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

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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

- **Some institutions do not comply with their law-mandated obligation on consulting the companies from the relevant industry when drafting the technical specifications for public procurements whose value exceeds 130,000 EUR, i.e. to engage in so-called technical dialogue.**

Recommendation: In the light of enabling greater control over the use of technical dialogue, EPPS must create and maintain an archive with relevant data. At present, EPPS publishes only information on active calls for technical dialogue, but does not provide insight whether all procurements whose value exceeds 130,000 EUR have been preceded by timely announced and organized consultations with potential bidding companies.

- **Contrary to recommendations developed as part of the monitoring reports for public procurements, the institutions more frequently require the companies to demonstrate profitable operation in the last three years as precondition for participation in tender procedures. Such behaviour on the part of contracting authorities is contrary to the law provisions whereby eligibility criteria for bidding companies should be closely related and proportionate to the procurement subject and should not have a limiting effect on competition.**

Recommendation: Law on Public Procurements should introduce a possibility for appealing the terms and conditions defined in the tender documents immediately after the announcement of relevant call for bids. By doing so, the business sector will be stimulated to defend the rights it has been denied by means of tender documents that favour certain companies.

- **The issue of low competition in tender procedures gains in intensity and scope. As a result thereof, e-auctions cannot be organized at the final stage in the procurement procedure and increased is the number of tender procedures in which the contract is signed with the only bidding company.**

Recommendation: In order to address this problem and in addition to the commitment of the Bureau of Public Procurements, efforts are needed on the part of the business sector and the relevant business associations. In particular, they have to be more open in identifying the reasons thereof and proposing efficient measures to overcome them.

- **Institutions continue to use bid-assessment elements that do not guarantee selection of the most favourable bid. Performance/delivery deadlines are still used as bid elements subject to point-allocation, while the issue of inadequate assessment of the quality of bids is broadly present.**

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 bid-assessment and point-allocation elements for quality.

- **According to official data from EPPS, the number of tender annulments was reduced to 18% in the second quarter of the year. However, the monitoring period is very short and does not allow conclusions on the change of the general trend in relation to tender annulments that are considered one of the main characteristics of the public procurement system in the country for years back.**

Recommendation: Although the share of annulled procedures was decreased, having in mind the short period of time covered by this report, it yet remains to be determined whether this trend will continue in the future or it is merely a reflection of one-time events. This is further supported by the fact that monitoring findings do not correspond to the trend observed on the basis of data available in EPPS.

- **In the second quarter of 2013, a total of 335 contracts were signed by means of negotiation procedure without prior announcement of call for**

bids, whose total value amounts to 11.5 million EUR. The corresponding value of such contracts signed in the first half of 2013 amounts to 22.6 million EUR.

Recommendation: BPP should take adequate measures to reduce the use of this type of procurement procedures, having in mind that the increasing 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.

- **Almost half of contracting authorities (47.5%) from the monitoring sample did not publish their relevant tender documents in EPPS, and half of them imposed fees for issuance of tender documents in hardcopy.**

Recommendation: The contracting authorities should be legally obliged to publish their tender documents in electronic form.

- **Contrary to ever-increasing number of tender procedures, the number of appeals lodged by the companies continues to decrease. In the first half of 2013, the State Commission on Public Procurement Appeals was presented with a total of 291 appeals.**

Recommendation: Findings from this analysis should serve the competent authorities as a baseline to improve the state-of-affairs concerning the protection of rights enjoyed by participants in public procurement procedures.

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, 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 April – June 2013. In addition, the present report includes an analysis of appeals lodged in front of SCPPA in the period January – June 2013.

QUARTERLY PUBLIC PROCUREMENT MONITORING REPORT

- **Some institutions do not comply with their law-mandated obligation on consulting the companies from the relevant industry when drafting the technical specifications for public procurements whose value exceeds 130,000 EUR, i.e. to engage in so-called technical dialogue.**

