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## **Proposals for Amendments to the Public Procurement Law**

### ***Introduction***

Public procurements become increasingly important in the Republic of Macedonia given the fact that they account for 12% of the total domestic production of goods and services (GDP) and tend to mark steady increase from year to year due to both – the procurements' number and value. State institutions spend more than 45 billion MKD, or approximately 750 million EUR per year for procurement of goods, services and works by means of public procurement procedures, which accounts for as high as 35% of the total budget of the country. These figures indicate the importance of public procurements not only for the normal functioning of the state, but also for its overall economy.

State institutions, i.e., employees therein, by means of public procurements spend the money that citizens and companies provide through taxes levied for the normal functioning of the state. Thus, one of the main recommendations at world level is for civil servants to spend the public funds, i.e., citizens and companies' money, as if it were their own money. In other words, one of the basic principles of public procurement procedures includes the commitment of state institutions to provide the best possible quality for the funds spent. One does not expect to see the purchase of the most quality products, nor the most expensive ones. Instead, one should focus on obtaining the best value for the funds spent.

In order to achieve this, the implementation of public procurements should ensure competitiveness, equal treatment and non-discrimination of bidders, and enable economic, cost-effective and efficient use of funds spent under public procurement procedures.

In order to understand the importance of public procurements, one should bear in mind that efficient procurements imply improved road infrastructure, modern schools, well-equipped hospitals, and better services for citizens in general. Moreover, public procurements are important since they also imply a serious source of business activities for a significant portion of companies.

Given that public and private sector mostly interact in the field of public procurements, the OECD continuously points out that public procurements are subject to greatest threats and risk of corruption. Thus, countries worldwide make efforts to regulate public procurement systems and processes as accurately as possible, in order to ensure their functioning in a manner that will enable the application of basic principles of public procurements: transparency, competitiveness, equal treatment of bidders, non-discrimination, legal proceeding, cost-effectiveness, efficiency, effectiveness and cost-effective public spending, the commitment to obtain the best bid under most favourable terms and conditions, as well as accountability for the public spending as part of procurements.

Since its independence, Macedonia adopted three laws on public procurements. The first law was adopted in 1998 (*"Official Gazette of the Republic of Macedonia"* no. 26/1998, entered into force on 20<sup>th</sup> June 1998), the second law was adopted in 2004 (*"Official Gazette of the Republic of Macedonia"* no. 19/2004, entered into force on 7<sup>th</sup> April 2004) and the third law was adopted in 2007 (*"Official Gazette of the Republic of Macedonia"* no. 136/2007, entered into force on 20<sup>th</sup> November 2007, and its application started from 1<sup>st</sup> January 2008).

Taking into consideration that the latest law was developed in line with EU directives, at the end of 2008 the Center for Civil Communications started to monitor the law's implementation, i.e., monitoring public procurement procedures in order to identify weaknesses and recommend measures aimed to promote this important system, and primarily to reduce possibilities for abuse and corruption.

Analysis of the public procurements implementation in the past period showed numerous weaknesses and inconsistencies identified in the behavior of state authorities during the implementation of public procurements and in the Public Procurement Law. Hence, recommendations made by the Center for Civil Communications aiming to promote this field generally include two directions. First – consistent compliance with laws and other regulations governing this matter, and second – several corrections (amendments) to the present law.

One should note that in the past period, the Parliament of the Republic of Macedonia already introduced several amendments to the Public Procurement Law that were recommended by the Center for Civil Communications. The accepted proposals included, as follows: the State Commission on Public Procurement Appeals became independent and started acting within the Parliament instead of the Government (2007), the Bureau for Public Procurements was awarded legal entity status (2008), deadline was introduced within which contracting authorities were obliged to take decision on procedure selection or annulment (2010), and SCPPA was enabled to annul the procedure even when the entity lodging the appeal had not submitted request on procedure annulment in cases when contracting authorities failed to submit documents to SCPPA within the law-stipulated deadline (2011).

