions, unlike bidding companies which often acted in same manner by setting their commission charge for procurement of airline tickets at 0.01 MKD. In that, tourist agencies responded to requested clarification of low prices and indicated that they do not charge their services because they enjoy other benefits from sales of high number of airline tickets. Be that as it may, actions taken by institutions are the main concern here.

The first monitored procedure for procurement of airline tickets was set in the value of 2 million MKD, without VAT, and was organized by institution that operates in the field of culture. Two of the five agencies offered prices set at 0.01 MKD, which served as reason for this contracting authority to annul the tender procedure under justification that: *"the commission was unable to fully and with certainty perform the bid-evaluation process that would imply possible acceptance of bids in the value of 0.01 MKD as valid"*.

Value of the second monitored tender procedure for airline tickets, organized by scientific institution, was also set in the amount of 2 million MKD, without VAT. This tender procedure was presented with 7 bids, of which 5 bids implied commission charge in the amount of 0.01 MKD. Unlike the previous example, this procurement procedure was concluded with selection of one tourist agency and the contract was signed. Having in mind the same price of 0.01 MKD, selection of the tourist agency was made according to the time when bids were submitted. The decision for selection of the most favourable bid indicated: *"the commission on public procurements ranked the bids according to their time of submission in the Electronic Public Procurement System and on that basis proposed the selection of the most favourable bid"*. Documents obtained from this contracting authority did not allow the monitoring team to infer exact time when the first-ranked bid was actually submitted. Anyway, this type of actions on the part of contracting authorities opens space for manipulation by advising the favoured company about the time when the procurement notice will be announced.

The contracting authority (educational institution) in the third monitored tender procedure for procurement of airline tickets in the value of 1 million MKD applied

completely different approach from the other two procedures elaborated above. Notably, the relevant procurement notice indicated that framework agreement will be signed with all economic operators that fulfil eligibility criteria and quality parameters. In this case, the contracting authority received 8 bids and the contract was signed with 5 companies, including tourist agencies that offered commission charge of 0.01 MKD. Here it should be noted that individual contracts will be awarded after repeated collection of bids and the selection criterion is defined as “economically most favourable bid”, which means lowest price of offered airline tickets after destination and number of tickets are known. However, if two or more bids have the same price, the contract will be awarded to the first bidder that submits its bid.

It seems the third model is the only correct. Namely, the first public procurement did not end with contract award, while the second public procurement was awarded under commission charge of 0.01 MKD, but does not guarantee low and favourable price at the time when tickets will be purchased for specific destinations.

Different approach applied by institutions in same type of procurements that are implemented according to the same law was observed in tender procedures organized for procurement of toner. The monitoring sample included two such tender procedures. In the first procedure, organized by inspection institution, procurement of toner was set in the value of 1.5 million MKD, without VAT, and was divided into 4 lots according to printer brands. A total of 6 bids were submitted, as follows: 2 lots were presented with 1 bid each, and the other 2 lots were presented with 5 bids each. The second tender procedure, organized by public enterprise, concerned procurement of toners, drums, ink cartridges and ribbons in the value of 2.1 million MKD, without VAT, and was comprised of 68 items. However, this procurement was not divided into lots and was therefore presented with only one bid.

Non-division of tender procedures, as subjective right that institutions know how to abuse was also noted in the monitored procedure for procurement of works for interior space adaptation and refurbishment of existing structure - building. In particular, this procurement required masonry works, wall-plastering, wall-painting and ceramic works, but also electrical, thermal and hydro-technical installations and interior design, i.e. procurement of desks, cabinets and chairs. In that, one of the two bids was exempted from bid-evaluation because tender documents indicated that: *“Prior to developing and submitting their bids, economic operators interested to participate in this tender procedure need to perform mandatory announced visit to location in order to get acquainted with the building’s current status. One of the two bidding companies did not visit the location”*. It should be noted that the law allows visits to location, but that should not be considered as basis for elimination of economic operators.

Recommendation: Tender procedures should guarantee cost-effective public spending and, in cases when there is knowledge about certain manipulations that could result in budget damages, efforts are needed to find systemic solutions to address these problems. Above-elaborated practices on the part of institutions create inconsistency and are

unacceptable. This raises the need for definition of unified approach for same-subject procurement procedures. At the same time, in cases when bids with identical prices are ranked according to their time of submission, decisions on selection of the most favourable bid and relevant notifications submitted to bidding companies must enlist exact time when the procurement notice was announced and exact time when individual bids were submitted, in order to eliminate doubts about possible pre-arrangements.

- » **In most cases, contracting authorities do not indicate the estimated value in their procurement notices, which is in compliance with novelties introduced in the law. However, insight in bids submitted to monitored tender procedure reveals high number of cases in which offered prices are symptomatically close to the procurement's estimated value which bidding companies were unable to learn from tender documents.**

According to the new Law on Public Procurements, contracting authorities can, but are not obliged to, publish estimated values of their tender procedures. Justification for this legal solution implied that publication of estimated values informs bidding companies how much institutions are prepared to spend on specific procurements. Having in mind that estimated values are often not developed with sufficient quality, it was believed that their publication increases risks for payment of prices higher than market prices.

However, it seems that the reality is completely different from the intention behind this legal solution. Namely, dominant share of tender procedures were presented with bids whose prices are almost identical to their estimated value. Hence, for example, the estimated value of the tender procedure organized for development of study on non-occupied buildings that are attractive for foreign investors was set in the amount of 423,790 MKD, without VAT, and was not published. This procurement procedure was presented with only one bid, in the amount of 423,000 MKD, which is only 790 MKD or 0.19% lower than the estimated value.

