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POLICY BRIEF:

**Frequent annulment of tender procedures as one
of the major problems in public procurements**

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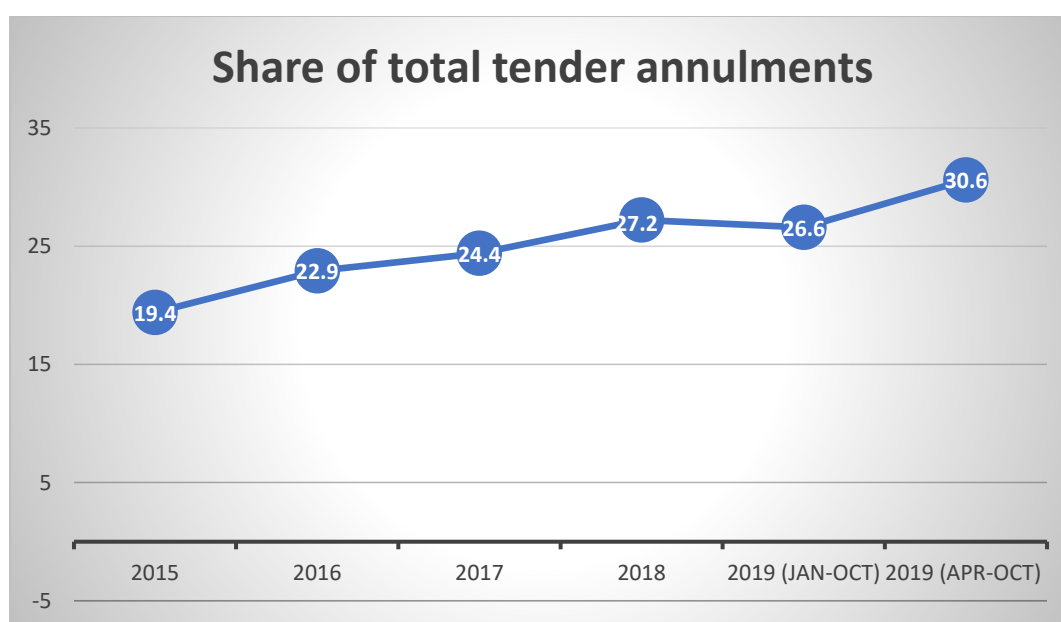
INTRODUCTION

Frequent annulment of tender procedures one of the major and most lasting problems in the system of public procurements in our country. The fact that every fourth tender procedure is annulled puts the country on the top rank worldwide according to another infamous phenomenon in public procurements.

The problem with massive annulment of tender procedures did not subside with any of the several measures taken in the past, and more recently with the new Law on Public Procurements,¹ which reduced the list of legal grounds for tender annulment. This shows that institutions easily and daily resort to tender annulment when certain matters are not what they expected, because the analyses do not allow the conclusion that, when annulling tender procedures, they are motivated by the idea of defending the public interest in public procurements.

Tender annulments delay procurement of necessary goods, services and works; create additional costs for repeated organization of procurement procedures; increase economic and legal uncertainty of companies and undermine the trust in public procurements because of the conviction that tender procedures are annulled because they cannot be rigged.

The three-year average (2016-2018) share of tender annulments in total procurement notices stands at 25% (including both fully and partially annulled tender procedures), while the share of tender annulments after the new law entered in effect, in April 2019, by October the same year, is calculated at a record-breaking 31%. In the first nine months of 2019, the share of tender annulments is 27%.



According to the Law on Public Procurements, tender procedures can be annulled on seven grounds, but the tree main grounds for annulment of public procurement procedures include: no bids were

¹ Law on Public Procurements, Official Gazette of the Republic of Macedonia no. 24 from 1st February 2019 (http://www.bjn.gov.mk/wp-content/uploads/2019/05/ZJN_Sluzben-vesnik_24-2018-od-01.02.2019.pdf)

submitted, contracting authority assessed bids submitted as unacceptable and eliminated all of them, and bided prices are high and exceed the procurement's estimated value.

The problem with high share of annulled tender procedures exists from the very start when accurate statistics on public procurements was introduced, i.e. from establishment of the Electronic Public Procurement System (EPPS).

