

# **MONITORING THE IMPLEMENTATION OF CENTRAL LEVEL PUBLIC PROCUREMENTS IN THE REPUBLIC OF MACEDONIA**

## **FORTH QUARTERLY REPORT**



**Center for Civil Communications**  
Центар за граѓански комуникации

# 4 MONITORING THE IMPLEMENTATION OF CENTRAL LEVEL PUBLIC PROCUREMENTS IN THE REPUBLIC OF MACEDONIA

## Monitoring the implementation of the public procurement procedures in the Republic of Macedonia – Forth quarterly report

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### KEY REMARKS

**Insufficient transparency and accountability on behalf of state institutions as regards public spending in public procurement procedures.** A number of state institutions such as the Ministry of Labour and Social Policy, the Ministry of Local Self-Government, the Ministry of Agriculture and the Secretariat for European Affairs, despite their legal obligation to submit the Bureau of Public Procurements reports on all public procurement contracts signed have not submitted such reports in the course of 2009.

**Number of state institutions which did not submit the Bureau of Public Procurements data on public spending in the amount of up to 20,000 EUR for goods and services and up to 50,000 EUR for works-related procurements is increasing.** Contrary to last year's data when only one ministry did not submit the said records, this year the number of ministries which failed to do so accounted for five. According to the Public Procurement Law, all contracting authorities are required to submit the said records to the Bureau of Public Procurements twice a year. These records, in fact, are the single document on public spending made

by means of so-called small procurements, on which more than 26 million EUR were spent in the first half of 2009.

**Delays in decision-taking on the selection of the most favourable bid become a worrying problem.** Decisions on selecting the most favourable bid were not taken in 13 (33%) of the total number of 40 public procurement procedures monitored in this quarter. Such delays in decision-taking for the said procedures range from 50 to 120 days.

**Insignificant mitigation of the problem concerning annulment of public procurement procedures was noticed.** Decisions on annulling the entire procurement procedure were taken in 5 of the 40 public procurement procedures monitored, while 2 procedures were partly annulled, or a total of 17.5% of the procedures were annulled, thus indicating a mitigation of the problem compared to the previous monitoring quarter when 25% of the procedures were annulled.

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### GOALS AND METHODOLOGY

The Center for Civil Communications from Skopje, in the period from November 2008 to November 2009 will monitor the implementation of public procurements in the Republic of Macedonia as regulated under the Public Procurement Law. The monitoring aims to assess the implementation of public procurements in the Republic of Macedonia in the light of the new Public Procurement Law and the application of basic principles of transparency, competitiveness, equal treatment of economic operators, 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 procurements implemented.

The analysis of the public procurement process in the Republic of Macedonia was performed based on the monitoring of selected sample of procedures and analysis of legal protection in the public procurement procedures.

The selected sample subjected to the monitoring activities undertaken in this reporting period was comprised of 40 public procurement procedures announced by central level contracting authorities, whose call for bids were published in the "Official Gazette of the Republic of Macedonia" in the period August-October 2009. Monitoring activities start with the publication of calls for bids, followed by attendance on public opening of bids and data collection on the procedure course, and used structured questionnaires submitted to the contracting authorities and the economic operators.

The second part of the present report contains the analysis of legal protection in the field of public procurements, performed by means of information available in the public or obtained in oral form on discussions during the meetings held with part of participants in the procedures.

The present report on the monitoring of public procurements was developed in cooperation with and financial support from the Foundation Open Society Institute – Macedonia (hereinafter: FOSIM).

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### QUARTERLY PUBLIC PROCUREMENT MONITORING REPORT

**Insufficient transparency and accountability on behalf of state institutions as regards public spending in public procurement procedures.** State institutions' transparency and accountability as guaranteed under the Public Procurement Law are endangered in practice and questioned on several levels. The key problem lies in the failure of state institutions to publish data on all public procurement contracts signed and also in number of them failing to comply with the legal obligation stipulating that they should submit the Bureau of Public Procurements records on the contracts signed accompanied with the calls for bids twice a year. These procedures include public procurements in the amount of up to 5,000 EUR, which do not require the announcement of call for bids, as well as procurements in the amount of up to 20,000 EUR for goods and services and up to 50,000 EUR for works-related procurements for which bids are collected by means of announced call for bids.