In some tender procedures the companies are denied their law-guaranteed right to transparent and non-discriminatory engagement in drafting of technical specifications for tender procedures that are yet to be announced, by submitting comments. Both national and local institutions are inconsistent in complying with the obligation from the Law on Public Procurements (Article 43, paragraphs 2 and 3) whereby the companies should be informed, through EPPS, about technical specifications for tender procedures that are yet to be announced and should be entitled to contribute in the drafting process by submitting proposals, suggestions and comments. The Law stipulates that in cases of procurement procedures concerning goods and services whose value exceeds 130,000 EUR the contracting authorities are obliged to publish the draft technical specifications for the relevant procedure in EPPS at least 5 working days prior to the announcement of the relevant call for bids. Monitoring efforts revealed that some tender procedures that are mandated by law to organize a technical dialogue prior to the announcement of the call for bids did not comply with this obligation. Despite the fact that this law-stipulated obligation entered in effect as early as July 2012, some contracting authorities justified their non-compliance with LPP with the fact that they are unaware of such obligation, which was also characteristic for the economic operators, as they demonstrated low level of knowledge about this possibility.

As for tender procedures in which this obligation was duly complied with, monitoring findings indicate certain inconsistency, especially in terms of unclear instructions for the potential bidding companies as to the entity that should be addressed with their proposals and comments and whether this communication will be confined only to electronic channels or the contracting authority plans to organize a joint meeting with the potential bidding companies. Moreover, it should be noted that technical specifications that were published did not specify the designated e-mail address for

submission of proposals and comments, but the companies were instructed to address the contact person, without being given the identity and contact information for the person in question, however suggesting that these are the employees of relevant contracting authorities appointed as contact persons for tender-related issues. Be that as it may, such practices do not provide incentives for the companies to submit their proposals and comments.

The fact that the introduced mechanism for dialogue between the institutions and the relevant business sector (so-called technical dialogue) is not functioning is further supported by information that in the monitored procedures that implemented this technical dialogue literally no comment made by the potential bidding companies was accepted.

Recommendation: In the light of enabling greater control over the use of technical dialogue, EPPS must create and maintain an archive with relevant data. At present, EPPS publishes only information on active calls for technical dialogue, but does not provide insight whether all procurements whose value exceeds 130,000 EUR have been preceded by timely announced and organized consultations with potential bidding companies.

- **Contrary to recommendations developed as part of the monitoring reports for public procurements, the institutions more frequently require the companies to demonstrate profitable operation in the last three years as precondition for participation in tender procedures. Such behaviour on the part of contracting authorities is contrary to the law provisions whereby eligibility criteria for bidding companies should be closely related and proportionate to the procurement subject and should not have a limiting effect on competition.**

There are two types of eligibility criteria for participation in tender procedures: the first group concerns mandatory eligibility criteria, and the second group is optional. Thereby, without any exceptions therefrom, the institutions are obliged to request the companies to demonstrate their:

- *individual status* (in the last five years, the company was not issued an enforceable court judgement on the grounds of participation in criminal organization, corruption, embezzlement or money laundering; proof that the company has not initiated a bankruptcy or insolvency procedure; the company has settled all taxes, employment contributions and other public fees; the company has not been prohibited to perform its business activity) and
- *ability for performance of the business activity*, i.e. the company is registered for performance of the relevant business activity related to the procurement subject.

In practice, in addition to these documents, the institutions are entitled to make independent decisions whether they will request the potential bidders to provide proof of their:

- *technical and professional capacity* (for ex., equipment in their possession, reference lists, previously performed contracts, number of staff, expert staff, and the like), and
- *economic and financial ability* (total annual turnover and total turnover related to the procurement subject).

Actually, concerns are raised with the fact that there are no tender procedures whose value exceeds 20,000 EUR that did not include detailed requirements for the companies in order to demonstrate their technical and professional capacity and their economic and financial ability. In such cases, in addition to requirements related to total turnover in the previous years, number of staff, required equipment, etc., eligibility criteria for participation in tender procedures also include a requirement related to company's profit in the last three years.

Several tender procedures from the monitoring sample required the bidding companies to demonstrate positive financial balance and they concern:

- procurement of hotel and catering services for organization of a global conference: only one bid was submitted in the tender procedure and the contract was signed with the single bidder;