Except for two sporadic indications of tender annulments as problem in annual reports published by the Bureau of Public Procurements,² no other state bodies have developed any analysis of this problem. The problem is regularly underlined and analysed in monitoring reports on public procurements developed by the Center for Civil Communications,³ and are also noted in several SIGMA reports and European Commission's annual country reports.

Old problem, no meaningful solutions

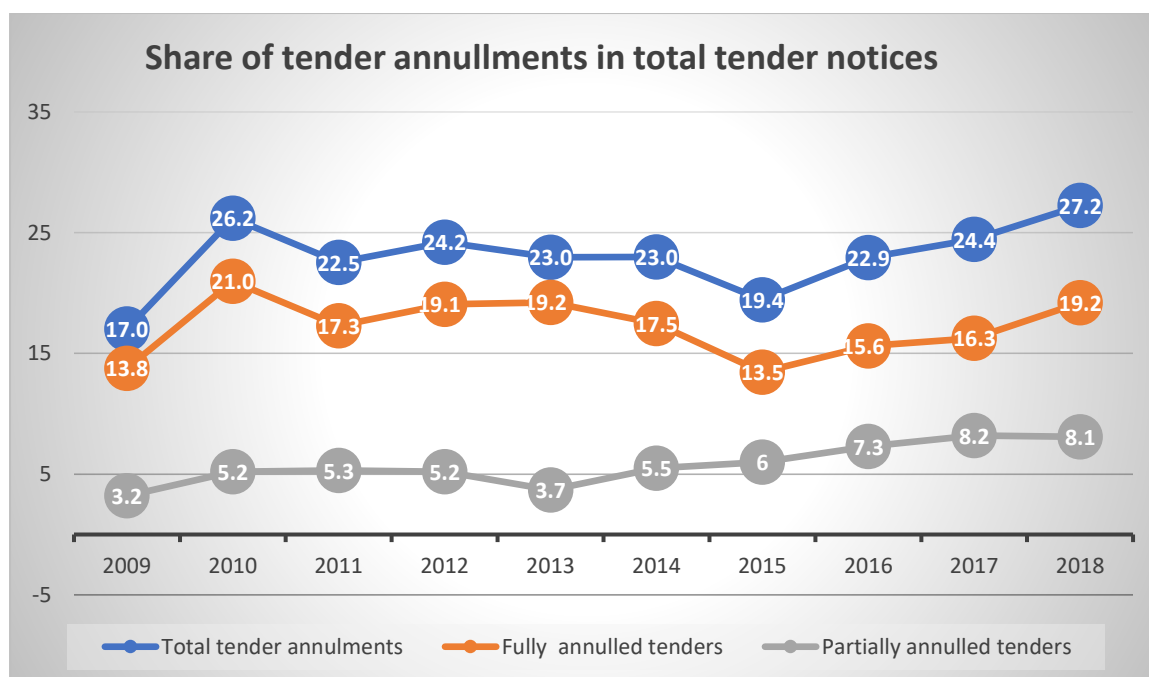
In our country, the problem of tender annulments dates from introduction of the modern system of public procurements in 2008 and establishment of the Electronic Public Procurement System, as the single computerized system for organization of tender procedures. In that, it should be noted that separate records are kept for full and for partial annulment of tender procedures, although in all cases of tender annulments completely new procurement procedure is organized for the procurement item for which the procedure was previously annulled.

Be that as it may, the analysis of datasets related to tender annulments from 2009 to present revealed several stages. Although from the very beginning the share of tender annulments is high, the first significant increase is noted in 2010, when for the first time the shares of fully annulled tender procedures and total tender annulments (fully and partially annulled tender procedures) exceeded 20%. In the next several years, this share was maintained at similar high levels. A drop in this share is noted in 2015, followed by continuous increase since.

In that, there are almost identical fluctuations under the share of total tender annulments (fully and partially annulled tender procedures) and the share of fully annulled tender procedures, which means that this type of tender annulment has a dominant impact.