Furthermore, the bid submitted by one of the three companies that participated in the procedure for procurement of services provided by property and personal security agency amounted to 1,080,000 MKD (i.e. was identical to the estimated value that was not made public) and exactly this company was awarded the contract, albeit after the organized e-auction.

Evidently easy revelation of information about procurement's estimated value is seen in another example that concerns procurement of joint platform for business start-ups and internet portal modernization estimated in the value of 32,200,000 MKD which was presented with two bids in respective amounts of 31,750,000 MKD and 32,200,000 MKD.

In the tender procedure for procurement of preventive maintenance, upgrading and hosting services for integrated information system (which was annulled by the State

Commission on Public Procurement Appeals due to discriminatory elements), the estimated value was literally identical with the price offered by one bidding company in the amount of 7,982,700 MKD, while the second bidding company offered 7,977,700 MKD. Concerns raised about such practices are related to information that bidders have insider knowledge of estimated values, which creates discrimination among economic operators.

Recommendation: If contracting authorities are unable to keep estimated values of their tender procedures secret, they should not practice non-publication of this information as part of their procurement notices because in doing so they actually put bidding companies in unequal position.

- » **In the first half of 2019, competition in public procurements has deteriorated compared to the previous two years. The average number of bids in the monitoring sample stands at only 2.74 bids per tender procedure, while high 35% of monitored public procurements were presented with only one bid.**

In the first half of 2019, satisfactory level of competition (3 or more participants) is noted with 43% of monitored tender procedures. The share of tender procedures presented with only one bid is significantly increased and stands at 35%, which is the highest level observed in the period of three years.

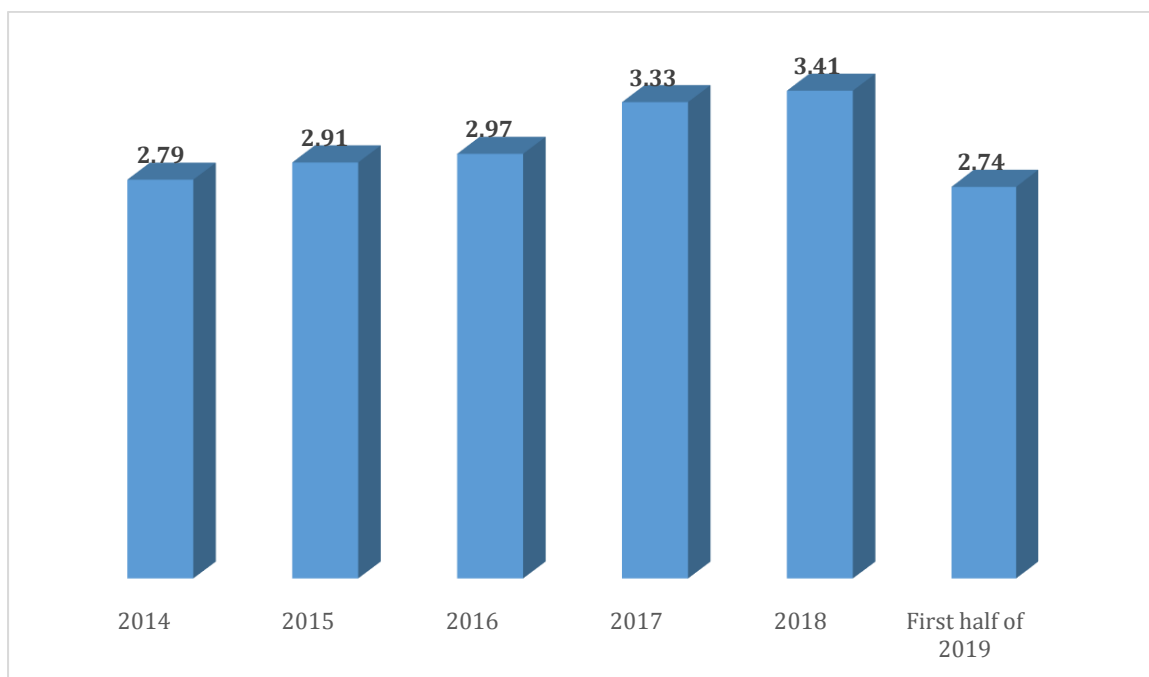
Competition in monitored tender procedures at semi-annual level

Period	No participants	1 participant	2 participants	3 and more participants
January-June 2015	4%	26%	19%	51%
January-June 2016	5%	39%	19%	37%
January-June 2017	3%	25%	23%	48%
January-June 2018	2%	18%	13%	67%
January-June 2019	0	35%	22%	43%

This situation is particularly worrying because it represents one of major indicators for serious weaknesses in the system of public procurements. Namely, low competition could be a consequence from series of factors, the most dominant being tender documents and technical specifications that limit competition and non-adherent application of the principles of non-discrimination and equal treatment of economic operators.

Based on the monitoring sample, the average number of bids in 2019 is marked by decrease compared to the previous years and stands at only 2.74 bids per tender procedure.

Average number of bids per tender procedure *



*Data indicated for the first half of 2019 is based on calculations for the monitoring sample, while data for other years are taken from annual reports published by the Bureau of Public Procurements.

If this trend is maintained in the second half of 2019, it is possible for the average number of bids per tender procedure among contracting authorities at central level to reach the lowest level in the last 6 years.