- procurement of water-purifying system with reverse osmosis/dialysis: one company participated in the tender procedure, but the bid was assessed as unacceptable and inadequate and the tender procedure was annulled;
- procurement of original compatible toners, cartridges, ink-jets, printer and fax machine ribbons: four companies participated in the tender procedure, three of which were disqualified from further bid-evaluation with the explanation that they did not fulfil the eligibility criteria and the contract was signed with the single eligible bidder, without organization of e-auction;
- procurement of nuclear-medical diagnostics equipment for brain- and other pathology, with adequate software: no bids were submitted and the tender procedure was annulled;
- procurement of services related to compilation, preparation and burning of a DVD edition with restored movies: only one bid was submitted, but its value was higher than the tender's estimated value; the tender procedure was annulled and followed by direct negotiations with the company without prior announcement of call for bids for contract-signing;
- procurement of insurance service for fire-fighting air tanker: two bids were submitted in the tender procedure, but one of the bidding companies did not fulfil the eligibility criteria for economic and financial ability (total annual turnover in the amount of 400 million MKD and positive financial balance) and submitted the bid in order to exercise the right to appeal. SCPPA annulled this tender procedure, accepting the appeal allegations that as part of its tender documents the contracting authority defined discriminatory terms and conditions and in that prevent greater competition among the companies;
- procurement of meat, meat products and similar: two bids were submitted, but the organized e-auction did not result in reduction of initially bided prices;
- procurement of ballet flooring services: only one bid was submitted, but in a value higher than the estimated value, after which the procedure was annulled and the contracting authority continued the procurement by means of negotiation procedure without prior announcement of call for bids in order to reduce the bid's value and sign the contract;
- procurement of conservation, restoration and reconstruction services for a round building: two bids were submitted, but one of the bidders did not fulfil

the eligibility criteria for economic and financial ability and the contract was signed with the single eligible bidder, without organization of e-auction;

- procurement, transport and installation of prison equipment: two bids were submitted, followed by organization of e-auction for selection of the most favourable bid.

In general, concerns related to frequent requirements for the companies to demonstrate positive financial balance in the previous years are primarily due to the fact that when drafting the eligibility criteria for participation in tender procedures, the institutions fail to comply with the underlying legal principles related to:

- the minimum requirements should be related and proportional to the procurement subject; and
- the minimum requirements should not have a limiting effect on the competition.

Low competition noted in these procedures from the monitoring sample where the companies were required to demonstrate positive financial balance provides sufficient proof that such eligibility requirements have detrimental effect on competition.

It should be noted that definition of discriminatory eligibility criteria that limit competition among the companies is prohibited under Article 144, paragraph 2 of the Law on Public Procurement, which stipulates that the contracting authority shall not request fulfilment of certain minimum requirements concerning the companies' economic and financial ability and technical and professional capacity that are disproportionate to the subject of the public procurement.

What additionally complicates the situation is the fact that in certain tender procedures the contracting authorities do not indicate that the companies that have not existed for more than three years should provide proof on their economic and financial status only for the operating years. This implies additional discrimination whereby the newly established or young companies are prevented to enter the public procurement market, irrespective of the quality of goods and services they offer.

Recommendation: Law on Public Procurement should introduce a possibility for appealing the terms and conditions defined in the tender documents immediately after the announcement of the relevant call for bids. By doing so, the business sector

will be stimulated to defend the rights it has been denied by means of tender documents that favour certain companies. The legal solution in effect whereby appeals related to tender documents can be lodged only after the public opening of bids is inadequate, because illogical is for a company to have to submit a bid in order to be able to exercise its right to appeal.

- **Institutions continue to use bid-assessment elements that do not guarantee selection of the most favourable bid. Performance/delivery deadlines are still used as bid elements subject to point-allocation, while the issue of inadequate assessment of the quality of bids is broadly present.**

The trend on using “lowest price” as the selection criterion for the most favourable bid is still dominant. However, even in cases where “economically most favourable bid” is used as the selection criterion, the contracting authorities select inadequate elements for quality assessment. Hence, in the procedure for procurement of original/compatible toners, cartridges, inkjets, printer and fax machine ribbons manufactured according to EU standards and other computer materials, the selection criterion was defined as “economically most favourable bid” and included the following bid-evaluation elements: price was assigned 60 points and quality (manufacturer) was assigned 40 points. The relevant tender documents indicated that the maximum number of points will be given to the bidder that offers the highest quality of goods, i.e. the bidder that offers original products, which will be assessed on the basis of the manufacturing entity and that other bids will be allocated proportionally less points. Moreover, the companies were required to present quality certificates issued by authorized quality control institution, statement by the manufacturer demonstrating the origin and quality of goods, as well as ISO 9001, ISO 14001 certificates on quality management system and DIN 33870 certificates on quality assurance system. Having in mind that three from the four bidders in this tender procedure were disqualified from further evaluation (did not fulfil the requirements defined in tender documents and technical specifications) unclear is the manner in which points were allocated. Namely, in order to secure relevant preconditions for objective bid-evaluation, the contracting authorities must provide

clear indication of the manner in which the 40 points for quality will be allocated: how many points will be given for original goods and how many points will be given for compatible toners, cartridges, etc.

