



USAID
FROM THE AMERICAN PEOPLE



FOUNDATION | ФОНДАЦИЈА
OPEN | ОТВОРЕНО
SOCIETY | ОПШТЕСТВО
MACEDONIA | МАКЕДОНИЈА

C Center for Civil Communications
Центар за граѓански комуникации

QUARTERLY REPORT
ON MONITORING THE IMPLEMENTATION OF
PUBLIC PROCUREMENTS IN THE
REPUBLIC OF MACEDONIA

1/2013

REPORT NO. 17

Skopje, August 2013

This report is made possible by the generous support of the American people through the United States Agency for International Development (USAID) within the USAID Civil Society Project. The contents of the publication are the responsibility of the Foundation Open Society – Macedonia and the Centre for Civil Communications and do not reflect the views of USAID or the United States Government.

TABLE OF CONTENTS

| | |
|--|----|
| KEY FINDINGS AND RECOMMENDATIONS..... | 4 |
| GOALS AND METHODOLOGY..... | 7 |
| QUARTERLY PUBLIC PROCUREMENT MONITORING REPORT..... | 8 |
| COMPARATIVE ANALYSIS OF PENAL PROVISIONS FOR PUBLIC PROCUREMENT PROCEDURE VIOLATION | 28 |

ABBREVIATIONS

BPP – Bureau of Public Procurements

SAO – State Audit Office

SCPPA – State Commission on Public Procurement Appeals

CA – contracting authorities

EO – economic operators

EPPS – Electronic Public Procurement System

EU – European Union

LPP – Law on Public Procurement

RM – Republic of Macedonia

CCC – Centre for Civil Communications

KEY FINDINGS AND RECOMMENDATIONS

- **Every fourth public procurement contract from the monitoring sample was signed in a tender procedure with only one bidding company. Lack of competition among companies results in no guarantees that public funds are spent for quality goods and services offered at favourable, competitive prices.**

Recommendation: Companies should be given the possibility to lodge appeals against terms and conditions set in tender documents as early as the call for bids is announced. This would allow them to react, by lodging an appeal, in cases they have assessed that tender-related criteria are discriminatory and inadequate.

- **Companies are denied the right to demonstrate previous performance acquired by means of joint ventures. According to SCPPA, the purpose served by another legal entity's support is provision of relevant technical and expert resources for contract performance, rather than demonstration of past track record.**

Recommendation: BPP must further specify provisions contained in Article 154 paragraph 3 of LPP for the purpose of defining relevant terms and conditions under which a company can demonstrate its technical and professional capacity supported by another legal entity.

- **In addition to using payment, delivery or construction completion deadlines as elements for selection of the most favourable bid, contracting authorities avoid disclosure of these bid-related information at the public opening of bids (especially in cases when “economically most favourable bid” is used as the selection criterion). Series of other weaknesses were recorded in regard to bid-evaluation and ranking process.**

Recommendation: BPP should develop a manual on good practices that would include examples from best practices worldwide and positive examples from the

domestic public procurement system, especially in relation to defining adequate evaluation and point-allocation for the bid's quality elements.

- **Although planned, e-auctions were not organized in 38% of monitored procedures. Moreover, one third of organized e-auctions did not result in reduction of initially bided prices.**

Recommendation: Given the fact that e-auctions are mandatory for all types of tender procedures, thereby rendering Macedonia the only country in Europe that pursues this concept in public procurements, additional efforts are needed to stimulate greater competition.

- **In this monitoring period, tender annulments are exceptionally high in number and account for 26.6%. In that, institutions continue the practice of frequently annulling tender procedures of great value compared to those of lower value.**

Recommendation: Sanctions/penal provisions should be introduced for contracting authorities that frequently take tender annulment decisions.

- **In the first quarter of this year, the total amount of funds contracted by means of negotiation procedure without prior announcement of call for bids accounts for 11 million EUR.**

Recommendation: BPP should take adequate measures to reduce the use of this procedure.

- **In the first quarter of 2013, 22 negative references were issued and resulted in black-listing of a total of 14 companies, which are prohibited to participate in tender procedures for a period of one to five years. The monitoring sample included one procurement procedure characterized by selective enforcement of LPP in relation to issuance of negative references.**

Recommendation: BPP should make an analysis of cases that include issuance of negative references in order to determine whether law-stipulated rules are adherently applied, both in terms of issuance of these references and in terms of conscious exculpation of certain companies.

- **Free-of-charge electronic publication of tender documents is marked by a decline. Portion of contracting authorities whose public procurements were subject to monitoring activities did not disclose relevant tender documents, even after they were addressed with FOI applications.**

Recommendation: Legal obligation should be introduced for contracting authorities to publish tender documents in electronic form.

- **Comparative analysis of relevant practices pursued by the countries in the neighbourhood, in the region and beyond (Europe) shows that almost all of them have stipulated penal provisions for violations made to the Law on Public Procurement. In most cases, except for state institutions, sanctions are stipulated and enforced against companies as well. Macedonia is among a handful of countries in the world whose LPP does not stipulate sanctions for violations made to legal provisions in effect, despite the numerous cases of violations identified in the practice.**

Recommendation: Findings and conclusions from this analysis could be used by the competent authorities to take relevant actions aimed to sanction violations made to LPP, as a mechanism that guarantees adherent application of the law-stipulated procedure and of basic principles governing public procurements.

GOALS AND METHODOLOGY

From November 2008, the Centre for Civil Communications from Skopje has continuously analysed the implementation of public procurements in the Republic of Macedonia as regulated under the Law on Public Procurement. The analysis aims to assess the implementation of public procurements in the light of the new Law on Public Procurement and the application of the underlying 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 spending as part of procurements.

Analysis of the public procurement process in the Republic of Macedonia was performed based on the monitoring of randomly selected sample of public procurement procedures (40 per quarter). Monitoring activities start with the publication of calls for bids in the “*Official Gazette of the Republic of Macedonia*” and in the Electronic Public Procurement System (EPPS), followed by attendance at public opening of bids and data collection on the procedure course, and use in-depth interviews and structured questionnaires submitted to economic operators, as well as data collected from contracting authorities through EPPS and by means of Freedom of Information (FOI) applications.

The present analysis was performed on the basis of monitoring of selected sample of 40 public procurement procedures implemented by central level contracting authorities, whose public opening of bids took place in the period January – March 2013. In addition, the present report includes a comparative analysis of penal provisions concerning violations made to public procurement procedures.

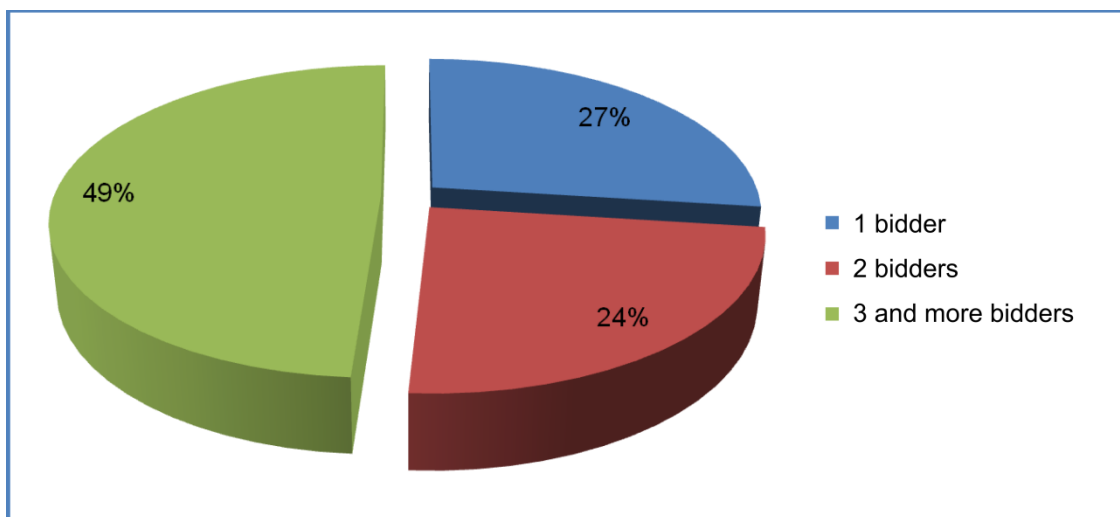
QUARTERLY PUBLIC PROCUREMENT MONITORING REPORT

- **Every fourth public procurement contract from the monitoring sample was signed in a tender procedure with only one bidding company. Lack of competition among companies is, to great extent, a result of disproportionate and discriminatory eligibility criteria for participation in tender procedures.**

Small number of bids submitted in tender procedures raises serious concerns about the ultimate purpose of public procurements, i.e., to obtain the best value for the money spent. Lack of competition among companies ultimately results in no guarantees that funds were spent for quality products and services procured at favourable, competitive prices. On this account, worrying is the fact that low competition among companies was noted in almost half of tender procedures from the monitoring sample (one or two bids).