Most prominent examples of public procurements with discriminatory eligibility criteria for tender participation include several procedures from the monitoring sample, and they are elaborated below.

The procurement procedure for on-call services by auxiliary machinery was comprised of three lots. Although 8 companies participated in the overall tender procedure, the highest value procurement lot (86% of the tender's total value, i.e. 42.7 million MKD) was presented with only two bids. One of these two bidding companies was exempted from bid-evaluation because it offered earthmover machine with engine capacity of 355 kW, which is by 5 kW higher than the value indicted in tender documents that anticipated engagement of earthmovers with engine capacity of 280-350 kW. This prevented competition and organization of the planned electronic auction. Hence, the question is raised why the state-owned enterprise that organized this tender procedure, for the purpose of ensuring greater competition, did not act pursuant to requests from interested companies to engage in technical dialogue, but enlisted minimum instead of maximum

engine capacity in relevant tender documents. In its response, this enterprise indicated that earthmovers of higher engine capacity would be more costly and that excavation works could be performed with engine capacity of 350 kW. Given that lowest price was used as selection criterion and electronic auction was anticipated in this procedure, it remains unclear why the contracting authority focused on this matter. It seems utterly discriminatory for engine capacity to be set at 350 kW when it is known that earthmovers are also available with engine capacity of 355 kW, i.e. under minimum difference.

Another example that should be elaborated concerns the procedure for procurement of preventive maintenance, upgrading and hosting services for integrated information system in which bidding companies were required to have employed an expert relevant for this procurement subject, but not to have engaged such expert under contract only for this procurement and not to have taken such expert under secondment from another company. The State Commission on Public Procurement Appeals assessed that this eligibility criterion is discriminatory and annulled the tender procedure.

Two tender procedures from the monitoring sample concerning procurement of vehicles raised justified doubts about favouring tender documents. In particular, both procedures were presented with only one bid, which is very symptomatic given the high number of car dealerships in the country.

Discrimination was also seen in the manner in which contracting authorities perform their bid-evaluation processes. Hence, two bidding companies were exempted from bid-evaluation in the procurement procedure for traffic network project (infrastructure) and levelling plan with project design for road and street network because one of them did not submit the statement confirming it has not been subject of enforceable court decision for criminal offence in the last 5 years, while the second was exempted because it did not submit financial results for the last 3 years (2016, 2017 and 2018) to demonstrate economic and financial capacity, but provided balance sheets and profit-and-lost statements issued by the Central Register with financial results for the years 2015, 2016 and 2017. Insight in documents obtained from the contracting authority did not allow the monitoring team to infer whether these companies were asked to submit additional documents and complete their bids. In particular, Article 109, paragraph 2 of the Law on Public Procurements stipulates that: *“When verifying completeness and validity of documents on eligibility of bidding companies and when evaluating their bids, the commission can request companies to clarify or complete their documents provided it is not matter of significant deviation from documents required. The commission cannot create advantage to the benefit of certain economic operator by using such clarifications or additions”*. Law on Public Procurements should be enforced adherently and in unified manner.

At the same time, as shown by the previously analysed tender procedure, some institutions continue to use utterly discriminatory eligibility criteria related to positive financial results in the previous years. Moreover, monitoring activities observed tender procedures that concern equipment servicing and, as it could be expected, were presented with only one bid, which is logical because they implied authorized servicing operators. This example is highlighted in the analysis because it usually implies contracts

of high value. Having in mind the risk for abuse of exclusive rights, the question is raised whether regular public procurement procedures are adequate for these problems or efforts should be made to find a systemic approach that would enable money savings in equipment servicing and software maintenance.

Recommendation: Institutions must demonstrate honest will to stimulate competition in their respective tender documents and by their actions in public procurements.

- » **Every fourth tender procedure (25.8%) is fully or partially annulled. In addition to commonly indicated legal grounds for tender annulment, the new law added another possibility for tender procedures to be annulled upon instruction from the Bureau of Public Procurements, after having conducted administrative control. This legal ground was indicated for annulment of large-scale tender procedure from the monitoring sample.**

As shown in the table below, in the first half of the year the share of annulled tender procedures in total number of procurement notices stands at 25.8% and is almost identical to the relevant share calculated for the first six months in 2018. Among 9,743 tender procedures announced in the first six month of this year, a total of 2,511 decisions were taken on full or partial tender annulment. In that, institutions continue practices related to frequent annulment of large-scale, but not small-scale tender procedures. At the same time, concerns are raised with the fact that significant part of annulled tenders in the monitoring sample implied above-average level of competition.