Analysis of data contained in the Bureau of Public Procurements' Information System shows that not only did state institutions fail to submit data on all contracts signed,

but some of them did not submit any data at all. Notably, in the course of 2009 (from 01.01.2009 until 28.12.2009) the Ministry of Labour and Social Policy, the Ministry of Local Self-Government, the Ministry of Agriculture and the Secretariat for European Affairs have not submitted a single notification on contracts signed. Contrary to this, in 2009 the said ministries have announced 14 to 24 calls on awarding public procurement contracts.

The analysis further shows that 546 institutions submitted records on public procurement procedures implemented with calls for bid collection (so-called small procurements) in the first half of 2009, thus indicating that only 60% of the institutions complied with the legal obligation and provided insight in the contracts signed pursuant to this procedure. In that, one must take into consideration that as regards the public procurement procedures in the amount of up to 5,000 EUR, which do not require the announcement of call for bids or public opening of bids, the submission of records to the Bureau of Public Procurements is the only form of any kind of transparency and public information on public spending made under this

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type of procedures. The need for enabling public insight in these data is confirmed by the fact that in the first half of the year a total of 14 million EUR were spent under the so-called small procurement procedures in the amount of up to 5,000 EUR, whereas together with the procedures for bid collection upon previously announced call for bids (for procurements in the amount of up to 20,000 EUR for goods and services and up to 50,000 EUR for works) a total of 26 million EUR were spent in the same period.

Worrying is the fact that the group of institutions that are not accountable for procurement contracts signed in the said two manners (by bid collection with and without call for bids announcement) includes 5 ministries, those being: the Ministry of Transport and Communications, the Ministry of Local Self-Government, the Ministry of Agriculture, the Ministry of Defence and the Ministry of Culture. In comparison, in 2008 only one ministry did not submit records on these procedures.

These data undoubtedly point to the fact that the principle of transparency in public procurement processes in practice has been reduced to a discretionary right of certain institutions rather than a legal obligation which all institutions are required to enforce.

This conclusion was further reinforced with the situation as regards the responsiveness of contracting authorities on our applications for access to information related to implemented public procurement procedures. 12 months from the initiation of public procurements' monitoring process - in which period 200 applications for access to information were submitted - the number of state institutions ignoring such applications or believing they do not hold the obligation to provide public insight in these data remains high. In average, around 40% of state institutions did not respond to our applications for information, thus breaching two laws: the Law on Free Access to Public Information and the Public Procurement Law.

**Recommendation:** Penal (misdemeanour) provisions should be introduced in the Public Procurement Law targeting the contracting authorities that fail to comply with their obligation to submit requested data for the Bureau of Public Procurements' Information System. Penal provisions are contained in the public procurement legislation of many countries from the region and beyond.

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**Delays in decision taking on the selection of the most favourable bid become a worrying problem.** Decisions on the selection of the most favourable bid were not taken in 13 of the 40 public procurement procedures monitored. Delays in decision taking in the said public procurement procedures range from 50 to 120 days. When considering the other legally stipulated deadlines applicable to the entire public procurement procedure, it can be concluded that in certain cases the procedures last for more than 6 months, which is completely unacceptable.

The lack of justifiable reason behind delayed procedures was confirmed by the fact that in some cases the lowest price is set as a criterion for the selection of the most favourable bid and that the bid-assessment process uses a pre-defined formula, thus making the selection of the most favourable bid utterly simple procedure.

**Recommendation:** In order to achieve greater efficiency and accelerate the procedures, as well as to ease the economic operators' uncertainty and free their tied funds, legally stipulated deadlines on decision-taking should be set at different duration depending on the procedure's value or number of bidders.

**Insignificant mitigation of the problem concerning annulment of public procurement procedures was noticed.** Decisions on full annulment were adopted in 5 (12.5%) of the 40 public procurement procedures monitored and decisions on partial annulment were adopted in 2 procedures (5%). In all these cases, public procurement procedures were annulled by the contracting authorities. Although the total share of annulled procedures in this monitoring quarter remains high (17.5%), it has been marked by a slight decrease when compared to the previous monitoring quarter (25%).