Overview of competition in tender procedures from the monitoring sample

(January – March 2013)



More specifically, only one company submitted a bid in 27% of monitored procedures, while two bidding companies participated in 24% of tender procedures. Remaining share of tender procedures from the monitoring sample (49%) was

characterized by attainment of desirable competition, with an average of 4 bidding companies.

In that, some tender procedures where two companies submitted their bids resulted in assessing one of the bids as unacceptable, meaning that the company failed to fulfil the eligibility criteria concerning economic and financial ability or technical and professional capacity.

Evidence in support of the statement that low competition is a result of stringent eligibility criteria for companies' participation in tender procedures are identified in series of examples recorded as part of monitoring activities.

The procurement procedure concerning instant and express lottery tickets, where only one company submitted a bid, defined eligibility criteria related to companies' economic and financial ability as minimum annual turnover of 25 million EUR in the last 3 (three) years. Having in mind that contract's value was 95,000 EUR, a conclusion is reached that the ratio of contract's value and required annual turnover is incredible 1:263! Good practices imply use of ratio that is not higher than 1:3.

Minimum eligibility requirements related to company's technical or professional capacity included:

- at least 3 (three) successful contract performances for a minimum of 1,000,000 instant lottery tickets and database for a company dealing with lottery games, in the last 3 years;
- mandatory submission of not less than 3 different types of samples with at least 200 instant lottery tickets and 200 express lottery tickets, which would be subject of special inspection performed by expert services at the contracting authority, in order to determine their compliance with previously-defined technical and other features as precondition for establishment of bidder's ability to perform the procurement subject;
- previous contract performances in the procurement subject for at least 5 (five) different countries, 1 (one) of which should be EU Member-State.

Moreover, bidding companies were required to possess ISO9001, ISO27001 and ISO14001 certificates for quality management system. Only one bid was submitted

by a company that had already signed same type of contracts with the same contracting authority back in 2011 and 2012.

High eligibility criteria were also defined in the procurement procedure for servicing and maintenance of vertical elevators. In order to be awarded the contract in the value of 15,000 EUR and concerning maintenance of 7 elevators in total (labour, spare parts and monthly servicing), companies were required to demonstrate:

- positive annual financial results for the last three years;
- at least 20 full-time employees, with enclosed copies of M1/M2 templates as proof of official employment, tasked for contract performance in the last 3 years;
- at least 5 contracts in the same procurement subject signed and performed in the last 3 years and at least 5 references on successful cooperation issued by company's clients;
- 1 (one) mechanical engineer on the payroll;
- list of technical equipment and capacity for contract performance;
- ISO 9001:2008 certificate on quality management system.

In this tender procedure, only one company submitted a bid. The tender procedure was annulled, and was later followed-up by organization of negotiation procedure without prior announcement of call for bids and signing of contract with the single bidder. According to LPP, tender procedures can be annulled and negotiation procedure can be organized with the only bidder only in cases when the supplier has offered prices that result in payments higher than the tender's estimated value. Hence, unclear is why the single bidder initially offered a total contract price in the amount of 585,000 MKD (VAT excluded), as read out at the public opening of bids in the presence of CCC's monitor, but later the contract signed by means of negotiation procedure without prior announcement of calls indicated a total contract price in the amount of 800,000 MKD (VAT excluded) or 944,000 MKD (VAT included), which is the same amount indicated as the procurement's estimated value.

Further, the service procurement procedure implemented by a Joint Stock Company in State Ownership and concerning production of creative marketing solutions, market research, lease of media advertising airtime, printing of promotional materials and branding postal offices defined the following eligibility criteria:

- cumulative annual turnover of at least 90 million MKD for the last 3 years;
- minimum technical and professional capacity, demonstrated by at least 3-years long working experience;
- at least 10 references on quality and timely service performance, one of which should concern marketing campaign performance for a contracting authority in the same sector;
- participation in development of at least 2 advertising campaigns for the needs of a contracting authority;
- 2 public relation campaigns performed for a contracting authority;
- 3 interdisciplinary campaigns (advertising, public relations and lease of media airtime) performed for a contracting authority; and
- ISO 9001:2008 certificate on quality management system.

Contract in the amount of more than half million EUR was signed with the only bidding company. In that, major concerns about legitimacy and discriminatory character of tender requirements are raised by the fact that eligibility criteria were centred on company's previous experience with state institutions. In this case as well, the contract was signed with the company that had already performed procurement contracts of similar nature (2010 and 2011).

Limiting criteria were recorded in the procurement procedure organized for Internet services, where the bidding companies were required to present:

- ISO 9001:2008 certificate on quality management systems issued on the economic operator's name;
- ISO 27001 certificate on information security management system issued on the economic operator's name;

- ISO/IEC 20000-1:2005 certificate on IT management system issued on the economic operator's name.

Despite the high number of internet providers operating in the market, only one company submitted a bid and was awarded the public procurement contracts.

Recommendation: Having in mind problems recorded in terms of eligibility criteria for companies' participation in tender procedures, it is of outmost importance bidding companies to be given the possibility to lodge appeals against terms and conditions set in tender documents as early as the call for bids is announced. This would allow them to react, by lodging an appeal, in cases they have assessed that tender-related criteria are discriminatory and inadequate. According the legal provisions in effect, appeals on the grounds of tender documents' content can be lodged after the public opening of bids and is considered a delayed right. Namely, it is totally absurd for a company that does not fulfil the eligibility criteria to submit a bid with a sole purpose of acquiring the right to appeal the inadequacy of such criteria.

- **Companies are denied the right to demonstrate previous performance acquired by means of joint ventures. As part of its decision taken upon an appeal lodged in a tender procedure from the monitoring sample, SCPPA indicated that contracts performed by a different company cannot be submitted in the capacity of support in the public procurement procedure for the purpose of fulfilling eligibility criteria related to technical and professional capacity in compliance with Article 154 of LPP.**

According to SCPPA, the purposed served by another legal entity's support is provision of relevant technical and professional resources related for contract performance (human resources, technical equipment) or storage premises, while the remaining terms and conditions and requirements defined by contracting authorities (reference lists, licenses and authorizations or certificates, as well as previous contract performances) cannot be transferred to other economic operators. This is the rationale provided by SCPPA in its decision taken upon an appeal lodged in the tender procedure concerning construction of in-doors sports hall. One bidding

company wished to demonstrate technical and professional capacity (three previous contract performance whose total value exceeds 60 million MKD, one of which should specifically concern construction of a sports hall), by means of joint venture with another company. After its bid was assessed as unacceptable due to non-fulfilment of above-defined criterion, the company lodged an appeal in front of SCPPA, but the same was rejected.

Emphasis is put on this case because SCPPA's interpretation of legal provisions and rationale is not clearly indicated in the Law on Public Procurement. In fact, the Law does not differentiate between past track record and future capacity for tender performance. Namely, Article 154 of LPP reads:

“Technical and professional capacity of economic operators may be supported by another legal entity, irrespective of legal relations between the economic operator and the said entity.” Therefore, this article is often interpreted as companies' right to demonstrate capacity by means of joint ventures in the broadest meaning, both for contract performance and demonstrating past track record.

This becomes more worrying when considered against the fact that in 2008 representatives of the Bureau for Public Procurements developed “Manual on Enforcement of the Law on Public Procurement”, which in relation to Article 154 of LPP indicates, *inter alia*, that: *“Contracting authorities assess technical and professional capacity by making due account of the ability of all members of a group/consortium, i.e., the group/consortium as a whole should fulfil the required criteria related to technical and professional capacity, and not the individual members thereof.”*

These differences in interpretation of legal provisions impose the need for unified position and further specification of LPP provisions. Moreover, in case BPP acknowledges the position taken by SCPPA in this matter, Article 154 of LPP must be immediately amended for the purpose of specifying the meaning of another legal entity's support. However, such course of action must be accompanied by complete abolishment of current practices whereby contracting authorities define high eligibility criteria to assess companies' capacity. On the contrary, there is high risk that in the long run public procurement performance would be concentrated and restricted to a small group of big companies.