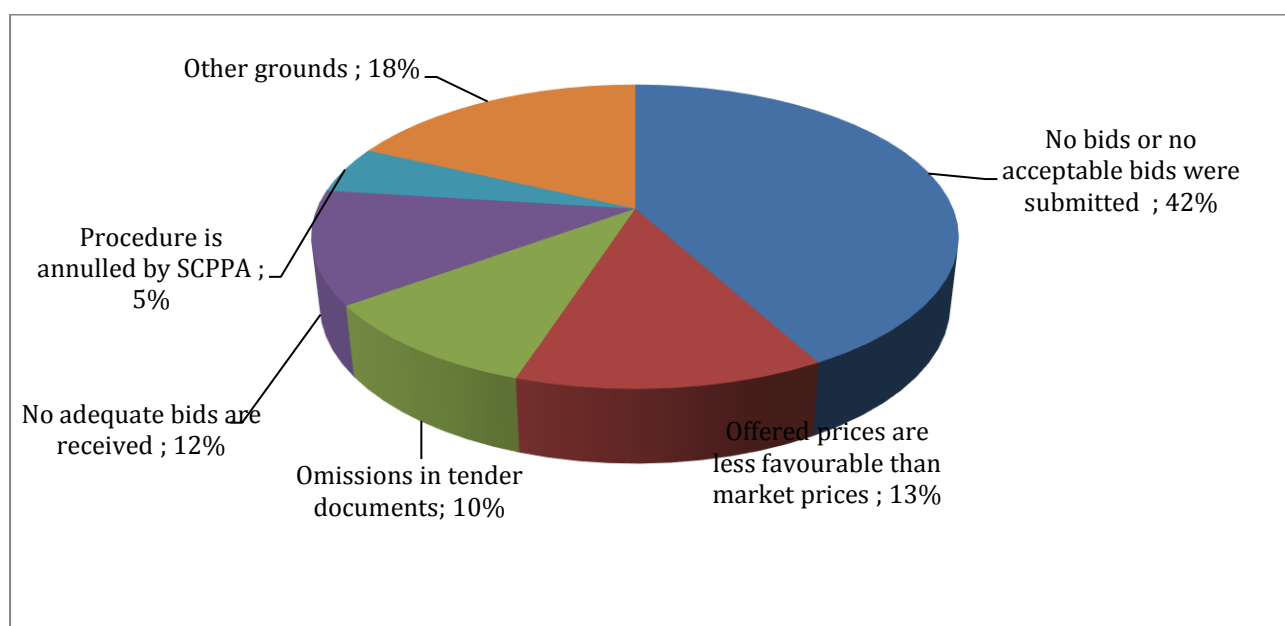
Annulment of tender procedures at semi-annual level (partial and full)

Period	Number of procurement notices	Number of decisions on tender annulment	Share of annulled tender procedures
January-June 2015	8,657	1,602	18.5%
January-June 2016	9,220	2,030	22.0%
January-June 2017	8,562	2,033	23.7%
January-June 2018	10,259	2,707	26.4%
January-June 2019	9,743	2,511	25.8%

As regards reasons indicated for tender annulment, most dominant is the reason that no bids were received or no acceptable bids were received, which was used to annul high 42% of tender procedures.

Second most frequently indicated reason for tender annulment concerns the fact that prices are less favourable than market prices, which was used as legal ground to annul 13% of public procurements. Next in frequency are tender annulments based on the fact that bided prices are higher than the procurement's estimated value (12%), while significant omissions in tender documents accounted for annulment of 10% of tender procedures.

***Overview of reasons indicated for tender annulments in the first half of 2019
(January-June) ****



*Overview of reasons indicated for annulment of public procurement procedures is based on processed data from all 2,511 notifications on tender annulment in the first half of 2019, submitted to EPPS by October 2019.

Every third tender procedure from the monitoring sample was annulled. Reasons indicated for that are different, as well as institutions that initiated tender annulment: contracting authority that implemented the public procurement, State Commission on Public Procurement Appeals or instructions from the Bureau of Public Procurements after having conducted administrative control. In order to provide better image about tender annulments, an example from monitored tender procedures is elaborated below.

The monitored procurement procedure for construction of 14 swimming pools across the country was estimated in the value of 200 million MKD, without VAT, and was presented with 9 bids, 5 of which fulfilled defined eligibility criteria for companies and they were invited to participate in e-auction. After the organized downward bidding, the lowest price reached 688 million MKD. It is common for bided prices to differ from the procurement's estimated value, but it is not normal when such differences imply the ratio 1:3.44. Such great difference is indicative of the fact that the contracting authority made exceptionally poor estimate. The monitoring sample also included examples of tender

annulments due to inadequacy of bids (higher than the estimated value), but in those cases the difference was not significant, which opens another question, i.e. are provisions under Article 77, paragraph 5 of the Law on Public Procurements adequately applied. This article stipulates: *“In cases when, during the public procurement procedure, the most favourable bid includes price that is higher than the amount of funds established in the decision on public procurement, contracting authorities may change their decisions and secure the funds necessary for contract performance, provided that the previously conducted analysis has established that such action is economically more favourable than to repeat the procurement procedure and the price does not exceed the value threshold set for the type of procurement procedure in compliance with this law”*.

The monitoring sample included examples of inadequate actions in terms of tender annulment notifications submitted to bidding companies. Namely, institutions generally comply with legal grounds and quote relevant paragraphs from the law that provide basis for their tender annulments. However, in order to improve the system of public procurements, institutions should provide additional information for their annulment decisions that would allow potential companies to be convinced in validity of such decisions or would give them better arguments to initiate appeals before SCPPA.

Recommendation: An obligation should be introduced for the Bureau of Public Procurements to develop and publish annual analysis of annulled tender procedures. Findings from these analyses should be used for designing specific measures to be taken by the Bureau of Public Procurements in order to improve systemic solutions in public procurements.

- » **In the first half of 2019, non-transparent negotiation procedures without prior announcement of call for bids were used to award contracts in the value of 9.6 million euros, which is by 11% less compared to the same period last year.**

In the first six months of the year, a total of 178 contracts were signed in individual values ranging from 900 MKD for procurement of expert literature for the needs of the Institute of Philosophy to 90 million MKD for on-call services by construction machinery for the needs of MEC Bitola. A total of 589 million MKD, i.e. 9.6 million euros were contracted under this type of procedures.