In this quarter, most common reasons for public procurement annulment as indicated by state institutions were the provisions stipulated under Article 169, paragraph 1, items 2 and 5 from the Public Procurement Law, those being:

- failure to obtain a single acceptable bid, or
- prices and terms and conditions bidden for the contract implementation were more unfavourable than the real market terms and conditions and prices.

The problem concerning procedure annulment remains significant having in mind that not only does it result in delayed procurements and loss of time and money, but also

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creates mistrust on behalf of economic operators. Notably, an impression is created in the public that tenders are annulled due to the inability of contracting authorities to achieve certain previously calculated interests.

**Recommendation:** In the light of future decrease of the number of annulled procurement procedures we reiterate the need of precise stipulation of terms and conditions under which public procurement procedures can be annulled and the need to impose the obligation on providing rationale and arguments on why none of the bids obtained is acceptable. In order to increase the share of successful public procurement procedures, the legislators should consider the introduction of supervision over the justification of procedure annulment, as well as relevant sanctions for public procurement commission members in cases when subjective shortcomings have been detected. At the same time, in order to prevent multiple annulments for the same public procurement procedure, which creates serious doubts in regard to the misuse of legal possibilities, the supervision performed by the Bureau of Public Procurements and the State Audit Office needs to be legally stipulated.

Although increased, the utilization rate of the Electronic Public Procurement System in the last quarter of 2009 is still unsatisfactory, meaning that the situation is far from the achievement of the legal obligation stipulating that in the year 2010 30% of the total value of public procurements should be organized as e-Procurements.

By 25 December 2009, a total of 170 procedures were implemented via the EPPS in the course of 2009. This number is much higher and indicates an increased use of the EPPS compared to the total number of e-procedures implemented in the period from April 2006 (when e-Procurements were introduced) until the end of 2008. The use of e-Procurements shows a tendency of increase in the last quarter of this year. In the first nine months of 2009, approximately 70 procedures were implemented via the EPPS, while in the last three months of this year approximately 100 new procedures were implemented.

However, the 170 procedures implemented via the EPPS account for only 2.5% of the total number of public procurement procedures implemented in the course of 2009 for which the EPPS can be applied. Only 30 of approximately 1,000 contracting authorities in the Republic

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of Macedonia have used the EPPS, 10 of which use the system on regular basis, whereas the others implemented only one or few procedures.

Such low application of e-Procurements by the contracting authorities raises the question on their preparedness to implement such procedures from 1 January 2010, as stipulated under the Public Procurement Law, where 30% from the total value of annual public procurements should be implemented via the electronic system. It seems that the contracting authorities are failing to benefit from the transitional period in order to acquire the knowledge and routine required, and therefore delay the use of a more transparent procurement system that enables budget savings.

**Recommendation:** The mandatory application of e-Procurements in 2010 should be secured by means of introducing penal (misdemeanour) sanctions for the failure to do so.

**Contracting authorities continue to use contestable elements in the selection of the most favourable bid. Broad discretionary rights of contracting authorities in**

**regard to setting the criteria for the selection of the most favourable bid still provide the possibility for subjective bid-assessment and malpractices.** Subjective approach in developing bid-assessment criteria can be best illustrated with the fact that within all 40 procedures monitored the price criterion varies within the range of 40 to 100 points. Thus, the problem of different institutions setting entirely different bid-assessment criteria for the same type of goods or services remains. In this monitoring period, contracting authorities continue to apply criteria that can be subjected to malpractice, such as the delivery deadline and warranty period, or points allocation for company's technical eligibility and reference list.

According to the Public Procurement Law, the said criteria should be included as part of the economic operators' eligibility, both technical and professional, meaning that they should be an eligibility criterion for tender participation and not subject to point-based ranking in the bid-assessment process. It should be emphasized that in one of the monitored procedure the criterion "commission's judgement" was applied for the selection of the most favourable bid, while another included the criterion "additional benefits offered by economic

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operators". These criteria create doubts on malpractices and corruption and provide for subjective assessment and favouring particular bidders.

In this quarterly monitoring period as well, elements concerning the criterion "economically most favourable bid" also included the economic operator's staff expertise without details as regards the parameters on whose basis this element will be assessed. This criterion creates dilemmas and raises doubts on subjective bid-assessment and the possibility for malpractices aimed to assist the favoured bidder.