² The Public Procurement Bureau annual reports available at: <http://www.bjn.gov.mk/category/godishni-izveshtai/>

³ The last two public procurement monitoring reports available at: <https://tinyurl.com/yx3xqkoc> and <http://www.ccc.org.mk/images/stories/31mk.pdf>



After the first significant increase in tender annulments from 2010, one institution referred to this problem for the first time. In its 2010 Annual Report, the Bureau of Public Procurements had indicated that: “it could be noted that the highest number of tender annulments have taken place in the months of October and November, which is most probably due to the fact that this period was preceded by adjustment of the 2010 state budget”.

After this, BPP’s next annual report (for the year 2011) is the only document which, in addition to regular statistics, this state body had briefly referred to the problem of tender annulments: “Aimed at reducing the number of tender annulments, the Bureau had taken a series of measures covered under the last round of amendments to the Law on Public Procurements, adopted by the Parliament of the Republic of Macedonia in December 2011. Effects of these measures will be analysed in the report for the next year, 2012.”

BPP’s 2012 Annual Report, however, did not include analysis of this problem, although tender annulments were marked by high increase compared to the previous year.

Nevertheless, SIGMA did address the problem in its 2011 Peer Review on the System of Public Procurements.⁴ “Concerns are raised with the increased number of annulled tender procedures. One of the factors that have led to this situation is probably the formalistic approach referred above; many bids have been rejected on the basis of small irregularities or deviations that could have been easily corrected if the bid-evaluation commission had requested addition or correction of certain documents. Another factor could be strict eligibility criteria for bidders.”

⁴ SIGMA Peer Review on Public Procurements, Concessions and Public-Private Partnerships in Macedonia for 2011, available at: <http://www.bjn.gov.mk/razni-analizi/makedonski-ocenska-na-sigma-na-sistemo/>

In the same document, SIGMA leaves space that portion of tender annulments in 2010 could be a result of the budget adjustment and reallocation of funds, but also raises the problem of tender annulment for the purpose of rigging public procurements: “Another reason indicated by some economic operators that were interviewed implied selection of ‘wrong’ economic operator. In that, ‘wrong’ means selection of different economic operator from the one that should be awarded the contract”.

Furthermore, other possible reasons enlisted by SIGMA include the practice on the part of some contracting authorities to announce procurement notices without intention to implement the procurement procedures, but to collect information from the market. Hence, SIGMA calls for analysis of the problem related to tender annulments and for development of action plan for their reduction, especially due to the fact that in legal terms, after the annulment, contracting authorities can use the negotiations procedure without prior announcement of call for bids, i.e. engage in direct contract award.

Certain trends in tender annulment can be observed when analysing the most frequently indicated reasons for annulment of tender procedures throughout the years, which are greatly influenced by the manner in which annulment grounds are grouped under the applicable law at that moment.

This quantifies another major problem that affects public procurements in the country, i.e. low competition in tender procedures. That could be seen from the share of annulled tender procedures on the grounds that no bids were submitted, which is the main reason for tender annulment in the last six consecutive years.

Dominant reason for tender annulments, per year

| Year | Reason for tender annulment | Share in total tender annulments |
|-------------|--|---|
| 2009 | No acceptable bids were received | 26.5% |
| 2010 | No acceptable bids were received | 25.5% |
| 2011 | No acceptable bids were received | 27.8% |
| 2012 | No acceptable or adequate bids were received | 31.1% |
| 2013 | No acceptable or adequate bids were received | 32.4% |
| 2014 | No bids were submitted | 31.2% |
| 2015 | No bids were submitted | 33.6% |
| 2016 | No bids were submitted | 35.6% |
| 2017 | No bids were submitted | 35.2% |
| 2018 | No bids were submitted | 33.0% |

In an attempt to influence institutions to reduce annulment of tender procedures, annual list is published with contracting authorities marked by highest shares of tender annulments. This practice started in 2009, and was abandoned in 2011, 2012 and 2013, only to be continued from 2015 onwards.

Institutions with highest share of tender annulments, per year

| Year | Institution | Share of tender annulments |
|------|--|----------------------------|
| 2009 | ELEM | 25.5% |
| 2010 | Ministry of Defence | 65.2% |
| 2011 | No data published in BPP's annual report | / |
| 2012 | No data published in BPP's annual report | / |
| 2013 | No data published in BPP's annual report | / |
| 2014 | Ministry of Defence | 36.6% |
| 2015 | Ministry of Interior | 33.7% |
| 2016 | City of Skopje | 45.1% |
| 2017 | Ministry of Health | 73.1% |
| 2018 | Ministry of Interior | 48.1% |

The period after the new Law on Public Procurements entered into effect to present must be analysed separately, at least due to two reasons.