Disputable quality-assessment provisions were noted in the tender procedure for ballet flooring services, where it was indicated that the quality element (assigned 70 points), contrary to the price element (assigned 30 points), will be assessed according to product's technical and functional features, on the basis of catalogues and other materials provided, as follows:

- products that fully correspond to the description provided in the technical specifications will be assessed as most functional and will be given 70 points;
- products that mostly (for large part) correspond to the description provided in the technical specifications will be given 50 points; and
- products that insignificantly (for small part) correspond to the description provided in the technical specifications will be given 30 points.

Such bid-assessment and point-allocation is disputable because according to the Law, products or services that do not correspond to with the technical specification are not evaluated and eliminated as unacceptable bids. This position was confirmed in the decisions taken by the State Commission on Public Procurement Appeals.

Although instructed otherwise, some contracting authorities continue to assess the quality of bids on the basis of reference lists, in that indicating that the highest number of points will be given to the bidder with the most extensive reference list.

This approach is unacceptable, both in terms of LPP's adherent application and according to the official interpretation of EU Directives (which were used as baseline for drafting the Macedonian Law on Public Procurement) adopted by the European Court of Justice. Article 153, paragraph 1 of the Law on Public Procurement is decisive and stipulates that lists of previous contract performance by bidders or participants in tender procedures can be used as proof of their technical and professional capacity. In its judgement, answering the question that is understood as request for preliminary ruling whether Directive 93/96 precludes the contracting authority, in a public procurement procedure, from taking into account the number of

references as contract-awarding criterion, the European Court of Justice is straightforward that such practices are contrary to public supply rules. In the Court's opinion: *"a simple list of references which contains only the names and the number of the suppliers' previous customers, without other details relating to the deliveries effected to those customers... cannot in any event constitute an award criterion"* because it does not provide any information to identify the economically most favourable bid.

Concerns are raised also with the procurement procedure that used "economically most favourable bid" as the selection criterion, with the following elements: 70 points for the price element and, depending on individual procurement needs, 30 points will be additionally defined in the invitation for bids. It should be noted that this procurement was implemented as procedure for signing framework agreements, where in the first stage the contracting authority selects the companies that fulfil the eligibility criteria. Be that as it may, the approach applied in terms of bid-evaluation and point-allocation is contrary to the Law as the potential bidders must know the bid-evaluation requirements and criteria in advance.

This monitoring sample also included institutions that use performance/delivery deadlines as bid-assessment criteria. This bid-assessment element is prone to malpractices and manipulation for the purpose of favouring a particular bidding company. According to LPP, as part of their relevant tender documents the contracting authorities can indicate the required performance/delivery deadline instead of using it as bid-assessment element.

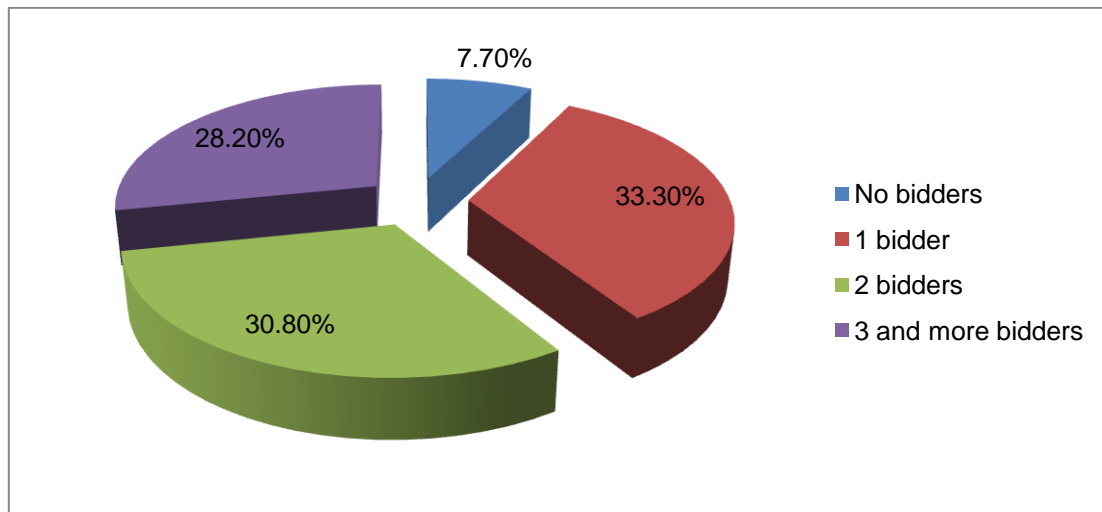
Recommendation: BPP should develop a manual on good practices that would include examples from best practices worldwide and positive examples from the domestic public procurement system, especially in relation to defining adequate bid-assessment and point-allocation elements for quality.