**Recommendation:** Contracting authorities should set and publish bid-assessment elements related to the qualifications and competences of key staff to be involved in the contract implementation. Also, it is necessary to discontinue the application of elements that provide for malpractice in the selection of the most favourable bid. In this context, the Bureau of Public Procurements needs to develop recommendations and directions for the contracting authorities in the light of unified and accurate definition of criteria and their consistent application.

### **Misapplication of the framework agreement model.**

This specific case concerns a public procurement on which 9 companies have applied, and framework agreements were signed with 7 companies selected for the performance of the relevant service. Indicative is the fact that although the price criterion has been awarded 60 points, the contracting authority also accepted bids whose prices were even three times more expensive than the cheapest bid, thus creating unequal treatment of bidders as selected bidders were paid different rates for the performance of same services. The contracting authority should have determined a single price, which should be used as a basis for the calculation of the individual prices of the public procurement contracts awarded in the future pursuant to the framework agreement. The contracting authority should have also anticipated a model for awarding individual contracts under which the public procurement would first be awarded to the first-ranked economic operator, and if the same is unable to perform the service in question to award the procurement to the next-in-rank economic operator. This would eliminate the dilemmas currently faced by economic operators meaning that under this model they expect equitable allocation of



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the public procurement subject to all bidders with whom the contracting authority has signed framework contracts, irrespective of their ranking.

**Recommendation:** Considering the fact that framework contracts are not often signed and therefore there is insufficient knowledge on such procedures, which results in imprecisely defined requirements and methods for individual bid-ranking, the Bureau of Public Procurements needs to develop an opinion on the manner of implementing such framework contracts and forward it to the contracting authorities.

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### ANALYSIS OF LEGAL PROTECTION IN THE PUBLIC PROCUREMENT PROCEDURES

#### SUMMARY

Obtaining information on specific public procurement-related appeal procedures is quite difficult. All parties involved, and state authorities in particular, are insufficiently transparent in front of the broader public (stakeholders). Hidden behind various reasons and referring to certain legal provisions, they did not respond to our applications for access/insight in appeals and decisions taken in appeal cases.

The contracting authorities do not apply certain legal provisions related to the appeal procedure. The State Commission on Public Procurement Appeals (hereinafter: SCPPA) ceased its practice to publish the decisions on its website and failed to benefit from the possibility to publish its decisions in the “Official Gazette of the Republic of Macedonia“. The contracting authorities (state institutions) often fail to enforce the legal obligation stipulating that they should submit SCPPA the complete procurement

procedure-related documents within a period of 5 days from the appeal's receipt.

SCPPA introduced a day-to-day practice on publishing on its website the appeals lodged in the course of the previous working day, thus providing public insight in the number of appeals, entities lodging the appeals and the procedures appealed.

The number of appeals lodged in the last 6 months shows a tendency of slight increase. Economic operators (companies) more frequently decide to contest the activities (most commonly the bid-selection decisions) of contracting authorities (state institutions). Even SCPPA adopted more decisions on announcing the appeals as reasonably founded, i.e., every fourth appeal is approved for processing. This points to the fact that contracting authorities increasingly violate legal provisions, meaning they make mistakes in the procedures.

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The biggest number of recorded violations in public procurements procedures still refers only to the bid-assessment stage of the process. SCPPA identified major irregularities in this stage (unreasonably rejected bids, irregular assessment based on certain subjective criteria, etc.) due to which it has revoked the bid-selection decisions and returned the procedures for bid-reassessment.

### I. ANALYSIS OF APPEAL PROCEDURES AND THE OPERATION OF THE STATE COMMISSION ON PUBLIC PROCUREMENT APPEALS

#### INTRODUCTORY NOTES

As was the case in the previous monitoring quarterly period, the project team submitted applications for information on appeals to different information holders in relation to the 40 procedures subject to the present monitoring. The information sources were the following:

- entities lodging appeals - economic operators participating in the said procedures;
- contracting authorities - whose decisions were appealed; and

- the State Commission on Public Procurement Appeals (SCPPA) – taking decisions on the appeals lodged.

Unfortunately, the said sources did not provide information related to the specific appeal procedures. Therefore, the present analysis was - to a greater extent - based on public information available or obtained in oral form during meetings held with participants in the said procedures.