First, an attempt was made under this law to shorten the list of legal grounds for contracting authorities to annul tender procedure. Second, data became incomparable to previous years on the account that the previously most frequently used grounds for tender annulment were merged under one legal ground in the new law. It is a matter of tender annulment on the ground “no bids were submitted” and on the ground “no acceptable bids were received”. These two grounds are now merged and therefore it cannot be established how many tender procedures have been annulled because companies did not submitted bids in the tender procedure, and how many because companies submitted bids, but the contracting authority exempted all of them from competition.

These two grounds are very different one from another, although the effect of both is identical – ultimately there are no bids in the tender procedure and the same must be annulled. Nevertheless, it should be noted that tender annulment because no acceptable bids were received could also hide corruptive motives. Therefore, it is important to know how many tender procedures have been annulled on this basis. Also, the share of tender procedures that were not presented with any bids is very important, because this share is often considered as one of the basic indicators for success of the system of public procurements.

Legal grounds for tender annulment according to the current Law on Public Procurements

Article 114

(1) Contracting authorities can annul the public procurement procedure by adopting a decision on tender annulment in cases when:

- the number of tender participants is lower than the minimum number anticipated for public procurement procedures pursuant to this law;
- no bids were submitted or no acceptable bids were received;
- unforeseen changes had occurred in the contracting authority's budget;
- bidders have offered prices and conditions for performance of the public procurement contract that are more unfavourable than market prices and conditions;
- it has been assessed that tender documents include significant omissions or shortcomings;
- instruction have been received from the Bureau for tender annulment, as result of administrative control or due to technical problems on EPPS that cannot be resolved in different manner; or
- unforeseen and objective circumstances have changed the contracting authority's procurement needs.

(2) In cases of annulment of public procurement procedure according to paragraph (1), item 7 of this article, contracting authorities shall not be allowed to organize a new procedure for the same procurement subject in a period of one year from the day when the decision on tender annulment was adopted.

(3) Contracting authorities shall notify via EPPS and within a deadline of three days the latest from the day when the tender procedure was annulled all participants in the public procurement about termination of participants' obligations arising from submission of bids and about reasons for annulment of the tender procedure.

(4) Contracting authorities shall publish a notification on EPPS concerning annulment of part or complete public procurement procedure within a deadline of ten days from the day when the tender procedure was annulled.

Conclusion and recommendations

Having in mind the continuously high share of annulled public procurement procedures in North Macedonia, it could be concluded that contracting authorities often and easily resort to this legal possibility, but are not always led by the idea for protection of the public interest.

Although allowed by the law, there are numerous examples in the practice related to implementation of public procurements in the country, many of which have been noted in reports from regular monitoring of public procurements conducted by the Center for Civil Communications, which show that tender procedures had been annulled without fully valid and objective reasons.

Tender annulments, except in cases when no bids have been submitted (there are examples when this is not necessarily due to lack of interest on the part of companies), should be rare and pursued as exception, and should be made on the basis of changed circumstances from those in effect when the procurement notice was announced or based on other unforeseeable reasons.

Tender annulments have great negative consequences. First, they imply loss of time and money for both, contracting authorities and companies. Second, they result in uncertainty for companies and inability to plan their business. Third, for contracting authorities they mean delayed procurement and non-realization of plans. Fourth, they imply a possibility for use of non-transparent procurement procedure – negotiations without prior announcement of call for bids. Finally, they mean loss of trust among companies and decrease of already low competition in public procurements.

Hence, it is recommended to use mass databases disposed only by the Electronic Public Procurement System to develop detailed and in-depth analysis of tender annulments, including by identification of patterns of behaviour with contracting authorities, and to draft recommendations to address this problem.

It might be necessary to further reduce the list of legal grounds for tender annulment or impose sanctions to contracting authorities marked by high share of tender annulments.

Of course, additional training and guidance is needed for contacting authorities in order to avoid annulment of tender procedures.

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