Recommendation: BPP must further specify provisions contained in Article 154 paragraph 3 of LPP for the purpose of defining relevant terms and conditions under which a company can demonstrate its technical and professional capacity supported by another legal entity.

- **In addition to using payment, delivery or construction completion deadlines as elements for selection of the most favourable bid, contracting authorities avoid disclosure of these bid-related information at the public opening of bids (especially in cases when “economically most favourable bid” is used as the selection criterion). By doing so, they undoubtedly jeopardize transparency and integrity of public procurements. Series of other weaknesses were recorded in regard to bid-evaluation and ranking process.**

Although institutions predominantly use “lowest price” as the selection criterion, on annual level more than 2,000 tender procedures use the second selection criterion defined as “economically most favourable bid”. Monitoring findings indicate non-compliance with recommendations on reduced use of deadlines as bid-evaluation elements, but also increasingly common disrespect of the rule whereby in addition to the price, other elements used for bid-evaluation and ranking to be disclosed at the public opening of bids.

As contracting authorities disregard recommendations on avoiding the use of these manipulation-prone elements that are often misused to favour a particular bidding company, they are obliged to disclose these elements at the public opening of bids.

In the procurement procedure concerning GPS devices for tracking and locating locomotives, heavy and other vehicles, PE Railway Transportation used “economically most favourable bid” as the selection criterion with the following elements: price was allocated 45 points, quality - 40 points, equipment warranty period - 5 points, implementation deadline – 5 points and post-warranty support was also allocated 5 points. At the public opening of bids, the public procurement commission read out only the prices offered by the two bidding companies, but did not disclose relevant deadline-related elements that are also subject of bid-

evaluation and ranking. According to data indicated in the selection decision for the most favourable bid, the company whose bid was assessed as the most favourable one was allocated significant number of points on the grounds of implementation deadline and equipment warranty period.

Identical shortfall was noted in the tender procedure concerning employee insurance at a public enterprise where the selection criterion was “economically most favourable bid” with the following elements: 80 points were allocated to the price element and 20 points to the payment deadline. However, only financial sections from the five bids obtained were disclosed at the public opening of bids, while relevant information on payment deadlines remained unknown.

Furthermore, in the tender procedure concerning vertical elevator servicing and maintenance for a period of one year, the contracting authority used “economically most favourable bid” as the selection criterion with the following elements: 70 points were allocated to the price element, 20 points to quality and 10 points to built-in parts warranty period. According to tender documents, the bidding company that offers a longer warranty period for the built-in parts should be awarded more points. However, only the contract price bided by the single company participating in this tender procedure was disclosed at the public opening of bids. Another problem was recorded with this tender procedure and concerns the manner of assigning points to the quality element, i.e., the maximum of 20 points was divided as follows:

- up to 10 points for list of technical equipment and economic operator’s capacity for service performance;
- up to 10 points for number of full-time employees, with enclosed copies of M1/M2 templates as proof of official employment, tasked with contract performance of similar nature in the last three years.

Problems stemming from this approach imply that, first, the list of technical equipment and number of employees are not quantified and therefore unknown in the manner in which points were allocated, and second, the same parameters were already used by the procurement-performing entity to assess bidders’ technical and professional capacity. Tender documents clearly indicate that companies that wish to participate in the procurement procedure must fulfil the following criteria:

- to have at least 20 full-time employees, with enclosed copies of M1/M2 templates as proof of official employment, tasked with contract performance of same nature in the last three years; and
- to provide a list of technical equipment and capacity for service performance.

As part of our regular monitoring reports, we duly emphasized the fact that elements used to assess companies' capacity for tender participation cannot be used as elements for bid-evaluation.

Such actions were recorded in the procurement procedure concerning stationery, office supplies and automatic data-processing materials where the quality element was assigned 20 points distributed in the following manner:

- list of contract performances related to the procurement subject in the last 3 years, with indication of relevant values, dates and purchasing entities (10 points); and
- references on timely, efficient and quality delivery of this type of goods issued by other contracting authorities in the last 3 years (10 points).

As regards this case, it should be noted that additional problems are raised by the fact that the contracting authority insisted the bidding companies to demonstrate previous procurement-related experience with state institutions which, of course, is unacceptable, especially because it is a matter of procurement subject of broad use.

Moreover, tender documents related to procurement of copy paper in which quality was assigned 30 points indicated that the maximum number of points will be allocated to the economic operator that would submit sample of copy paper in compliance with the pre-defined technical specifications. This is a total absurd, knowing that non-compliance with elements defined as technical specifications provide the grounds for bid's elimination from further evaluation and its assessment as unacceptable.

Contrary to these negative examples, the monitoring activities also recorded two cases in which, except for the price, other elements subject to bid-evaluation and ranking were disclosed at the public opening of bids.

Recommendation: BPP should develop a manual on good practices that would include examples from best practices worldwide and positive examples from the domestic public procurement system, especially in relation to defining adequate evaluation and point-allocation for the bid's quality elements.

- **Although planned, e-auctions were not organized in 38% of monitored procedures. Moreover, one third of organized e-auctions did not result in reduction of initially bided prices.**

Reasons for non-scheduling e-auctions in the tender procedures from the monitoring sample where only one company submitted a bid are evident and understandable. However, downward bidding was not organized even in procedures where more companies submitted a bid, but the public procurement commissions eliminated a number of bidders on the grounds of non-fulfilment of eligibility criteria related to companies' economic and financial capacity or on the grounds that their bids deviated from requirements enlisted in technical specifications.

Especially worrying is the service procurement procedure related to access control system and integrated system for registration of working hours, as well as indoor video surveillance organized by one line ministry. Four companies submitted their relevant bids in the tender procedure, three of which were assessed as unacceptable, which ultimately led to contract-signing without previously organized e-auction. At the public opening of bids, the company whose bid was assessed as acceptable was characterized with the highest price offered.

Insight performed in the report prepared by the public procurement commission, as well as in the appeal lodged by one of the bidding companies, provides the conclusion that companies were eliminated due to the fact that the devices they offered do not fulfil the technical specifications for intelligent devices with logical entry and exit options, rather than additional options the use of which would result in errors. Unknown remains how could as many as three from the total of four bidding companies that participated in the procurement procedure offer devices with multitude of options that do not fulfil the technical specifications?!

In its appeal lodged in front of SCPPA, one of the bidders indicated that by failing to organize an e-auction anticipated as the last stage in the procedure, the contracting authority committed evident and tendentious disqualification of the applicant's bid. According to the applicant, the rationale provided by the public procurement commission for the alleged unacceptability of the technical bid is unacceptable, incorrect and frivolous. In support of his claim, the bidder enclosed brochures, catalogues and technical description of devices it has offered. SCPPA rejected the appeal.

As regards this procurement, it should be noted that the notifications submitted to the bidders contained information on the selection decision taken, but did not include reasons on whose basis their bids were eliminated. Following a request for insight in the report on the procurement procedure, one of the companies was given detailed information thereof. Of course, such behaviour on the part of contracting authorities is unacceptable; especially having in mind that detailed notification of bidders is not only a legal obligation, but prerequisite for companies to be able to effectively protect their rights in the course of appeal proceedings.

Detailed technical specifications resulted in non-organization of e-auction in the procurement procedure concerning petrol-powered jeeps, where one of the two bids received was rejected as unacceptable. Information obtained as part of monitoring activities provide the conclusion that technical specifications were too precise, which – in turn - resulted in only one acceptable bid.