Value of contracts signed under negotiation procedure without prior announcement of call for bids

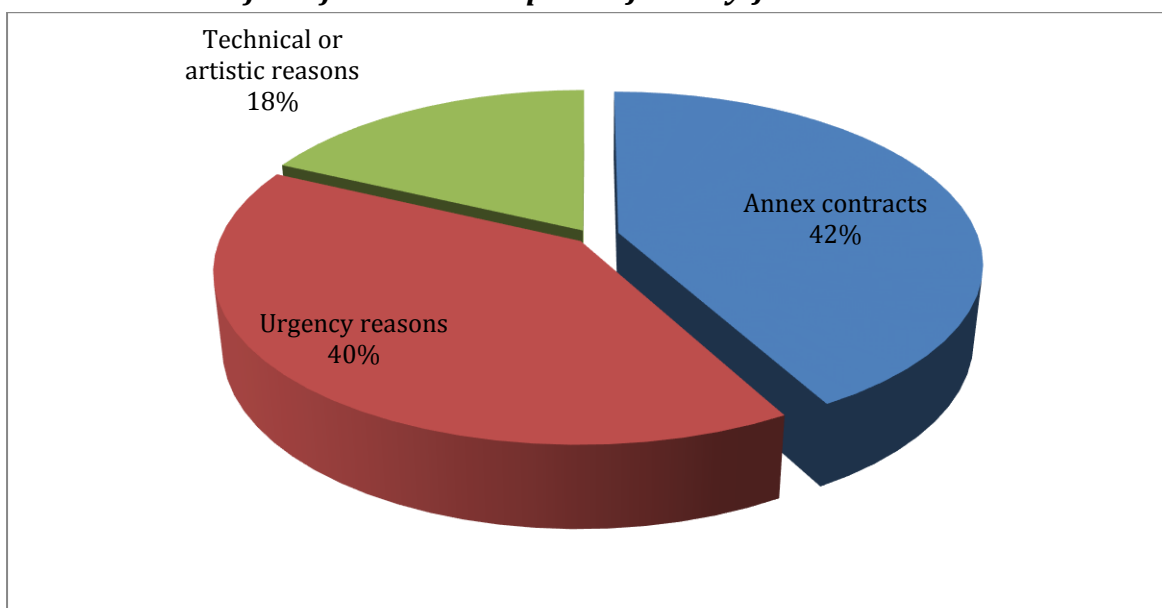
Period	Value of contracts (mill. euros)	Change
January-June 2015	11.5	-61.4%
January-June 2016	6.6	-42.6%

January-June 2017	7.4	+12.12%
January-June 2018	10.8	+45.95%
January-June 2019	9.6	-11.11%

Calculations are made by October 2019.

According to reasons for signing this type of contracts, the highest value is observed with annex contracts. In that, only 20 annex contracts were signed, but their value is exceptionally high and amounts to 4 million euros. Next in rank according to their value are contracts signed for emergency procurements and lack of time to organize public procurement procedures (45 contracts were signed in the value of 3.8 million euros). Third-ranked are contracts for which this non-transparency procedure was organized due to technical or artistic reasons, i.e. reasons related to protection of exclusive rights (patents, etc.). This group accounts for the highest number of individual contracts, i.e. 105, in total value of 1.7 million euros.

Overview of contracts signed under negotiation procedure without prior announcement of call for bids in the period January-June 2019*



*Detailed overview of these contracts is available on CCC's website: opendata.mk

Other grounds were used to sign 8 contracts in small value of 56 thousand euros, which accounts for 0.56%.

Recommendation: Contracting authorities should continue the trend on reduced use of non-transparent negotiation procedures without prior announcement of call for bids.

» ***A total of 32 negative references were issued in the first half of 2019.***

Majority of negative references, i.e. 59% of them were issued to companies during contract performance and after guarantees for quality contract performance were collected. Second in frequency (19%) are negative references issued in cases when selected companies refused to sign procurement contracts. Moreover, negative references were issued because bidding companies failed to submit documents to demonstrate their legal status, failed to provide bank guarantees for quality contract performance as anticipated in tender documents and withdrew bids prior to expiration of their validity.

Recommendation: The law-stipulated possibility for institutions to issue negative references, i.e. to prohibit companies from participation in all tender procedures in the country is contrary to relevant regulations of the European Union. However, issuance of negative references is still allowed under the new Law on Public Procurements, albeit under shorter periods of sanction.

ANALYSIS FROM MONITORED PUBLIC PROCUREMENTS AT LOCAL LEVEL

- » **Tender procedures organized by local institutions are implemented as if the new Law on Public Procurements is not adopted and had not entered into effect. Hence, monitoring activities observed numerous shortcomings; lowest price is still used as the single selection criterion and e-auctions were organized in 70% of tender procedures, although when they were mandatory, both elements were criticized as the main reasons for problems in public procurements. Frequency of tender annulments has not receded, and competition is decreased.**

Although the new law is more liberal than the old legislation and allows contracting authorities to procure what they actually need without major limitations, it seems that persons tasked with public procurements are “stuck” in the old law because they continue to implement elements therefrom which they personally criticized, but are no longer obliged to use according to the new law.

Hence, public procurements are ineffective and result in selection of bids which (at least based on analysis of disclosed documents) are not the most favourable and the most cost-effective.

A prominent example thereof is the procurement procedure organized for construction and reconstruction of local and neighbourhood roads in one municipality. The contracting authority anticipated all and any works for this procurement, whereby analysis of relevant tender documents provides the conclusion that this procedure is inevitably doomed to be annulled. In particular, tender documents defined too many eligibility criteria for participation of companies, resulting in qualification of one from two bidders, which was later also excluded because the offered price was slightly higher than the estimated value published in advance and the contracting authority did not even attempt to secure the minimum extra funds needed, but decided to annul the procurement procedure.