- **The issue of low competition in tender procedures gains in intensity and scope. As a result thereof, e-auctions cannot be organized as the final stage in the procurement procedure and increased is the number of**

tender procedures in which the contract is signed with the only bidding company.

As shown on the Chart below, no bids were submitted in 7.70% of monitored procedures, only one company submitted a bid in 33.30% of them and two bids were submitted in 30.80% of them. Solid level of competition with three and more bidders was noted in only 28.20% of monitored procedures, contrary to the first quarter when this share accounted for 49.00%.

**Overview of competition in tender procedures from the monitoring sample
(April-June 2013)**



Reasons indicated for low competition in tender procedures, *inter alia*, should be sought in the unattainable eligibility criteria defined. Therefore, worrying is the practice pursued by the commissions on public procurements to eliminate bidding companies on the grounds of failure to fulfil eligibility criteria for participation in tender procedures. For example, four of five bidders in the procedure for procurement of general and personal hygiene supplies for a public institution were disqualified from the bid-evaluation process and the contract was signed with the only company that fulfilled the eligibility requirements defined in the tender documents, without organizing an e-auction. However, in the rationale provided for the companies' elimination, the commission on public procurements indicated that two companies were eliminated because they submitted bids only for groups of products, although the procurement was indivisible; one company did not present

documents in support of its status, economic and financial ability, and technical capacity, while the fourth company, after being requested to explain the low price bided, indicated that it had made an oversight by indicating price per item rather than per packaging, as required in the tender specifications. Insight performed in the relevant tender documents raised concerns that specifications contained therein more frequently required the bidding companies to indicate a price per item (for example: toilet cleaning and disinfection liquids (0.5 litres); fabric softener (1 litre); laundry whitener (1 litre); plastic buckets holding 10 kg; laundry baskets holding 10 kg; PVC litter bins; liquid hand-wash refill (1 litre); adhesive bandage, etc.), and not per packaging box, which would be impossible because different manufacturers offer products in different packaging boxes. Packaging boxes were indicated as price unit only for litter bags, deep freezer bags and adhesive bandages, which are traditionally sold in packages and not per piece. However, it should be stressed that participants in the tender procedure did not appeal the final decision on contract-awarding.

Elimination of three of four bidding companies was noted in the procurement of original/compatible toners, cartridges, inkjets, printer and fax machine ribbons. The decision taken by the contracting authority assessed that only one company has submitted an acceptable bid, meaning that it fulfilled the requirements defined in tender documents. Understandably, on the account of receiving only one acceptable bid, the contracting authority did not organize an e-auction and the contract was signed without a prior downward bidding as initially anticipated. In this tender procedure, one of the bidding companies appealed the decision taken by the commission on public procurements wherein it eliminated the company from the bid-assessment process on the grounds that evidence presented in support of products' compliance with European quality standards were unacceptable. State Commission on Public Procurement Appeals rejected this appeal.

Special attention should be paid to the tender procedure for conservation, restoration and reconstruction works needed on circular building where, in addition to eligibility requirements related to total annual turnover of more than 250 million MKD and positive financial balance in the last three years, bidding companies were required to submit evidence that they dispose with at least 10 million MKD on their bank account for continuous period of 10 working days. One of the two bidders in this tender procedure was eliminated because the relevant bank statement did not offer

evidence in support of the last requirement: 10 million MKD for period of 10 working days. The contract was signed with the only acceptable bidder, without organization of e-auction.