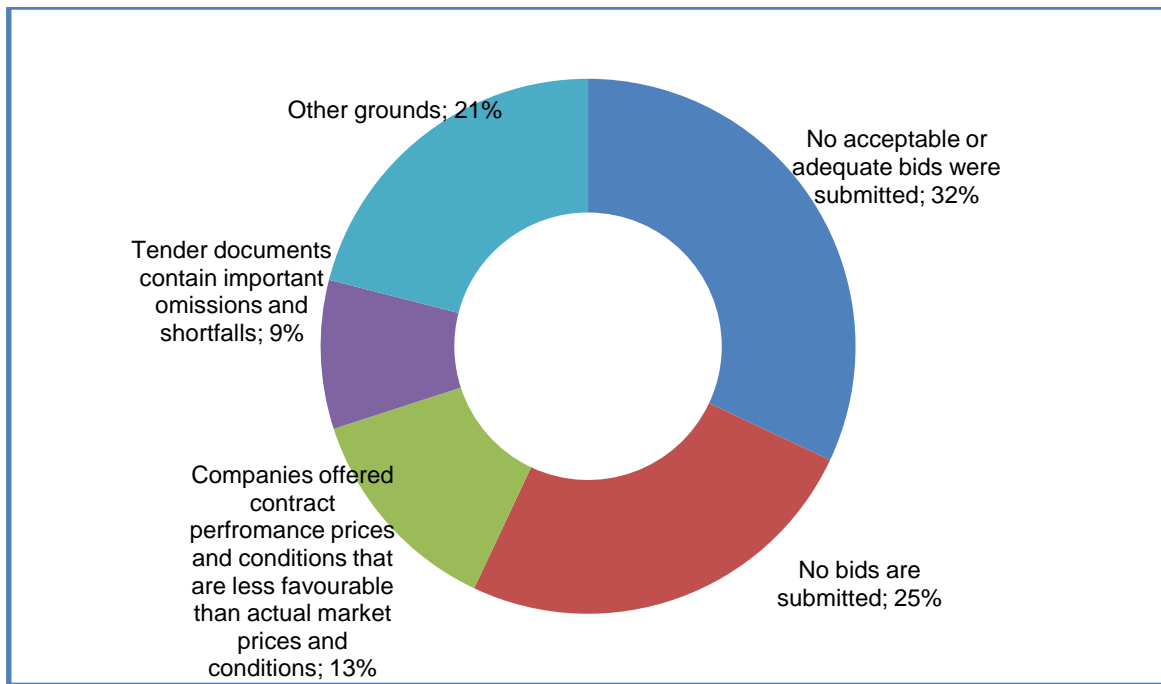
Recommendation: Given the fact that e-auctions are mandatory for all types of tender procedures, thereby rendering Macedonia the only country in Europe that pursues this concept of public procurements, additional efforts are needed to stimulate greater competition. For that purpose, when implementing bid-collection procedures and open procedures of lower value, contracting authorities are recommended to set eligibility criteria on companies' economic/financial ability and technical/professional capacity only as exception, rather than a rule. As regards tender procedures of greater scope and higher value, eligibility criteria should not be copy-pasted from one to another procedure, but the contracting authorities are encouraged to individually approach this exercise on case-to-case basis and make

objective assessments, which would ultimately result in defining eligibility criteria that are relevant for the procurement in question and do not limit competition.

- **In this monitoring period, tender annulments are exceptionally high in number and account for 26.6%. In that, institutions continue the practice of frequently annulling tender procedures of great value compared to those of lower value. According to the type of public procurement procedure, the share of annulled tender procedures organized as open procedures accounts for astounding 41.82%, while only 20.52% of all tender procedures implemented as bid-collection procedures were annulled. This is a record-high percentage of annulled tender procedures noted in the first quarter of the year.**

Dominantly indicated reason for tender annulment is the fact that the contracting authority did not obtain a single acceptable or adequate bid. Worrying is the conclusion inferred on the basis of monitoring findings that tender procedures with participation of three bidding companies are also annulled. Considering the frequent annulment of tender procedures, reasons for bids' unacceptability and inadequacy should also be sought with the institutions, especially in terms of defining high criteria and requirements as part of relevant tender documents, and sometimes problems are raised in relation to inadequate estimates made about the procurement's value.

Reasons indicated for tender annulments in the first quarter of 2013



On national level and in terms of reasons indicated in tender annulment decisions, the structure of annulled procedures in the first quarter of 2013 (972 tender procedures) shows that as high as 32% of tender procedures were annulled because contracting authorities did not obtain a single acceptable or adequate bid. Moreover, 25% of annulment decisions were taken on the grounds that no bids were submitted in the tender procedure. Third most frequently indicated ground for tender annulment (13%) implies that companies offered contract performance prices and conditions that are less favourable than actual market prices and conditions. This is an exceptionally interesting formulation that provides the conclusion on contracting authorities' knowledge about the relevant market, but only when they wish to annul the tender procedure, whereas they demonstrate utter ignorance of the relevant market in cases when they are required to demonstrate relevant knowledge thereof.

As regards tender annulments, two extremely disputable cases were identified in the course of monitoring activities.

The first case concerns a procurement procedure with only one bidding company for which an annulment decision was taken on the grounds that *"the number of bidding companies is lower than the law-stipulated minimum threshold for public procurement contract-awarding"*. It is a matter of an open procedure for which the

Law does not stipulate a minimum number of bidding companies and which is conducive to contract signing with the single bidder. Such ignorance of legal provisions demonstrated on the part of representatives from a line ministry that is ranked among top public procurement performing entities is both worrying and unacceptable.

The second case concerns an annulment decision that included an extremely disputable rationale, as follows: *“acceptable bids were submitted, but they are incomparable due to the different approach applied in terms of drafting the technical or financial bid”*. Concerns are raised by the fact that this annulment decision was taken in a procurement procedure with only one bid and therefore if the said bid was considered acceptable, i.e., in compliance with terms and conditions indicated in the tender documents and technical specifications, unclear is why it was qualified as incomparable, especially knowing that there were no other bids against which it could have been compared.

As shown in the table below, this first quarter of the year is marked by the highest share of annulled procedures recorded in the last two years.

Trend on procedure annulments, per quarters

| Period | Number of announced call for bids | Number of annulment decisions | Share of annulled procedures |
|-----------------------------|-----------------------------------|-------------------------------|------------------------------|
| January - March 2011 | 392 | 2,072 | 18.9% |
| January - March 2012 | 451 | 1,945 | 23.2% |
| January - March 2013 | 972 | 3,661 | 26.6% |

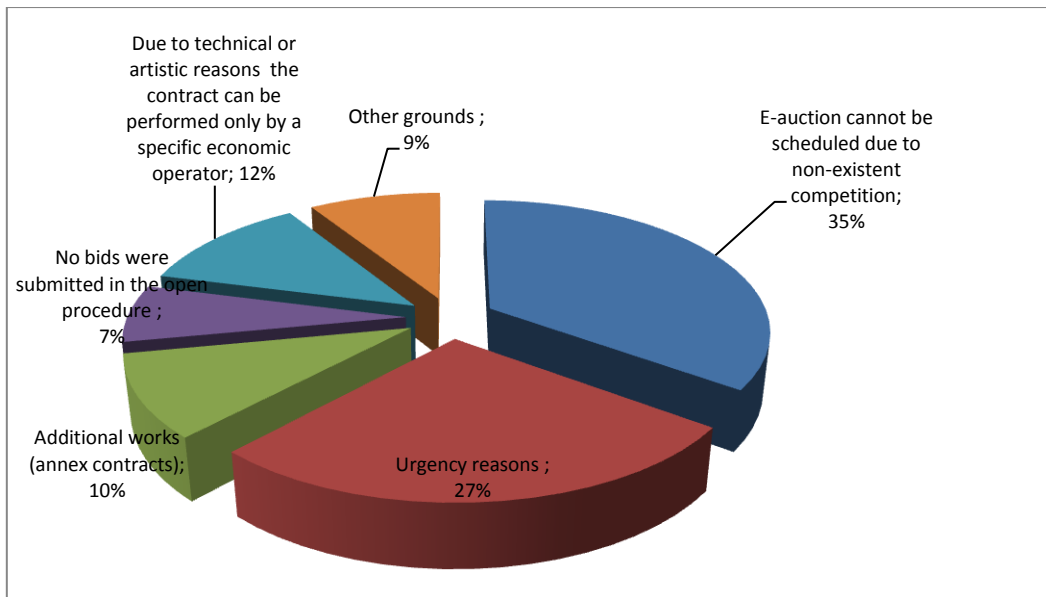
Hence the conclusion reached is that measures taken to reduce the number of tender annulments did not yield any results and that it is a matter of serious problem that necessitates a systematic approach.

Recommendation: Trend on increasing annulment of public procurement procedures imposes the need for the Law on Public Procurement to limit and precisely define the possible grounds for tender annulment. Centre for Civil Communications reiterates its proposal on introducing sanctions for contracting authorities that frequently take tender annulment decisions.

- **In the first quarter of this year, the total amount of funds contracted by means of negotiation procedure without prior announcement of call for bids accounts for 11 million EUR.**

Most frequently indicated reason for signing this type of contracts is the inability to organize e-auction due to non-existent competition (only one bid was submitted). In that, due consideration should be given to the fact that preconditions for greater competition in public procurements are created by the contracting authorities and therefore lack of competition in tender procedures does not exculpate them of their responsibility for signing non-transparent contracts.

Overview of contracts signed by means of negotiation procedure without prior announcement of call for bids in the period January – March 2013



By referring to the legal provision whereby e-auction cannot be scheduled in the procurement procedure due to non-existent or low competition, a total of 46 procurement contracts in total amount of 3.9 million EUR were signed in the first quarter of 2013.