#### CONTRACTING AUTHORITIES' ATTITUDE TO FOI APPLICATIONS ON APPEALS LODGED

The project team, by exercising the right to free access to public information, addressed all contracting authorities whose procedures were subject of the present monitoring to submit copies of lodged appeals and other information, which according to the Public Procurements Law (hereinafter: PPL) are submitted to both, the concerned contracting authority and SCPPA. Freedom of Information applications (FOI applications) were rejected in almost all cases, while following provisions from the Law on Free Access to Public Information (hereinafter: FOI Law) were provided as legal grounds thereof:

- contracting authorities did not create or are the single entity disposing with the said documents;

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- appeals are not considered documents of public character;
- appeals contain data on economic operators' performance, whose disclosure to the public would violate commercial and economic interests of economic operators; and
- as regards public procurement procedures, open calls and tender documents are the single documents deemed to be of public character.

Almost all reasons provided were not reasonably founded. It is correct that contracting authorities and SCPPA did not create the appeals, but they dispose thereof. Having in mind that PPL stipulates appeals to be submitted to both, contracting authorities and SCPPA, it is logically that disposal with said documents does not provide for the exclusive right, but this fact was used as an argument by both parties concerned in regard to distancing themselves as regards the competence over the disclosure of said documents.

Appeals usually do not contain data that could harm commercial and economic interests of economic operators,

as they often refer to data disclosed on the public opening of bids. Furthermore, SCPPA quotes such data in its decisions which are made available for the public. However, even if appeals contain such data, the FOI Law stipulates that those parts can be separated (or deleted) and the document can be disclosed to the public as such, i.e., partial access to information can be provided for the public.

The FOI Law stipulates which information must be disclosed to the public, but the list thereof is not conclusive, but rather indicative. The law stipulates that open calls and tender documents must be made publicly available, but this provision should not be interpreted that other documents from the public procurement procedures are deemed confidential, meaning documents that cannot be disclosed in public.

Contracting authorities apply narrow and arbitrary interpretation of the FOI Law, thus reducing the openness and transparency of their operations. The single contracting authority whose procedure was appealed in the course of this quarterly monitoring that positively responded to our application and forwarded the appeals from the specific procedure was the Customs Administration of the Republic of Macedonia.

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### PUBLISHING APPEALS AND DECISIONS

**SCPPA introduced the day-to-day practice on publishing on its website appeals lodged in the course of the previous working day.** This practice enables greater transparency as regards one segment of the procedure, i.e., provides insight in the number of appeals, entities lodging appeals and appealed procedures. This should also provide for decreased and complete elimination of cases where - due to various reasons - appeals lodged do not reach the contracting authority in question, which results in the contracting authority signing the procurement contract as it believes the procedure has not been appealed. However, for that purpose, the contracting authorities should be informed that on the said website they can check whether appeals are lodged in the specific procedure, on day-to-day basis. Still, it seems that unless this practice is stipulated as an obligation under the law, they will not adopt it in their everyday operations. On the other hand, data on appeals lodged cannot provide insight in the appeals' allegations or alleged violations contained therein and concerning the public procurement procedures.

**SCPPA ceased its practice and legal obligation on publishing on its website decisions taken in appeal**

**procedures.** In the first quarter of 2009, when SCPPA did not have its website, these decisions were published on the website of the Bureau of Public Procurements. For several months now SCPPA disposes with own website (<http://dkzjn.gov.mk/>), but the section on decisions taken in appeal procedures remains empty. SCPPA indicated the insufficient internal capacity and resources as a reason behind the failure to fulfil this obligation. In that, it adds that from 1 January 2010 onwards, all decisions taken in appeal procedures will be published on the day of the decision's adoption, i.e., the day of decision's submission to the appeal procedure parties.

### UNOFFICIAL DATA ON THE NUMBER OF APPEALS LODGED AND APPEAL DECISION TYPES

Data presented in the table below were obtained by SCPPA and concern the period from 01.01.2009 to 15.11.2009. SCPPA will provide official, complete and verified data in its annual report anticipated for publication by the end of January 2010. A total of 992 appeals were lodged in front of SCPPA, and decisions were taken in 941 appeal procedures, while the remaining 51 appeals (5.14%) are in the process of reconsideration and decision-taking. SCPPA held 48 meetings.