As seen in the examples above, low competition and additional elimination of bidding companies have negative effects on compliance with the legal obligation for organization of e-auctions. E-auctions were planned in all tender procedures from the monitoring sample, but were organized in only 55% of them. Share of tender procedures without previous organization of e-auctions (45%) is significantly higher compared to the previous quarter when downward bidding was not scheduled and organized in 38% of tender procedures from the monitoring sample.

Recommendation: In order to address this problem and in addition to the commitment of the Bureau of Public Procurements, efforts are needed on the part of the business sector and the relevant business associations. In particular, they have to be more open in identifying the reasons thereof and proposing efficient measures to overcome them.

- **According to official data from EPPS, the number of tender annulments was reduced to 18% in the second quarter of the year. However, the monitoring period is very short and does not allow conclusions on the change of the general trend in relation to tender annulments that are considered one of the main characteristics of the public procurement system in the country for years back.**

In the second quarter of 2013, a total of 979 tender procedures were annulled, but considering the high number of tenders announced in the same period, it seems that tender annulments have been significantly reduced and account for 18%.

However, contrary to reduced number of tender annulments in general, the number of annulment decisions taken in large-scale tender procedures has increased. According to data from EPPS for the period April-June 2013, the share of annulled procurements in the value of up to 5,000 EUR accounts for 13.7% (419 from the total of 3,059 announced procedures); the share of annulled procurements in the value from 5,000 to 20,000 EUR accounts for 19.26% (239 from the total of 1,241 announced procedures); and the share of annulled procurements in the value of

more than 20,000 EUR for goods and services and in the value of more than 50,000 for construction works accounts for 28.02% (299 from the total of 1,067 announced procedures).

Comparison of quarterly figures shows that the share of annulled procedure in this quarter (18%) was significantly decreased by 6.6 percentile points compared to the same period last year.

Trend in tender annulments, per quarter

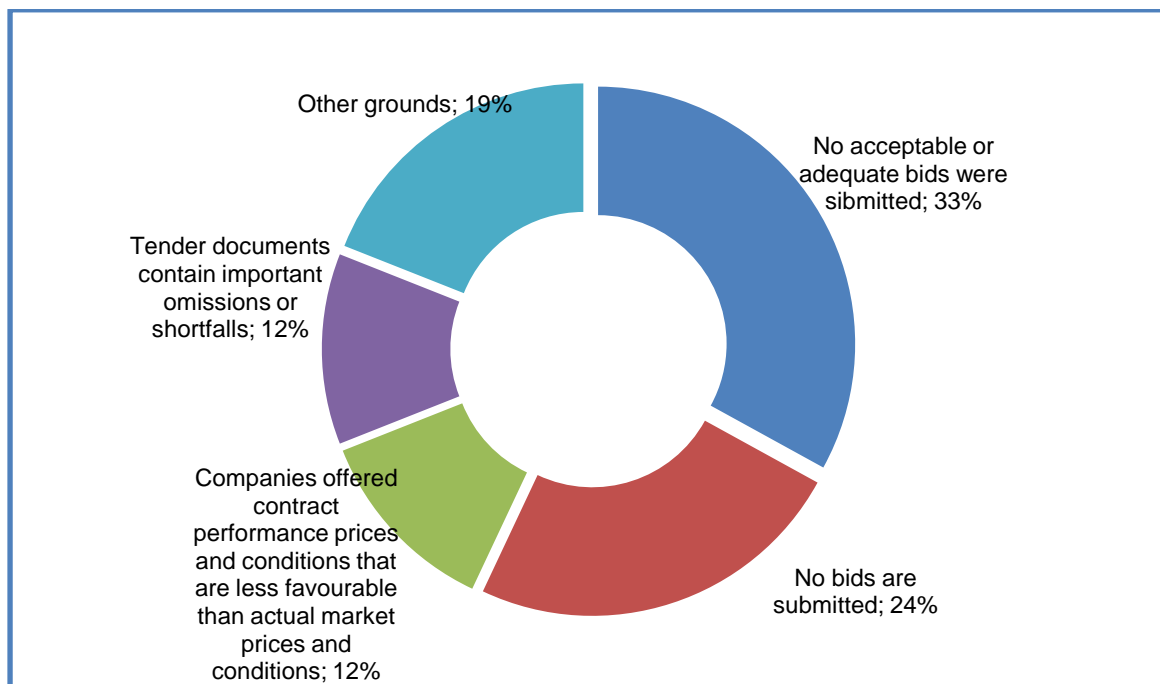
Period	Number of announced procedures	Number of annulment decisions	Share of annulled procedures
April – June 2011	1,875	429	22.9%
April – June 2012	2,225	552	24.8%
April – June 2013	5,385	979	18.2%