According to the number of contracts, as many as 94 contracts in total amount of 3 million EUR were signed under the explanation that institutions did not have time to organize and implement tender procedure due to urgency reasons caused by events which the contracting authority could not have anticipated or are beyond its control, thereby exculpating it from any responsibility related to failure to organize the tender procedure.

Furthermore, 68 contracts in total amount of 1.3 million EUR were signed in cases where there is only one company that can provide the relevant goods/services, namely due to artistic reasons or reasons related to protection of exclusive rights (patents and the like).

A total of 31 annex contracts in total amount of 1.1 million EUR were signed in the first quarter of the year.

Total amount of funds contracted without prior announcement of call for bids are reduced by 6.7% compared to the relevant figures for the same period last year.

Overview of total amount of funds contracted by means of negotiation procedure without prior announcement of call for bids, per year

| Period | Contracts' value (in million EUR) | Change |
|-----------------------------|--|---------------|
| January - March 2011 | 9.4 | +133.0% |
| January - March 2012 | 11.9 | +26.6% |
| January - March 2013 | 11.1 | -6.7% |

Although the total amount of funds spent by means of these contracts is lower compared to the same period last year, a new record was observed in terms of the number of contracts signed in 2013. Namely, as many as 320 contracts were signed on this basis in the first quarter of this year, which represents a significant increase compared to last year when only 180 contracts were signed.

Recommendation: BPP should take adequate measures to reduce the use of this procedure, especially having in mind that the number of contracts signed by means of non-transparent negotiation procedure without prior announcement of call for bids is a result of low competition and non-organization of e-auctions, but also making due account of the easiness with which institutions use this procedure without acknowledging the fact that public spending requires high level of transparency and accountability.

- **In the first quarter of 2013, 22 negative references were issued and resulted in black-listing of a total of 14 companies. 9 of these companies were prohibited to participate in tender procedures for a period of one year, 3 companies – for two years and 2 companies were prohibited to participate in tender procedures for as many as five years. The monitoring sample included one procurement procedure characterized by selective enforcement of LPP in relation to issuance of negative references.**

In the first quarter of 2013, negative references or prohibitions for companies to participate in tender procedures in duration of 1 to 5 years were predominantly issued due to companies' decision to decline contract signing or failure to provide the required bank guarantees. Smaller share of negative references were issued on the grounds of activating the bank guarantee for quality performance of already signed contracts.

Moreover, a case was recorded in which the contracting authority did not act in compliance with the legal provisions although the behaviour of the company qualified for issuance of negative reference. It is a matter of tender procedure that was annulled on the grounds that "*there were no acceptable and adequate bids received*". According to information received from the representative of the company that was the only bidder, the tender procedure was annulled due to the fact that the contracting authority and the bidder did not reach an agreement on reducing the invoice payment deadline from 30 to 15 days.

As part of relevant tender documents, the contracting authority clearly indicated a payment deadline of 30 days following invoice receipt. However, the only bidder in the tender procedure insisted on payment deadline of 15 days, which was unacceptable for the institution. Concerns are raised with the fact that the contracting authority annulled the tender procedure and did not issue negative references for the company on the grounds of refusal to sign the contract. Tender documents related to this procedure clearly indicated that bidding companies are required to submit a signed statement of serious intent and that in case of non-compliance with the statement the company would be penalized by means of prohibition for further participation in the tender procedure and would be issued negative reference. By not issuing negative reference, the contracting authority did not act in compliance with Article 47, paragraph 5 of the Law on Public Procurement.

Without any intention to comment about justifiability of negative references as instrument for penalizing the bidding companies, we must emphasize that selective enforcement of the Law on Public Procurement in this respect is exceptionally dangerous. These risks were duly noted by CCC from the moment negative references were introduced in the Law, especially having in mind the absence of control mechanism in the public procurement system that could result in unequal treatment of companies, i.e., the Law would be applicable for some, but not for other

companies, i.e., some companies would manage to avoid sanctions for their behaviour in public procurements.

Recommendation: BPP should make an analysis of cases that include issuance of negative references in order to determine whether law-stipulated rules are adherently applied, both in terms of issuance of these references and in terms of conscious exculpation of certain companies.

- **Free-of-charge electronic publication of tender documents is marked by a decline. Portion of contracting authorities whose public procurements were subject to monitoring activities did not disclose relevant tender documents, event after they were addressed with FOI applications.**

Tender documents from half of monitored procedures were not published in EPPS, which is by 10 percentage points lower compared to the previous quarter. In that, portion of institutions that did not publish their documents in EPPS resorted to the practice of imposing fees for issuance of tender documents in hardcopy. Fees charged for tender documents range from 500 to 1,500 MKD. Under circumstances of extremely low competition in public procurements, unclear is why the contracting authorities do not use the possibility for public and free-of-charge publication of tender documents that would encourage more supplies to submit bids.

Transparency of public procurement process is also endangered by the fact that portion of contracting authorities that did not upload tender documents in EPPS refused to disclose these documents after they were addressed with FOI applications, followed by a series of telephone calls. List of institutions that refused to disclose tender documents as public information includes the Ministry of Foreign Affairs, JSC for Management of State-Owned Commercial Property, Macedonian Railways – Transportation JSC Skopje, Ministry of Health, PE State Roads, PE Macedonian Forests - Regional Office in Skopje and Sector on Logistics at the Ministry of Defence. It should be noted that above-listed contracting authorities disclosed all other information requested. Therefore, unclear is why tender documents are considered confidential information, having in mind that these documents were requested after procurement procedures were completed and for the purpose of monitoring public procurements.

Recommendation: Without any exception therefrom, the contracting authorities should publish complete tender documents together with the call for bids, thereby avoiding additional administrative and financial burdens for the companies. Introducing a legal obligation for electronic publication of tender documents would imply a financial compensation settled by the companies as EPPS registration charge.

Comparative Analysis of Penal Provisions for Public Procurement Procedure Violation

Comparative analysis of relevant practices pursued by the countries in the neighbourhood, in the region and beyond (Europe) shows that almost all of them have stipulated penal provisions for violations made to the Law on Public Procurement. In most cases, except for state institutions, sanctions are stipulated and enforced against companies as well. Macedonia is among a handful of countries in the world whose LPP does not stipulate sanctions for violations made to legal provisions in effect, despite the numerous cases of violations identified in the practice. Findings and conclusions from this analysis could be used by the competent authorities to take relevant actions aimed to sanction violations made to LPP, as a mechanism that guarantees adherent application of the law-stipulated procedure and of basic principles governing public procurements.

Introduction

Public procurements are prone and conducive to malpractices and corruptive actions. Great scope of public funds allocated for this purpose results in great interest on the part of participants in public procurements for attainment of personal material and other proceeds, notably by circumventing or violating law-stipulated procedures. In order to prevent and sanction these inadmissible practices, EU Member-States or countries aspiring to join the EU are introducing relevant sanctions, including fines for minor violations made to legal provisions from the Law on Public Procurement, as well as imprisonment sentences anticipated in the Criminal Code in cases of aggravated violations of the law. In order to obtain a clearer image on the manner in which the countries that adhere to the fundamental principle of the rule of law prevent illegal behaviour on the part of participants in public procurements, we developed a comparative analysis of sanctions imposed in cases of public procurement violations, as regulated in the relevant laws. This analysis targets eight countries and their relevant legislation. Most of them are

countries in the region; some of them are EU Member-States, while others are successfully pursuing EU accession, including new EU Member-States and one old EU Member-State.

Serbia

Serbia adopted a new Law on Public Procurement on 29 December 2012, which entered in effect on 1 April 2013. One of the main goals pursued with the adoption of this piece of legislation was prevention of corruption in public procurements, which is evident from the fact that the Law contains several anti-corruption provisions, including a legal provision on developing anti-corruption plan in public procurements, as well as sanctions/fines for participants in procurement procedures, when they have violated the law-stipulated procedure and rules, including conflict of interests.

LPP stipulates broad competences for the Republic Commission for Protection of Rights in Public Procurement Procedures (hereinafter: Republic Commission), in the capacity of second-instance body. This should ensure adequate implementation of fundamental principles governing public procurements and should limit the space for corruptive actions. With a view to increase efficiency and effectiveness of misdemeanour procedures, the Republic Commission is authorized to lead first-instance procedures and can, inter alia, impose fines for contracting authorities in the amount of 80,000 – 1,000,000 RSD (around 700 – 8,700 EUR) and fines for contracting authority's responsible person in the amount of 20,000 – 80,000 RSD (around 175 - 700 EUR) when they:

- upon submission of request for protection of rights, failed to act in the manner and within the deadline stipulated by the law;
- failed to supply additional documents, data, clarification and opinion pursuant to the request of the Republic Commission and within the deadline set by the Republic Commission;
- failed to submit reports and statements on implementation of decisions taken by the Republic Commission and acted contrary to the decision taken by the Republic Commission;

- do not facilitate public procurement control pursuant to legal provisions in effect.