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Type of Decision/Conclusion	Number	%
Withdrawn	106	11.27%
Rejected	168	18.74%
Denied	423	44.95%
Approved	244	25.92%
a) Cancellation	151	61.88%
b) Annulled	93	38.12%
Application for procedure's continuation	31	
a) Approved	2	6.45%
b) Denied	29	93.55%

The exact number of decisions taken on annulling procurement procedures due to the contracting authority's failure to submit relevant documents within the legally

stipulated deadline of 5 days is not known, as they were classified under the group of annulled procedures. Unofficially, more than 10 decisions of this type were taken.

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When comparing the unofficial data on appeals and SCPPA's operation in the first quarter of 2009 to these, still incomplete, data for the entire 2009, the following conclusions can be inferred:

- **Number of appeals lodged shows a tendency of slight increase.** Given that the number of appeals lodged in the first quarter was approximately 230, it would most likely increase up to 1,100 appeals by the end of 2009, thus the number of lodged appeals per quarter would be increased by 40-50 appeals.

- **Share of appeals which SCPPA has withdrawn and rejected** on the grounds of entity's failure to fulfil certain formal requirements (mostly due to unsettled fees, or the failure to submit the appeal within the legally stipulated deadline) was reduced by 5-6%, meaning that it currently accounts for 30% of the total number of appeals lodged.

- **Ratio between rejected and approved appeals had changed in favour of approved appeals.** The share of approved appeals in the first quarter accounted for approximately 17-18% of the total number of appeals

lodged, while it currently accounts for approximately 26% and the share of rejected appeals was reduced by 4%. SCPPA more frequently decides on annulling the complete procedure instead of only repealing contracting authority's decision and returning the procedure for re-assessment. This indicates that contracting authorities have more frequently made serious violations and illegal actions.

- **Number of submitted applications on procedure's continuation** (application submitted by the contracting authority for the purpose of signing the procurement contract irrespective of the fact that the appeal lodged is still pending decision) **shows a tendency of insignificant decrease.** SCPPA has not approved a single application of this type, except for the two applications submitted by the State Electoral Commission in the first quarter of 2009.

**Figures indicate that economic operators more frequently use the appeal as a legal remedy for contesting legal proceedings taken in the procedure. Moreover, their appeals are more frequently approved, i.e., SCPPA finds them reasonably founded. This means that not only do contracting authorities repeat the same mistakes (illegal**



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actions), but they have been characterized by an increase as well.

Also, SCPPA does not hold records on the exact number of its decisions against which lawsuits were initiated in front of the Administrative Court, but their number was increased in the last months and accounts for more than 100.

### **MOST FREQUENT ALLEGATIONS AND VIOLATIONS IDENTIFIED IN THE APPEALS AND CONCERNING THE PROCEDURE AND THE DECISIONS' CONTENTS**

Most often, appeal allegations and alleged violations in the procedure refer to the procedure's bid-assessment stage. Thus, SCPPA very often deems that the assessment of the criterion on quality has not been explained. However, more important is the lack of rationale concerning the points allocation in both, the decision on the selection of the most favourable bid (notification for tender participants) and the report on bid-assessment. SCPPA checks whether this criterion was properly defined in order to identify whether it provides for discrimination or to determine if bids and economic operators have been

discriminated and thus often makes reasonably founded rulings on that decision's revoking or annulment.

**Compared to the previous monitoring period, SCPPA's decisions have been improved in terms of their volume and facts presented, but they still contain insufficient rationale on the position taken by the Commission.** One of the main remarks contained in the previous report and expressed by the expert public in general concerns the brief and insufficiently explained decisions taken by SCPPA. Such decisions prevented identification of appeal allegations and the reasons for appeal's rejection, or, in the cases when appeals were approved, the decisions lacked explanation of reasons for revoking the first-instance decision. Unfortunately, due to the small number of decisions made available for insight, the monitoring team was not able to infer firm conclusions whether such shortcomings were overcome. Thus, the following conclusion should be taken with "grain of salt". Progress was achieved as regards the decisions' contents and length, i.e., they now provide detailed description of facts and allegations contained in the appeals and responds thereto. However, the number of decision containing SCPPA's position for taking the

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specific ruling still does not provide sufficient explanations that would indicate SCPPA's reasoning of facts.