### ***Public procurement-related problems that should be overcome***

The three-year monitoring performed in more than 400 public procurement procedures and interviews conducted with more than 1,000 companies-bidders and representatives of contracting authorities identified numerous problems in the implementation of public procurements, those being:

- High share of public procurements annulled; annulments are easily performed and leave space for state institutions (contracting authorities) to resort to misusing practices in favor of the favored company.
- Ever-increasing is the value of contracts signed by direct negotiations, i.e., so-called tête-à-tête contracts. Instead of doing so in exceptional cases, annex is signed for almost every procurement related to works performance by means of which the value is increased by the maximum allowed 30%.
- Companies (economic operators) are not given insight in the documents from the procedures they participated in, thereby preventing them to support their appeals with arguments or to waive the appeals should they determine that a rightful decision has been made.
- Economic operators cannot always perform an insight in technical specification prior to deciding whether to participate in the call for public procurements.
- Absence of deadlines within which contracting authorities must act in accordance with the decision taken by SCPPA.
- Decisions and notifications on bids selection do not include sufficient details that would enable contracting authorities to establish the grounds of their appeals or to waive the appeals submission if they determine that SCPPA's decision has been correct.
- Absence of authority responsible for performing control over the public procurement procedures implemented or contracts signed, and public procurement's implementation is not subject to in-depth analysis.
- Absence of sanctions imposed for violations of provisions and obligations stipulated in the Public Procurement Law encourages contracting authorities to misuse, and undertake manipulation-prone activities in the development of technical specifications and tender documents with a view to favour certain bidders; non-adherence to deadlines and many other violations of the Law's provisions identified during the multi-annual monitoring.
- Insufficient and imprecise provisions on prevention of conflicts of interest.

## ***Proposals for Amendments to the Public Procurement Law***

Having in mind the problems diversity and the inability to overcome these weaknesses in due time, the Center for Civil Communications is focused only on several major problems that can be overcome with minor amendments to the present law, which will significantly improve the state-of-affairs in public procurements. It is important to note that these proposals were supported by relevant national experts profiled in public procurement regulation, practitioners and university professors, and they take into consideration various solutions from neighboring and other European countries. In summary, the proposals include, as follows:

- **To limit and more precisely define the possibilities for public procurement annulment.**

Article 169 which stipulates the cases when contracting authorities can annul the procedure for awarding public procurement contracts due to “unplanned changes in the budget” and “changes in the needs of the contracting authority” should also stipulate that the procurement which is annulled on these two grounds must not be repeated during the same budget year. The grounds for annulment that include “unplanned changes made to the contracting authority’s budget” should specify the changes it refers to. The grounds for annulment based on “significant shortcomings in tender documents” should be removed. The last grounds for annulment should be corrected by deleting the first row and adding the words “according to the decision (guidelines) of the State Commission on Public Procurement Appeals” at the end of the sentence, since the possibility for annulment can be enabled only in this case.

- **The total value of additional procurements that contracting authorities can purchase by means of negotiations without prior announcement of calls for bids should be reduced to 20% or 25% of the value of the original contract instead of the current 30%, according to the examples from other countries and international institutions**

Article 99 which stipulates that the value of additional procurements/works for which contracting authorities implement a negotiation procedure without prior announcement of call for bids should not exceed 30% of the value of the original contract, should be amended and stipulate that it should not exceed 20% of the value of the original contract for procurement of goods and services. The value of the additional procurement can remain to 30% of the value of the original contract for procurement of works.

- **Contracting authorities should make tender documents available free-of-charge in the Electronic Public Procurement System, and in cases where this is not possible they should provide direct insight therein and unlimited download.**

Article 37 should clearly stipulate that tender documents are fully available and their download is free-of-charge. Whenever possible, these documents should be uploaded

and published at EPPS website. When this is prevented by documents' type or size, i.e., when documents are hard copy, this article should clearly stipulate that every economic operator is entitled to perform "direct insight" therein.

- **The Law should emphasize that economic operators are entitled to perform insight in documents from the procedures where they participated, and set the deadline within which contracting authorities are obliged to provide the insight.**

New article should be introduced that will clearly and accurately stipulate the right of economic operators to perform "direct insight" in documents from the procedures where they participated, as well as the deadline within which contracting authorities are obliged to provide the insight (proposal: three days following the submission and two days following the receipt of the request for insight).