In compliance with its law-stipulated competences, the Republic Commission imposes fines for above-listed violations when deciding upon requests for protection of rights in public procurements. Decisions taken by the Republic Commission are published on its official website.

The Republic Commission initiates misdemeanour procedures on the request made by the Public Procurement Office, the State Audit Institution, and another authorized body or ex officio, immediately after it has learned about the offence. Republic Commission's decisions in misdemeanour procedures can be contested in front of the Higher Misdemeanour Court. Within its law-stipulated competences, the Republic Commission can motion a dismissal proposal for the manager or responsible person at the contracting authority for whom it was established that, in spite of fines imposed in the procedure for protection of rights or in the misdemeanour procedure, failed to act pursuant to the decision taken by the Republic Commission or continued to violate legal provisions in effect. Motion for dismissal is submitted to the body competent for supervising contracting authority's performance.

The authority competent for protection of competition is given special authorizations related to prevention of malpractices and abuses in public procurements. Namely, this authority can issue measures such as "prohibition for participation in public procurement procedures" against bidders or interested persons in cases it was established that they have violated the competition rules in public procurement procedures stipulated in the law that governs protection of competition. These measures can be imposed for a period of up to two years, and the decision can be contested in an administrative dispute initiated in front of a competent court.

Except for sanctions intended for contracting authorities, LPP also stipulates fines for bidding companies (economic operators) for actions taken in the procedure or for failure to fulfil law-stipulated requirements and obligations within the given deadlines.

In cases of serious violations to the Law, contracting authorities are fined in the amount of 100,000 to 1,000,000 RSD (around 870 – 8,700 EUR) when they:

- failed to protect the confidentiality of data related to the bidding company and its bid; failed to keep records of all stages in the public procurement procedure; failed to keep records on public procurement contracts signed or failed to keep documents related to public procurements and does not communicate with relevant authorities in the manner stipulated by the Law;
- failed to publish or supply tender documents, amendments and supplements made to tender documents or failed to respond to the request for clarification of tender documents; failed to comply with legal provisions on setting and using technical specifications and standards;
- failed to take a contract-awarding decision when terms and conditions governing exceptions are not fulfilled or failed to take such decision within the law-stipulated deadline;
- re-announced the public procurement in the same budget year or within the next six months, after having cancelled the first public procurement announced;
- failed to provide the bidder or the applicant insight in documents related to the implemented public procurement and failed to submit a report to the Public Procurement Office;
- have not employed a public procurement officer or has not enabled the employee to obtain a certificate for public procurement officer.

The Law stipulates higher fines in the amount of 200,000 – 1,500,000 RSD (around 1,750 – 13,000 EUR) when the contracting authority:

- implemented a procurement procedure without applying legal provisions contained in LPP and the procedure does not fall any category of exceptions stipulated by the Law;
- failed to reject the bid submitted by persons involved in public procurement's planning, development of tender documents or parts thereof or the bid submitted by persons who have cooperated with the contracting authority;
- signed a public procurement contract in cases of obvious conflict of interests (this violation also implies fines for contracting authority's responsible person in the amount of 80,000 – 150,000 RSD, i.e., around 700 -1,300 EUR);
- contrary to the Law, did not implement an open or limited public procurement procedure;

- failed to adopt procurement plan or report on plan's implementation or failed to comply with the rules governing preparation of procurement plans;
- initiated a public procurement procedure when relevant terms and conditions were not fulfilled;
- failed to publish a notice or call for bids;
- signed a public procurement contract when relevant terms and conditions were not fulfilled;
- amended the public procurement contract indicating reasons that are not objective or when changes to public procurement contract are not anticipated in tender documents; failed to publish the decision or submit the report to competent state bodies;
- took a contract-awarding decision or signed the contract after a request was submitted for protection of rights; signed or performed a contract contrary to the decision taken by the Republic Commission or failed to reimburse costs related to procedure on protection of rights pursuant to the decision taken by the Republic Commission;
- failed to act according to the instructions laid down in the decision of the Republic Commission within the given deadline.

In addition to fines imposed to contracting authorities, the Law stipulates sanctions and fines imposed in cases when the bidding companies are in breach of legal provisions. Fines for bidding companies range from 100,000 to 1,000,000 RSD (around 870 – 8,700 EUR) and are issued in cases when the bidder:

- failed to protect the confidentiality of data related to the contracting authority;
- acted contrary to the provisions from Article 25 of the Law;
- failed to notify the contracting authority about changes made to data or supplied incorrect data on fulfilment of terms and conditions for participation in public procurements or supplied incorrect data about expert references required by tender documents;
- contrary to the legal provisions from LPP, hired a subcontractor that is not enlisted in the bid or in the public procurement contract;
- failed to reimburse costs incurred by the contracting authority in the procedure for protection of rights pursuant to the decision taken by the Republic Commission.

When these violations are committed by natural persons acting in capacity of bidder or applicant, they are fined in the amount of 30,000 – 200,000 RSD, while bidding company's responsible or engaged person is fined in the amount of 50,000 – 150,000 RSD.

Montenegro

New Law on Public Procurement entered in effect on 1 January 2012. The Law stipulates fines for contracting authorities when they have violated anti-corruption provisions or law-stipulated procedure and legal obligations in the course of implementing public procurements and signing public procurement contracts.

Misdemeanour fines in the amount of 2,000 – 20,000 EUR are imposed to the contracting authorities acting in capacity of legal entity when they:

- failed to keep records related to violation of anti-corruption rules;
- failed to make official note or motion relevant charges in front of competent state authorities for the purpose of undertaking measures stipulated by the Law;
- failed to record cases of conflict of interests and failed to immediately notify the competent authorities thereof;
- failed to publish on the Public Procurement Portal or failed to notify the applicants about the selection of eligible candidate with a rationale (within a period of 5 days from its adoption);
- failed to comply with terms and conditions and law-stipulated manner for implementing public procurement procedures; divide the procurement subject that is otherwise considered a whole into separate procurements through the fiscal or financial year in order to avoid application of law-stipulated procedure; failed to present the competent authorities with the decision on appointment of public procurement officer;
- failed to publish the call for bids on the Public Procurement Portal, together with any possible changes made thereto;
- failed to publish or submit to the bidders the decision on suspension of the public procurement procedure with a rationale (within a period of 3 days from

its adoption) or failed to publish on the Public Procurement Portal or failed to submit to the bidders the decision on the selection of the most favourable bid. Contracting authorities are in breach of LPP when they adopt selection decisions for the most favourable bid without previously implemented public procurement procedure in cases when implementation of such procedure is mandatory, when they fail to notify the competent authorities of a public procurement contract within a period of three days from its signing, for the purpose of having the contract published on the Public Procurement Portal and when they do not keep records on public procurement procedures implemented and contracts signed.

Fines are also imposed in cases when contracting authorities failed to submit a report on public procurement procedures implemented and contracts signed in the past year by 28 February in the current year.

Legal provisions governing records-keeping on implemented public procurements for a defined period of time serve the purpose of future controls in terms of legality of already completed public procurements. Hence, contracting authorities are liable to fines when they do not comply with this legal obligation and do not keep the records for at least 5 years after their completion or when they do not keep records on public procurements in the value of up to 15,000 EUR for a period of three years.

In cases of above-referred violations, fines in the amount of 250 – 2,000 EUR are imposed to responsible persons at contracting authorities, state bodies and local self-government units, including a fine in the amount of 500 – 6,000 EUR for the responsible person at the economic operator.

Croatia

New Law on Public Procurement was adopted in 2011. The Law stipulates fines for contracting authorities acting in capacity of legal entity and units of local and regional governments in the amount of 50,000 -1,000,000 HRK (around 6,600 – 133,000 EUR) when they:

- procured goods, services or works without implementing a public procurement procedure stipulated by the Law, except in cases when the said procurement falls under law-stipulated exemptions;
- signed a public procurement contract in which there is conflict of interest;
- divided the procurement's value (goods, services or works) in order to avoid application of the Law and the rules governing relevant type of mandatory procurement procedure according to the procurement's value;
- failed to submit, immediately after publication, to the central state administration body competent for public procurements information about the website hosting the procurement plan and any subsequent changes thereto; failed to submit the procurement plan and any subsequent changes thereto in electronic form, for example planned duration of public procurement contracts and framework agreements;
- failed to submit, after the initial publication of the register of public procurement contracts and framework agreements, to the central state administration competent for public procurements information about the website that hosts the register and any subsequent changes thereto;
- at least one authorized representative of the contracting authority involved in preparation and implementation of public procurement procedures does not hold a valid certificate for public procurements or when the contracting authority organizes negotiation procedure without prior announcement of call for bids.