Most frequently indicated reason for tender annulments, both on the basis of monitoring findings and EPPS data (33%), is the fact that bidding companies have not fulfilled the eligibility criteria or their bids exceed the public procurement's estimated value. According to the monitoring findings, in cases when the bid's value exceeds the procurement's estimated value, once they have annulled the tender procedure, contracting authorities often implement negotiation procedures without prior announcement of call for bids. In such cases, the goal of the procurement procedure applied is to reach an agreement on price reduction with the bidding company so that the contract's total amount corresponds to the procurement's estimated value.

Second most frequently indicated reason for tender annulment implies that the contracting authority did not receive a single bid (24%), followed by cases when the bidding companies offered contract performance prices and conditions that are less favourable compared to actual market prices and conditions (12%) and when the contracting authorities have assessed that the tender documents contain significant omissions and shortfalls (12%). Other reasons indicated include cases when the

contracting authorities were presented with acceptable, but incomparable bids; changes to the contracting authority's budget that are beyond its control and objective circumstances that have resulted in changed procurement needs, etc.

Reasons indicated for tender annulments in the second quarter of 2013



The monitoring sample included tenders annulled on the grounds of no bids submitted or only one acceptable bid that did not enable organization of e-auctions, due to which the annulled procedures were followed up by direct negotiation procedure without prior announcement of call for bids, usually organized with the single bidding company, in an attempt to agree price reduction that corresponds to the procurement's estimated value. Undoubtedly, such practices refer to the fact that the public procurement system is flawed: on one side, the companies initially bid higher prices in anticipation of the downward bidding and, on the other side, some contracting authorities are unrealistic and do not make due account of market developments in their public procurement estimations.

As shown in the Table below, on semi-annual level, the share of annulled from total procedures announced accounts for 21.6% and marks a decrease by 2.7 percentile points compared to last year's figure.

Trend on procedure annulments, on semi-annual level

Period	Number of announced procedures	Number of annulment decisions	Share of annulled procedures
January – June 2011	3,978	849	21.3%
January – June 2012	4,176	1,015	24.3%
January – June 2013	9,046	1,951	21.6%

Recommendation: Although the share of annulled procedures was decreased, having in mind the short period of time covered by this report, it yet remains to be determined whether this trend will continue in the future or it is merely a reflection of one-time events. This is further supported by the fact that monitoring findings do not correspond to the trend observed on the basis of data available in EPPS.

- **In the second quarter of 2013, a total of 335 contracts were signed by means of negotiation procedure without prior announcement of call for bids, whose total value amounts to 11.5 million EUR. The corresponding value of such contracts signed in the first half of 2013 amounts to 22.6 million EUR.**