- **To introduce a deadline within which contracting authorities must implement the decisions taken by the State Commission on Public Procurement Appeals.**

The final paragraph of Article 220 should stipulate a specific deadline within which contracting authorities must act upon the decision/conclusion taken by the State Commission on Public Procurement Appeals. The example of other countries shows that this deadline is set 30 days from the receipt of SCPPA's decision.

- **To strengthen the obligation of contracting authorities to provide detailed rationale on the reasons behind their decisions, by including in Article 210 the non-adherence to this obligation as a significant violation of the law.**

For the purpose of more consistent adherence to the obligation stipulated in Article 168 – that contracting authorities are obliged to submit detailed rationale on bid's selection/annulment to bidders – it is necessary to include the non-adherence to this obligation in the major violations of the law which are stipulated in Article 210.

- **To expand competences of the Bureau for Public Procurements in order to use its potential for better performance of its law-stipulated operations, namely monitoring public procurement procedures, making recommendations to contracting authorities aimed to remove irregularities identified and submission of request for initiating misdemeanor procedures.**

Competences of the Bureau for Public Procurements (referred to in Article 14) should include performance of control over public procurements implementation, same as similar bodies in other countries. These competences include: monitoring public procurement procedures, making recommendations to contracting authorities aimed to eliminate irregularities identified and submission of requests for initiating misdemeanor procedures.

- **To impose sanctions due to violation of obligations and provisions contained in the Public Procurement Law, for both – contracting authorities and economic operators.**

Sanctions due to violations of provisions and non-adherence to obligations stipulated in the Public Procurement Law should be imposed for both, contracting authorities and economic operators. Such provisions were included in public procurement laws in all neighboring and EU countries that were compared against the Macedonian Public Procurement Law, as well as in all other Macedonian laws.

- **To expand and specify provisions that stipulate prevention of conflicts of interest and their incorporation in the Public Procurement Law's general provisions since possible existence of conflict of interests should be identified prior to the procedure initiation.**

Provisions that stipulate the prevention of conflict of interest should be moved in the first part of the law, or in the law's general provisions, at the end of Chapter 1, after Article 11, since the existence of conflict of interest should be identified prior to the procedure's initiation. Article 62 should be deleted and replaced with a new Article that reads:

"Members of the Commission for Public Procurements, external entities that assist the Commission, the person at the contracting authority responsible for taking decision on the selection of the most favourable bid, members of the State Commission on Public Procurement Appeals and other entities that participate in public procurement procedures shall be obliged to timely inform on the actual or potential existence of conflict of interest.

Conflict of interest, referred to in paragraph 1 of this article shall exist if:

1. the person is economic operator, legal representative or proxy of the economic operator, or a person that maintains business relations with the economic operator;
2. the person is lineal relative (in the direct line of descent), and collateral relative up to fourth degree, or in marital or extramarital relation, or in-law, regardless if the marriage exists or ceased to exist, guardian, adopter or adoptee of responsible person at the economic operator;
3. the person is shareholder or member of the economic operator's management body;
4. the person, by influencing the decision, has direct or indirect interest in the public procurement procedure, which would enable personal acquisition of property or income;
5. there are other circumstances which raise doubts concerning the person's impartiality.

Persons referred to in paragraph 1 of Article shall submit a written statement on the existence or nonexistence of a conflict of interest, in compliance with the Law on Prevention of Conflict of Interests.

If the person does not sign the statement referred to in paragraph 3 of this Article, it shall be excluded from the public procurement procedure.

Should the procedure determine the existence of a conflict of interest, the person referred to in paragraph 1 of this Article shall be excluded from the public procurement in question.

Members of the Commission on Public Procurements, external entities and other persons who participated in the public procurement procedure shall inform the responsible person at the contracting authority on the existence of conflict of interest. Member of SCPPA shall inform the President of the SCPPA on the existence of conflict of interest, and in case of exclusion of the President of SCPPA, the member shall inform other members of the Commission.”