Contracting authorities are fined for signing public procurement contract or framework agreement with a bidder that should have been excluded from the procedure or whose bid should have been rejected on the basis of insight performed in and evaluation of bids.

Fines are also imposed in cases when the contracting authorities failed to send notifications for all contracts or framework agreements signed within the law-stipulated deadlines. Another situation liable to sanctions concerns cases when the contracting authority signed a public procurement contract or framework agreement contrary to terms and conditions defined in tender documents and selection criteria for the most favourable bid.

Contracting authorities are in breach of LPP when they act contrary to the request made by the state administration body competent for public procurements, the European Commission or the State Commission for Supervision of Public Procurement Procedures and failed to supply them with requested documents related to procurement procedures or contracts signed within the law-stipulated deadlines. Sanctions are imposed in cases when contracting authorities take actions contrary to the decision taken by the State Commission for Supervision of Public Procurement Procedures.

In the above-referred cases, fines in the amount of 10,000 – 100,000 HRK (around 1,300 – 13,300 EUR) are issued for responsible persons at relevant legal entities, state institutions or local and regional governments.

For the purpose of guaranteeing legal security, the Law stipulates a statute of limitations for the above-indicated violations. Hence, misdemeanour procedure cannot be initiated for violations stipulated by LPP after the expiration of three years from the moment the violation was committed, and absolute statute of limitations takes effect after the expiration of a period that is twice as long.

Slovenia

Law on Public Procurement is in effect from 2007, and amendments to the Law on Public Procurement were adopted in 2008 and 2010.

National Audit Commission for Public Procurements (hereinafter: National Audit Commission) is the body competent to detect violations made on the part of contracting authorities. Violation procedures are led and decided upon by an officer employed at the National Audit Commission who fulfils the terms and conditions stipulated by the General Offences Act and accompanying regulation adopted on its basis. This officer is appointed by the chairperson of the National Audit Commission. In compliance with the General Offences Act, the National Audit Commission is authorized to take decisions on initiation of misdemeanour procedures for violations made by responsible persons at contracting authorities and request the complete documents to be submitted by the contracting authority in question within the shortest possible deadline.

Fines for violations made as part of public procurements procedures in Slovenia are much higher compared to fines stipulated in relevant legislation adopted by other countries included in this analysis.

Fines range from 5,000 to 350,000 EUR and are imposed in cases when the contracting authority:

- awards a contract without implementing the required law-stipulated procedure;
- failed to comply with law-stipulated deadlines concerning publication and submission of call for bids;
- established selection criteria for the most favourable bid contrary to the Law;
- selected a method for setting the procurement's value in order to avoid implementation of public procurement procedure for reasons of lower prices;
- used economically most favourable bid as the selection criteria; changed the procurement subject in the middle of the procedure in a manner that the selected bid is no longer considered the most favourable bid.

Fines are anticipated in cases when the provisions from the public procurement contract deviate in their essential elements from the provisions indicated in contract-awarding documents.

Contracting authorities that signed contracts with a bidder that is on the negative reference list are also liable to sanctions.

Amendments made to LPP aimed to expand the list of actions that are considered violations of public procurement procedures, especially in order to strengthen contracting authorities' responsibility and prevent abuse of and corruptive actions in public procurements. Thus, fines in the above-indicated amount are issued for contracting authorities that failed to submit relevant statistical data on implemented public procurements or failed to submit documents requested by the National Audit Commission and failed to publish the necessary notifications.

A novelty introduced in the Law aimed to prevent abuse of public procurements geared towards favouring of bidders is the fine imposed to contracting authorities in cases when they:

- initiated a new public procurement procedure, although the circumstances on whose basis the first procedure was discontinued have not changed;

- failed to indicate whether bids should be submitted for the procurement as a whole or for individual lots defined;
- declined procurement contract performance and violated the provisions governing signing of public procurement contracts and framework agreements stipulated by the central bodies, as well as provisions governing preparation of documents and contract contents.

The Law also stipulates fines in the amount of 2,000 – 12,000 EUR for the responsible person at the contracting authority.

Amendments to LPP include fines for violations made by bidders and sub-contractors in the range from 5,000 to 100,000 EUR, which are imposed in cases when:

- the bidder acted contrary to the requirements governing preparation of tender documents and contract signing;
- in the absence of objective reasons that are beyond its control, the bidder failed to respond to contracting authority's request for contract performance or supplied the contracting authority with incorrect statements or evidence.

In addition to the fine, the bidder is sanctioned with prohibition to participate in public procurements in duration of three years in cases of goods or services and in duration of five years in cases of works, from the day the relevant decision enters in effect.

In addition, the Law anticipates fines in the amount of 2,000 – 10,000 EUR for responsible persons at the bidding companies.

Fines are imposed to sub-contractors in cases they violated the legal obligations stemming from their participation in the procurement procedure, accompanied with fines for responsible persons in the same amount anticipated for responsible persons at the bidding companies (2,000 – 10,000 EUR).

Hungary

Hungary's new Law on Public Procurement entered in effect on 1 January 2012 and is fully aligned with the rules, requirements, procedures and standards of the European Union. The Law does not include specific provisions on sanctions, but as

part of broad competences entrusted to the Public Procurement Arbitration Board, this body can stipulate detailed rules governing violations and relevant sanctions, can set the amount of fines and manner of payment, as well the amount of administrative fees charged by this body.

Czech Republic

Law on Public Procurement adopted in the Czech Republic contains special provisions that regulate so-called violations or offences made on the part of contracting authorities. According to the Law, the contracting authority is in breach of the Law when it:

- failed to comply with law-stipulated procedure for contract-awarding and when such action substantially affected or could have affected the selection of the most favourable bid and signed public procurement contract or framework agreement with the select bidder(s) prior to the expiration of the deadline for lodging appeals;
- annulled the public procurement procedure, although the law-stipulated terms and conditions for that purpose are not fulfilled;
- failed to keep records on public procurements within the law-stipulated period or failed to secure copies of records related to design competitions that were returned to the participants after the procedure was completed and after the contract was signed;
- failed to comply with the legal obligation on publishing all notifications related to public procurement procedure and contract awarding in a manner stipulated by the Law.

Fines imposed in these cases are set at up to 5% of contract's value or up to 10,000,000 CZK (around 385,000 EUR) in cases contract's value is not established. When the contracting authority continues to act contrary to the legal provisions (fails to comply with law-stipulated procedure and the procedure substantially affected or could have affected the selection of the most favourable bid), it is fined in an amount that is twice as high (20,000,000 CZK or around 770,000 EUR).

A contracting authority is considered to have repeated the violation when less than 5 years have passed from the first/previous violation.

Law on Public Procurement contains new provisions that regulate cases in which fines are not imposed, although a violation has been made, as well as statute of limitations. Thus, contracting authorities acting in the capacity of legal entity are not sanctioned in cases when they can prove that all efforts needed have taken with a view to prevent violation of the Law.

Moreover, the Law requires that when setting the fine for the contracting authority acting in the capacity of legal entity due consideration should be given to the time when the violation was made, especially the manner in which it was committed and the consequences thereof.

As regards statute of limitations aimed to guarantee legal security, the Law stipulates that the contracting authority acting in the capacity of legal entity shall not be held responsible for a violation when the competent state office failed to institute relevant proceedings within a period of 5 years from the time it learned about the violation and no later than 10 years from the time the violation was committed, which is defined as the absolute statute of limitations.

Body competent to issue misdemeanour sanctions in first-instance procedures is the Bureau (Agency) for Supervision of Public Procurements, which is entrusted with broad competences. In addition to issuing sanctions and monitoring implementation thereof, this body is also competent to take measure aimed to secure legal protection, as well as supervise the overall public procurement process. Natural persons/entities that committed violations related to direct business activities are held responsible to the same degree as contracting authorities acting in the capacity of legal entity. Fines for violations made to LPP are collected by the Agency, while revenue collected on this basis is fed in the state budget.