Namely, the first bidder did not fulfil three from all eligibility criteria enlisted, as follows: to have signed at least five identical contracts in the last three years, of which one should be in the value of 20,000,000 MKD (which is also the estimated value of this procurement); to have at least 50 employees and minimum 3 construction engineers; and to have at least one asphalt-making facility located within 30 kilometres from the contracting authority's headquarters. In that, it should be noted that the contracting authority is small municipality located in the far-east part of the country. The eliminated bidding company offered a price slightly lower than the procurement's estimated value. The second company fulfilled all eligibility criteria (those elaborated above are just small part of them), but offered a price slightly higher than the procurement's estimated value. In spite of that, the contracting authority rejected both bids as unacceptable and annulled the tender procedure.

This public procurement was announced again, under slightly less stringent criteria and without publication of estimated value (for which it could be assumed that it remained in the same amount). Three bids were submitted in the repeated tender procedure and the contracting authority selected the bid submitted by a completely new company that did not participate in the first tender procedure. Hence, this contracting authority lost almost four months from publication of the first tender procedure until the signing of procurement contract under the repeated tender procedure.

» **Mandatory justifications of procurement needs and reasons for procurement's indivisibility are not provided, although they are stipulated as obligation under the new Law on Public Procurements.**

Justification of procurement needs, which should be integral part of contracting authorities' procurement decisions in all cases irrespective of the type of procedure organized and the value of public procurements, is actually intended as elaboration of individual procurement's purposefulness, i.e. why particular goods, services or works need to be procured, but also their quantity and quality.

Such justification was enlisted by 15% of monitored tender procedures at local level, and in all cases, with just one exception, these elaborations were rather formal without due understanding of the essence behind this obligation.

For illustration, one municipality explained the need for procurement of office supplies as follows: "Office supplies are used in everyday work tasks and they are necessary for performance of contracting authority's business activity, which means that work processes cannot be performed without basic supplies such as pencils, paper, different types of office items, etc."

In its procurement decision for computer equipment repair and maintenance services, another municipality enlisted: "Justification of procurement need: this procurement is needed for everyday operation of the municipal administration."

The idea behind justification of procurement needs is not to explain why contracting authorities need office supplies, but why they need exact office supplies as enlisted in relevant tender documents, and to elaborate quantity and quality indicated in technical specifications for individual procurements.

The entire monitoring sample includes one tender procedure in which the contracting authority provided detailed and accurate elaboration of procurement needs which, in this case, concerned lease of printers.

The situation related to law-stipulated obligation for elaboration of non-division of public procurements into lots when they are organized as open procedures is much worse. Reference to procurement's indivisibility was made in one tender procedure in which the

contracting authority justified both procurement needs and indivisibility in single sentence: “This procurement is indivisible and the need thereof concerns maintenance of public lighting on the territory of the municipality as part of its law-stipulated competences”.

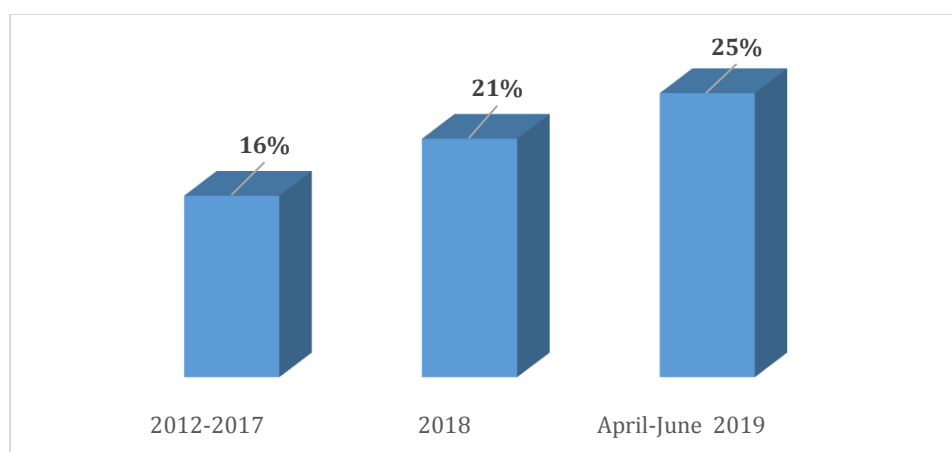
Mandatory division into lots of bigger tender procedures and justification of reasons when the procurement is not divided are intended to facilitate participation of micro and small companies in such tender procedures, notably by allowing them to submit bids for some procurement lots.

Contrary to this law-stipulated obligation, the monitoring sample did not include any contracting authorities that have elaborated reasons for non-division of their tender procedures.

One of more prominent examples concerns procurement of supplies by bigger local utility enterprise that did not divide this tender procedure into lots, although it covered many and various items, ranging from paint, glue, plaster and paint brushes, through shovels, grinders and drillers, to boots, buckets, door locks, cables, pliers, hammers, screws and water hoses. As it could be expected, only one bidding company participated and was awarded the contract worth almost 9 million MKD!