Article 63 should be added after this article.

## Annex 1: Table overview

No.	Problem	Article from PPL	Solution	Proposal - amendments
1	High share of public procurements annulled; annulments are easily performed and leave space for state institutions (contracting authorities) to resort to misusing practices in favor of the favored company.	169, 170	To limit and more precisely define the possibilities for public procurement annulment.	Article 169 which stipulates the cases when contracting authorities can annul the procedure for awarding public procurement contracts due to “unplanned changes in the budget” and “changes in the needs of the contracting authority” should also stipulate that the procurement which is annulled on these two grounds must not be repeated during the same budget year. The grounds for annulment that include “unplanned changes made to the contracting authority’s budget” should specify the changes it refers to. The grounds for annulment based on “significant shortcomings in tender documents” should be removed. The last grounds for annulment should be corrected by deleting the first row and adding the words "according to the decision (guidelines) of the State Commission on Public Procurement Appeals" at the end of the sentence, since the possibility for annulment can be enabled only in this case.
2	The value of contracts signed by direct negotiations, i.e., so-called tête-à-tête contracts is constantly increasing. Instead of doing so in exceptional cases, annex is signed for almost every procurement related to works performance by means of which the value is increased by the maximum allowed 30%.	99	The total value of additional procurements that contracting authorities can purchase by means of negotiations without prior announcement of calls for bids should be reduced to 20% or 25% of the value of the original contract instead of the current 30%, according to the examples from other countries and international institutions.	Article 99 which stipulates that the value of additional procurements/works for which contracting authorities implement a negotiation procedure without prior announcement of call for bids should not exceed 30% of the value of the original contract, should be amended and stipulate that it should not exceed 20% of the value of the original contract for procurement of goods and services. The value of the additional procurement can remain to 30% of the value of the original contract for procurement of works.
3	Companies (economic operators) are not given insight in the documents from the procedures they participated in, thereby preventing them to support their appeals with arguments or to waive the appeals should they determine that a rightful decision has been made.	37,38	The Law should emphasize that economic operators are entitled to perform insight in documents from the procedures where they participated, and set the deadline within which contracting authorities are obliged to provide the insight.	Article 37 should clearly stipulate that tender documents are fully available and their download is free-of-charge. Whenever possible, these documents should be uploaded and published at EPPS website. When this is prevented by documents’ type or size, i.e., when documents are hard copy, this article should clearly stipulate that every economic operator is entitled to perform “direct insight” therein.



4	Economic operators cannot always perform an insight in technical specification prior to deciding whether to participate in the call for public procurements.	New article	Contracting authorities should make tender documents available free-of-charge in the Electronic Public Procurement System, and in cases where this is not possible they should provide direct insight therein and unlimited download	New article should be introduced that will clearly and accurately stipulate the right of economic operators to perform “direct insight” in documents from the procedures where they participated, as well as the deadline within which contracting authorities are obliged to provide the insight (proposal: three days following the submission and two days following the receipt of the request for insight.
5	Absence of deadlines within which contracting authorities must act in accordance with the decision taken by SCPPA.	220	To introduce a deadline within which contracting authorities must implement the decisions taken by the State Commission on Public Procurement Appeals.	The final paragraph of Article 220 should stipulate a specific deadline within which contracting authorities must act upon the decision/conclusion taken by the State Commission on Public Procurement Appeals. The example of other countries shows that this deadline is set 30 days from the receipt of SCPPA’s decision.
6	Decisions and notifications on bids selection do not include sufficient details that would enable contracting authorities to establish the grounds of their appeals or to waive the appeals submission if they determine that SCPPA’s decision has been correct.	168	To strengthen the obligation of contracting authorities to provide detailed rationale on the reasons behind their decisions, by including in Article 210 the non-adherence to this obligation as a significant violation of the law.	For the purpose of more consistent adherence to the obligation stipulated in Article 168 – that contracting authorities are obliged to submit detailed rationale on bid’s selection/annulment to bidders – it is necessary to include the non-adherence to this obligation in the major violations of the law which are stipulated in Article 210.
7	Absence of authority responsible for performing control over the public procurement procedures implemented or contracts signed, and public procurement’s implementation is not subject to in-depth analysis.	14	To expand competences of the Bureau for Public Procurements in order to use its potential for better performance of its law-stipulated operations, namely monitoring public procurement procedures, making recommendations to contracting authorities aimed to remove irregularities identified and submission of request for initiating misdemeanor procedures.	Competences of the Bureau for Public Procurements (referred to in Article 14) should include performance of control over public procurements implementation, same as similar bodies in other countries. These competences include: monitoring public procurement procedures, making recommendations to contracting authorities aimed to eliminate irregularities identified and submission of requests for initiating misdemeanor procedures.
8	Absence of sanctions imposed for violations of provisions and obligations stipulated in the Public Procurement Law encourages contracting authorities to misuse, and undertake manipulation-prone	New article	To impose sanctions due to violation of obligations and provisions contained in the Public Procurement Law, for both – contracting authorities and economic operators	Sanctions due to violations of provisions and non-adherence to obligations stipulated in the Public Procurement Law should be imposed for both, contracting authorities and economic operators. Such provisions were included in public procurement laws in all neighboring and EU countries that were compared against the Macedonian Public Procurement Law, as well as in all other Macedonian laws.