The Law stipulates fines in the amount of up to 10,000,000 CZK (around 385,000 EUR) for violations made by economic operators.

Bulgaria

Relevant legislation on public procurements adopted in Bulgaria stipulates fines for violation of legal provisions. According to the Law on Public Procurement in Bulgaria, fines are anticipated for all actions taken during the procedure and for actions taken contrary to the legal requirements and obligations of contracting authorities, and serve the purpose of guaranteeing legality, efficiency and cost-effectiveness of public procurements. Bulgaria's LPP stipulates more sanctions compared to relevant laws adopted by other countries that recently joined the EU, and stipulates higher fines, except for Slovenia. Reasons for such actions should be sought in the country's effort to reduce corruption in public procurements, as duly noted by EU institutions, and compliance with the request to take efficient measures for fighting corruption and enforcing EU standards in public procurements.

Procedure on establishing violation to LPP and procedure on imposing relevant sanctions are initiated with the newly-stipulated obligation of employees at the Public Procurement Agency to submit a written deposition to the State Financial Inspectorate once they learned about the violation to LPP. This statement should be made within a period of 6 months from the day the relevant officer learned about the violation, but not later than three years after the violation was committed. Amount of fines is set by the Minister of Finance or a person he/she has authorized. Establishment of the violation, issuance of relevant sanctions/fines, submission of appeals against the decision, and enforcement of sanctions are pursued in compliance with the procedure stipulated by the Law on Administrative Offences and Sanctions.

According to the Law, the Commission for Protection of Competition is competent to protect competition in public procurements and to take adequate measures in cases when competition rules are violated. The Law obliges participants in public procurement procedures, state bodies and responsible officers to assist the Commission for Protection of Competition, and in cases of non-execution of its decisions or rules, the defaulting entity is subject to payment of the highest fine anticipated for natural persons, legal entities or self-employed persons in the amount of 5,000 – 100,000 BGN (2,500 – 50,000 EUR).

Decisions taken by the Commission for Protection of Competition for establishment of violations to LPP and setting relevant fines can be contested/appealed in front of the Supreme Administrative Court.

Enforceable decisions on sanctions/fines taken by the Commission for Protection of Competition are collected in compliance with the Law on Tax Insurance Procedure, while the Commission is obliged to notify the Public Procurement Agency of its decision within a period of 7 days from its adoption.

Fines in the amount of 2,000 – 10,000 BGN (1,000 – 5,000 EUR) are imposed to contracting authorities in cases when they failed to establish the procurement value for service contracts and design competitions, accompanied with fines in the amount of 200 – 1,000 BGN (100 to 500 EUR) for responsible persons or collective bodies tasked with implementation of public procurement implementation when they violated legal provisions from LPP in the course of the public procurement procedure. Fines in the same amount are imposed to contracting authorities that failed to take contract-awarding decisions or failed to comply with their law-stipulated requirements and obligations, accompanied with fines in the amount of 500 – 3,000 BGN (250 – 1,500 EUR) for the responsible person.

When contracting authorities defined technical specifications that are not conducive to equal treatment of all bidders and serve the purpose of favouring a certain bidder, they are fined in the amount of 1,000 – 3,000 BGN (500 to 1,500 EUR), accompanied with fines in the amount of 500 – 1,000 BGN (250 - 500 EUR) for the responsible person.

It should be noted that Bulgaria's LPP also includes fines (in the amount of 100 - 500 BGN or 50 - 150 EUR) for members of public procurement commission who decided on the selection of the most favourable bid, provided he/she approved presence of candidates or bidders outside the premises where the commission holds its meetings.

Fines in the amount of 5,000 – 20,000 BGN (2,500 – 10,000 EUR) are issued to contracting authorities that failed to sign procurement contract with the company whose bid was assessed as the most favourable one, while the responsible persons are fined in the amount of 1,000 – 3,000 BGN (500 to 1,500 EUR).

LPP anticipates higher fines in the amount of 10,000 – 50,000 BGN (5,000 – 25,000 EUR) for contracting authorities and additional fines in the amount of 1,000 – 5,000 BGN (500 to 2,500 EUR) for responsible persons in cases when they failed to sign procurement contract, although there are relevant bases for that or in cases when they amended already signed contracts.

Contracting authorities that failed to notify the EC about initiation of public procurement procedure whose value exceeds the amount stipulated by the Law are fined in the amount of 5,000 – 10,000 BGN (2,500 to 5,000 EUR), while responsible persons or collective bodies tasked to implement the public procurement are fined in the amount of 200 – 1,000 BGN (100 to 500 EUR).

Fines are also imposed when contracting authorities failed to notify the Commission for Protection of Competition in cases it they are legally obliged to do so and when they do not keep records on implemented public procurement procedures for a period of 4 years from the contract performance. In such cases contracting authorities are fined with 1,000 – 3,000 BGN (500 – 1,500 EUR), while responsible persons are fined with 200 – 1,000 BGN (100 to 500 EUR).

For the purpose of preventing abuse of public procurements, fines in the amount of 5,000 – 20,000 BGN (2,500 – 10,000 EUR) are imposed to contracting authorities when they, contrary to the Law, signed contracts by means of negotiation procedure without prior announcement of call for bids, while responsible persons are fined in the amount of 500 – 3,000 BGN (250 – 1,500 EUR).

Responsible persons tasked to implement public procurement procedures are fined with 500 – 1,000 BGN (250 - 500 EUR) in cases when they discontinued the procedure, although the relevant law-stipulated grounds were not fulfilled, whereas fines in the amount of 1,000 – 5,000 BGN (500 – 2,500 EUR) are stipulated for responsible persons in cases when they signed procurement contracts contrary to legal provisions contained in LPP. Fines in the same amount are issued for responsible persons who failed to supply information needed for the Registry of Public Procurements, as well as for responsible persons who failed to submit notifications within the law-stipulated deadline or any other information requested by the Executive Director of the Public Procurement Agency.

The Law stipulates notification-related obligations for contracting authorities in cases when they were informed by the European Commission about a violation made to the public procurement procedure. Non-compliance with this obligation implies misdemeanour sanctions for the contracting authority in question. Fines are stipulated for other misdemeanours, including non-submission of data, documents and reports to competent bodies as stipulated by LPP.

The legislator stipulated that offenders who have repeated the violations from penal provisions in effect shall be subject to payment of fines in double amount.

United Kingdom

UK Regulations on Public Procurements/Public Contracts do not contain specific penal provisions for violations made to legal obligations, but they stipulate stringent rules, criteria and procedures, and institute a control mechanism for public procurements, which significantly narrows the possibilities for abuses and malpractices, while participants in public procurements are required to strictly adhere to European Commission's standards and requirements defined in this field. In parallel to requirements and criteria that are binding for all EU Member-States, one must have in mind UK's long-standing tradition of respect for the law and ethical values upheld in a legal system that is both stable and well-developed. This limits the possibilities for administrative violations committed in public procurements that are liable to misdemeanour sanctions.

Moreover, one must have in mind that UK has instituted an efficient legal protection for public procurement applicants and bidders in cases of non-compliance with law-stipulated procedures, rules and obligations. Hence, bidders have two options in cases when law-stipulated procedure is violated: to initiate legal proceedings against contracting authorities for protection of their rights before the High Court of Justice in England and Wales or before the Court of Session in Scotland, or lodge a complaint before the European Commission requesting its intervention.

Republic of Macedonia

Macedonia is the only country in the region and beyond that has not stipulated misdemeanour sanctions as part of its Law on Public Procurement, despite numerous recorded violations to law-stipulated procedures, criteria and obligations committed by participants in public procurements, especially by contracting authorities. The Law does not contain a single anti-corruption provision or detailed provisions aimed to prevent possible conflict of interests among participants in public procurements, from members of public procurements commissions, responsible officers and other officers employed at contracting authorities and economic operators tasked with implementation of public procurements, to members of SCPA (except for the reference made to the Law on Prevention of Conflict of Interests, which contains general provisions and does not specify cases of conflict of interests in public procurements as stand-alone situations). Moreover, LPP does not include legal solutions that would enable control of overall public procurement process, as is the case with relevant legislation adopted in other countries.

It is believed that broadly-present breach of legal provisions and public procurement procedures is partially a result of absence of sanctions for these illegal practices that render the public procurement process non-competitive, non-transparent, inefficient and irrational. On this ground, incomprehensible is the refusal on the part of competent institutions to implement recommendations for introducing sanctions/penal provisions in LPP aimed to enhance responsibility of public procurement participants, especially among contracting authorities, and to guarantee adherent enforcement of the Law.