- » **Annulment of tender procedures has not receded even under the new Law on Public Procurements. Every fourth local tender procedure is annulled.**

Share of tender annulments in the monitoring sample



An interesting example among annulled tender procedures concerns procurement of three water tankers, which was organized by bigger public utility enterprise. Although it could be assumed that contracting authority of this type would have more serious approach to public procurements, it made a series of illogical steps and mistakes which

ultimately resulted in annulment of this tender procedure by the State Commission on Public Procurement Appeals.

Inter alia, eligibility criteria defined by this contracting authority required companies to submit evidence that manufacturers of water tankers have employed machine engineer for period of at least one year, although it is known that such manufacturers do not exist in the country. Moreover, companies were required to provide evidence that manufacturers have certificates on environmental protection, which cannot be secured having in mind that there are only vehicle distributors in the country.

The bidding company, which later lodged an appeal against this public procurement, addressed the contracting authority with questions about these and other illogical elements in tender documents, but the latter did not respond and did not take them into consideration for possible changes to tender documents. Dissatisfied for not being awarded the contract, this bidding company lodged an appeal before the Commission, which ultimately annulled the tender procedure ex-officio and due to series of irregularities that were established.

In the repeated procedure, this contracting authority persisted on its position. In particular, it eliminated disputable elements from tender documents, but introduced a multitude of new elements. They include requirements for bidding companies to have at least two trained persons, employed or engaged, to handle tankers; to have servicing facility and storage with spare parts and materials on stock; and list of successfully performed contracts for the same procurement subject in the last five years. As it could be expected, only one bid was submitted by the same economic operator that was selected the first time when the procurement procedure was annulled after the second bidding company lodged an appeal.

Another tender procedure organized by municipal utility enterprise for procurement of construction material was also annulled in spite of being presented with three bids. According to this contracting authority, none of these bids was acceptable, but it should be noted that this represented third annulment of the same procurement in 2019.

This public procurement was annulled for the first time in March 2019 when the old law was still in effect and implied that bidding companies offered prices higher than market prices. The second time, the procurement procedure was annulled according to the new law (when it was subject of monitoring), but reasons indicated for its annulment implied that all three bids are unacceptable. It should be noted that the contracting authority re-announced this procurement under the same estimated value, although all prices obtained in the first annulled procedure were higher.

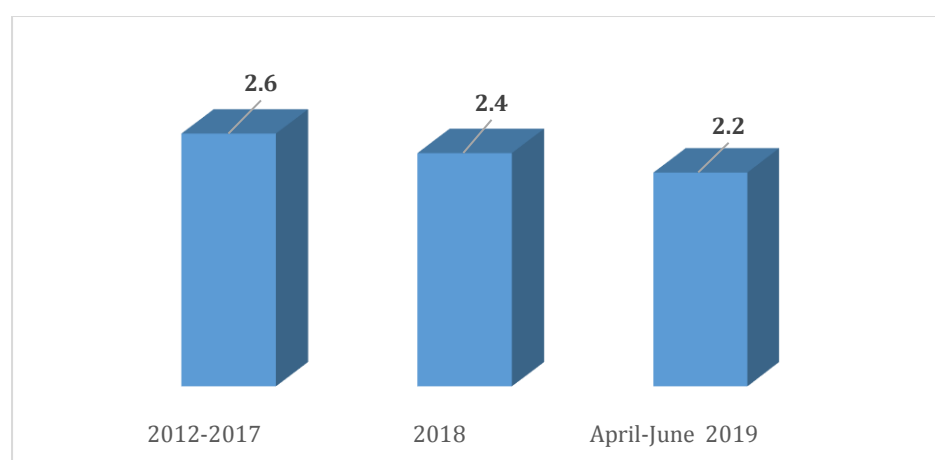
The third attempt for procurement of construction material failed as well, this time due to both reasons from before, i.e. due to prices higher than marker price and due to unacceptable bids received. Hence, this contracting authority spent entire 9 months on procurement which, by November this year, is still not successfully completed.

Such practices only show that weaknesses in annulled tender procedures are not analysed and are not used as lessons learned to improve future tender procedures, but contracting authorities insist on using same tender documents and same requirements, although it is highly unlikely for these unchanged tender procedures to be successful on the already small and fragmented market of public procurements in the country.

- » **Based on the monitoring sample, competition in local tender procedures is marked by decrease after the new Law on Public Procurements entered in effect.**

At least in the first three months after the new Law on Public Procurements entered in effect, the already low competition in local tender procedures is further decreased. The average number of bids for the monitoring sample stands at 2.2 bids per tender procedure and is lower than the last year's average of 2.4 bids calculated for local tender procedures.

Competition in monitored local tender procedures: average number of bids per tender procedure



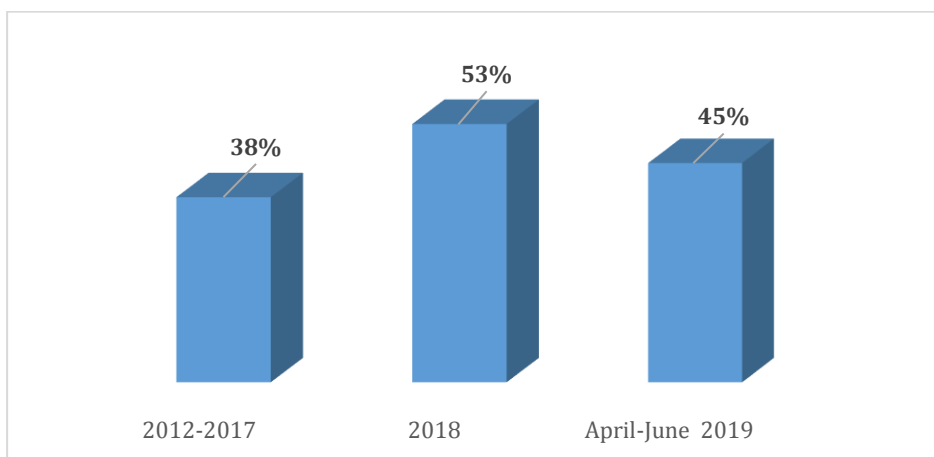
Although there are numerous examples, two of the most prominent procedures marked by low competition are elaborated below.