	activities in the development of technical specifications and tender documents with a view to favour certain bidders; non-adherence to deadlines and many other violations of the Law's provisions identified during the multi-annual monitoring.			
10	Insufficient and imprecise provisions on prevention of conflict of interest.	New article s 62, 63	To expand and specify provisions that stipulate prevention of conflicts of interest and their incorporation in the Public Procurement Law's general provisions since possible existence of conflict of interests should be identified prior to the procedure initiation.	<p>Provisions that stipulate the prevention of conflict of interest should be moved in the first part of the law, or in the law's general provisions, at the end of Chapter 1, after Article 11, since the existence of conflict of interest should be identified prior to the procedure's initiation. Article 62 should be deleted and replaced with a new Article that reads:</p> <p>"Members of the Commission for Public Procurements, external entities that assist the Commission, the person at the contracting authority responsible for taking decision on the selection of the most favourable bid, members of the State Commission on Public Procurement Appeals and other entities that participate in public procurement procedures shall be obliged to timely inform on the actual or potential existence of conflict of interest.</p> <p>Conflict of interest, referred to in paragraph 1 of this article shall exist if:</p> <ol style="list-style-type: none"> <li>1. the person is economic operator, legal representative or proxy of the economic operator, or a person that maintains business relations with the economic operator;</li> <li>2. the person is lineal relative (in the direct line of descent), and collateral relative up to fourth degree, or in marital or extramarital relation, or in-law, regardless if the marriage exists or ceased to exist, guardian, adopter or adoptee of responsible person at the economic operator;</li> <li>3. the person is shareholder or member of the economic operator's management</li> </ol>

			<p>body;</p> <p>4. the person, by influencing the decision, has direct or indirect interest in the public procurement procedure, which would enable personal acquisition of property or income;</p> <p>5. there are other circumstances which raise doubts concerning the person's impartiality.</p> <p>Persons referred to in paragraph 1 of Article shall submit a written statement on the existence or nonexistence of a conflict of interest, in compliance with the Law on Prevention of Conflict of Interests.</p> <p>If the person does not sign the statement referred to in paragraph 3 of this Article, it shall be excluded from the public procurement procedure.</p> <p>Should the procedure determine the existence of a conflict of interest, the person referred to in paragraph 1 of this Article shall be excluded from the public procurement in question.</p> <p>Members of the Commission on Public Procurements, external entities and other persons who participated in the public procurement procedure shall inform the responsible person at the contracting authority on the existence of conflict of interest. Member of SCPPA shall inform the President of the SCPPA on the existence of conflict of interest, and in case of exclusion of the President of SCPPA, the member shall inform other members of the Commission."</p> <p>Article 63 should be added after this article.</p>
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