### II. ANALYSIS OF PUBLIC PROCUREMENT-RELATED ADMINISTRATIVE DISPUTES AND THE OPERATION OF THE ADMINISTRATIVE COURT

#### PUBLISHING LAWSUITS AND DECISIONS

The Administrative Court (hereinafter: AC) **does not publish on its website** (<http://www.usskopje.mk/>) **administrative dispute lawsuits initiated by economic operators. AC publishes on its website the rulings taken in the lawsuits**, but they are not classified in order to enable quick and easy insight as regards the area they refer to. On the contrary, search engines do not function, i.e., do not provide search-based results.

#### WHO AT AC DECIDES IN LAWSUITS?

The Administrative Court has a specialized judicial council that takes rulings in public procurement-related

lawsuits. The said judicial council is comprised of three judges, and in addition to taking rulings in public procurement-related lawsuits, it also rules cases from several other areas.

#### MOST COMMON LAWSUIT-INDICATED ALLEGATIONS AND ALLEGED PROCEDURE VIOLATIONS

According to AC, the lawsuits initiated by economic operators who are dissatisfied with SCPPA's decisions lack legal grounds, as they refer to the proceedings on public procurement contract-awarding for which the economic operators failed to lodge an appeal within the PPL-stipulated deadline. Since they failed to do so, economic operators cannot use it as an argument in their lawsuits on alleged violation to the procedure. Therefore, such lawsuits are rejected as unfounded. Large number of lawsuits refer to the erroneous bid-assessment procedure, and AC is not competent on assessing the quality and other selection criteria defined (whether they are justifiable or properly ranked), but is competent on ruling whether procedure rules were adhered to (whether the bid-assessment was performed in compliance with PPL and the secondary legislative acts).

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Lawsuits vary in quality, meaning that in its actions AC deals with neatly composed lawsuits with detailed explanation of allegations to lawsuits lacking legal grounds for submission. AC most often approved the lawsuits after determining that decisions taken by both, contracting authority and SCPPA, were insufficiently explained. Employees at AC emphasized that in the last period it has been noticed that SCPPA adopted better decisions (reasonably founded and well explained), due to which lawsuits initiated in front of it are most commonly rejected as unfounded. Unlike the AC staff capacity, it is considered that public procurement commissions at contracting authorities lack training and expertise on implementing public procurements. This was indicated as a reason behind the annulment of contracting authorities' decisions in front of either SCPPA or AC.

### III. RECOMMENDATIONS ON IMPROVING THE LEGAL PROTECTION SYSTEM

Following are the several additional recommendations of the project team concerning the improvement of the legal protection system. Some of them were also supported by the authorities taking decisions on appeals or lawsuits related to public procurements.

Economic operators lodging appeals are not provided with a mechanisms that would enable them information whether the contracting authority in question has complied with the legally stipulated deadline of 5 days for submitting the relevant documents in the appeal procedure. SCPPA should be obliged to ex officio take into consideration the compliance with the deadline and should it identify failure thereof, to adopt a decision on the procedure's annulment, even in cases when there are no appeals lodged. The project team believes that would result in no tolerance for non-compliance with legal obligations and would probably increase the number of annulled procedures in the short-run, but would discipline contracting authorities as regards their effectiveness and consistent application of regulations

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on the long-run. SCPPA supported this recommendation, as well.

For the purpose of increasing transparency in appeal procedures, it is our opinion that the Bureau of Public Procurements should issue its opinion thereof, or the Parliament of the Republic of Macedonia should provide an authentic interpretation as regards the public character of appeals.

SCPPA should initiate regular publication of decisions taken on appeals, while AC should regularly publish and classify its decisions in order to provide the public easier insight in court rulings related to lawsuits initiated against SCPPA's decisions.

Introduction of lawsuits' suspension effect should be considered. This was proposed by AC, but it is our opinion that such provision would have the double-edged sword effect. First of all, a thorough analysis should be made on whether such suspension effect would provide more benefits than adverse effects. The question is whether all lawsuits initiated would by default create the suspension

effect, or certain stricter requirements should be met, including the settlement of the administrative fee, which is - at present – set at a symbolic rate.

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