The first concerns procurement of mechanic servicing for municipality vehicles, where bidding companies were required: to dispose with minimum one servicing facility that is not located more than 10 km away from the municipality's administrative building; to dispose with original spare parts from the respective car manufacturer; to dispose with expert and technical staff that will be engaged for performance of this procurement; to be technically equipped and to have potential to perform these services with at least one apparatus for defect diagnosis and computer software for defect diagnosis; and to be able

to charge maximum 5% margin from the procurement price of parts when they are installed (based on the procurement price for original parts by the authorized car dealership for specific brands). It does not take great imagination to assume that one bidding company participated in this procurement procedure and was awarded the contract.

The second example concerns procurement of services related to lease of printers and was organized by bigger municipality. Although tender documents included many eligibility criteria such as: successfully performance of past contracts; three employees with certificates for equipment servicing or previously attended training for that purpose; cumulative turnover in the amount of 2,500,000 MKD for the last three years; and possession of certificates on quality and environmental protection standards, four companies participated in this procurement procedure. However, three of them were eliminated on the same grounds, i.e. statements they submitted confirming that they are not subject of enforceable court decision for criminal offence had not covered the actual criminal offences required by the Law on Public Procurements. It should be noted that the single bidder that remained and was awarded this three-year contract was also the one whose financial bid was closest to the procurement's estimated value, which was not published in advance.

Share of tender procedures presented with one bid or no bids at all



The share of tender procedures presented with one bid or no bids in the total number of monitored tender procedures is slightly decreased compared to the previous period, but it is still very high and almost every second tender procedure is presented with only one bid or no bids at all.

- » **Although they are not mandatory under the new law and contracting authorities are given discretionary rights to decide about their use when that would be cost-effective, vast majority of tender procedures still use the unfortunate combination of “lowest price and electronic auction”.**

Lowest price as single criterion for selection of the most favourable bid was used in 100% of monitored procurements, while electronic auction for additional reduction of initially bided prices was anticipated in 70% of monitored tender procedures.

This happens in spite of perpetual complaints on the part of persons tasked with public procurements that problems in tender procedures mainly emerge due to the fact that they have to use lowest price and organize electronic auction, the combination of which prevents them to procure what they need and that procured goods, services and works are of poor quality, and that adequate quality cannot be secured.

It seems their arguments have gone up in smoke against the fact that, although lowest price and e-auction are not mandatory under the new law, they are still used in dominant share of tender procedures, even in cases of public procurements that were targeted with many and numerous complains about price and e-auction, for example, procurement of food for kindergartens. On the other hand, tender procedures that did not anticipate electronic auction were few in number and concerned procurement of goods marked by standard and previously determined quality, whereby it would have been logical for their selection decisions to be based on offered prices. Such practices show that either there is insufficient knowledge of the relevant law or the optional use of lowest price and e-auction is purposefully abused.

- » **Frequent practices are observed in terms of non-publication of relevant quantities for goods to be procured, whereby contracting authorities request unit prices, which ultimately prevents companies to economize on scale of procurements.**

Dominant share of monitored tender procedures that implied procurement of goods have not indicated planned quantities, but requested bidding companies to offer unit prices. This prevents companies to economize on scale of procurements by knowing in advance quantities needed in order to offer more favourable prices for goods procured in bulks.

On the other hand, having in mind that they are presented with unit prices, it remains unknown how contracting authorities establish whether certain bids fall within the estimated value defined for the total quantity of particular procurements.

Finally, although bids offer unit prices for procurement items, the contracts are signed in the total amount anticipated, without due consideration of offered prices. In other words, if offered prices are lower, the contract's total amount should be lower as well.

Recommendations: Having in mind the manner in which local institutions implemented public procurements in this monitoring period, the following recommendations are considered valid for contracting authorities:

- » To use the possibilities offered under the new Law on Public Procurements and to make efforts to procure items that are actually needed.
- » To diligently study the new Law on Public Procurements and to comply with obligations arising therefrom.
- » To include in their procurement decisions mandatory justification for procurement needs, i.e. why particular items are needed, including quantity and quality thereof, as enlisted in technical specifications, with due consideration of previously conducted analysis and inventories.
- » In addition to lowest price, to use the selection criterion defined as “economically most favourable bid” in order to obtain the best value for the money spent.
- » To organize electronic auctions only in cases when items being procured are of standard, well-known or well-established quality, whereby the price has decisive role in selection of the best bid.
- » To analyse annulled and unsuccessful tender procedure and use analysis findings to improve future public procurement procedures.
- » To align eligibility criteria for participation in tender procedures with procurement subjects in order to avoid limiting the already low competition in tender procedures.
- » When possible, to divide the procurement into smaller lots in order to enable participation of more and smaller companies, thereby increasing competition and improving quality of public procurements. In cases when contracting authorities still decide not to divide procurements into lots, they should provide detailed explanation of relevant reasons for that.
- » To publish planned quantities of procurements, thus enabling submission of bids of better quality and successful implementation of tender procedures.