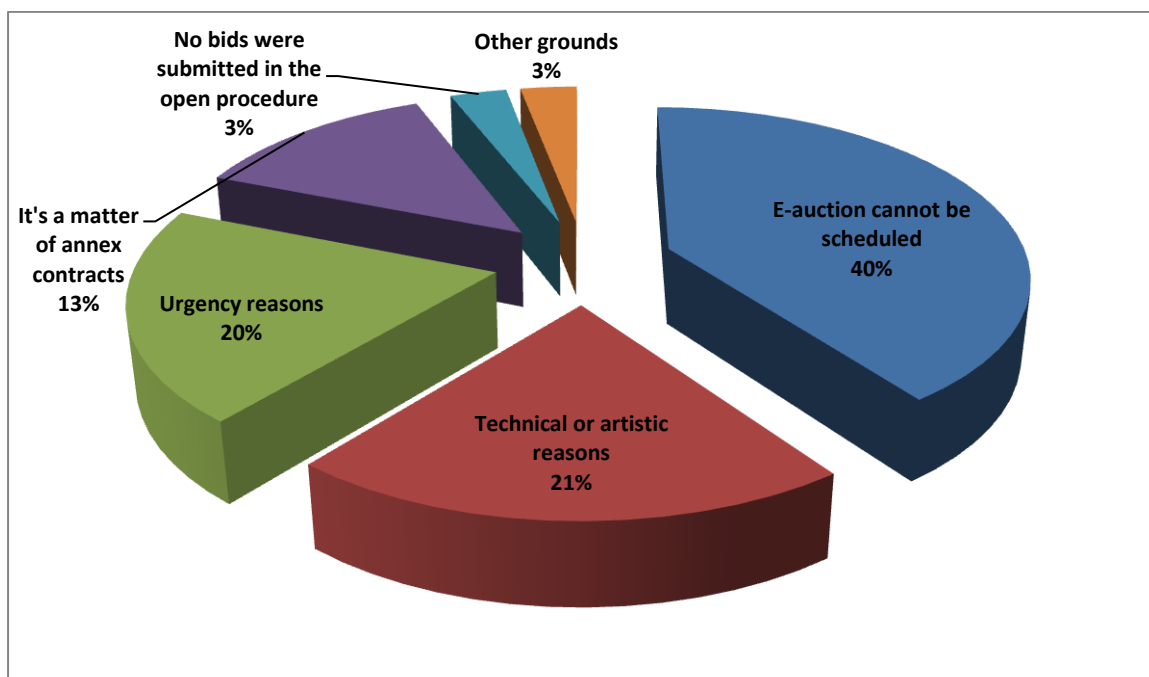
Total value of contracts signed by means of negotiation procedure without prior announcement of call for bids is increasing. Value of such contracts signed in the second quarter of 2013 amounts to 11.5 million EUR and is almost double in amount compared to the same period last year.

Overview of contracts signed by means of negotiation procedure without prior announcement of call for bids

Period	Value of contracts (in million EUR)	Change
April – June 2011	12.3	+101.6%
April - June 2012	5.8	-52.8%
April – June 2013	11.5	+98.3%

As a result of previously indicated problems, primarily those related to low competition in public procurements, the contracts signed by means of negotiation procedure without prior announcement of call for bids usually follow a previously organized open procedure with one bidder and no possibility to organize an e-auction. Therefore, as high as 40% of these contracts (accounting for 4.6 million EUR) concern procurements whose open procedure was unsuccessful and followed up by negotiation procedure without prior announcement of call for bids.

Overview of reasons indicated for contracts signed by means of negotiation procedure without prior announcement of call for bids



As shown on the Chart, the second most frequently indicated reason for organization of negotiation procedure for contract awarding is urgency, as indicated for 69 contracts signed, in total value of 2.3 million EUR. Around 21% of contracts signed under procedures without prior announcement of call for bids (accounting for 2.4 million EUR) were explained with technical or artistic reasons, i.e. reasons concerning protection of exclusive rights (patents and the like), implying that the contract can be performed only by a particular economic operator. In the second quarter of 2013, a total of 26 annex contracts were signed, in total value of 1.5 million EUR.

On semi-annual level, a total of 22.6 million EUR were contracted by means of negotiation procedure without prior announcement of call for bids and indicate an increase by 27.8% compared to the last year's figure.

**Total amount of funds contracted by means of negotiation procedure
without prior announcement of call for bids**

Period	Value of contracts (in million EUR)	Change
January – June 2011	21.7	+115.0%
January – June 2012	17.7	-18.2%
January – June 2013	22.6	+27.8%

Recommendation: BPP should take adequate measures to reduce the use of this type of procurement procedures, having in mind that the increasing 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.

- **Almost half of contracting authorities (47.5%) from the monitoring sample did not publish their relevant tender documents in EPPS, and half of them imposed fees for issuance of tender documents in hardcopy.**

Some contracting authorities continue to refrain from using the possibility offered by EPPS conducive to greater transparency and efficiency of the public procurement system. 47.5% of contracting authorities in the monitoring sample did not publish their tender documents in electronic form. In that, half of them imposed fees for issuance of tender documents in hardcopy that range from 500 to 1,500 MKD. Average fee for tender documents calculated for the monitoring sample amounts to 840 MKD.

Such behaviour on the part of contracting authorities (non-publication of tender documents in EPPS and imposing fees for tender documents) is absolutely contrary to the spirit of all changes made to LPP. This raises major concerns in cases of small procurements, where the deadline for bid submission is stipulated as five days from the call's announcement. Short deadlines (which also calculate non-working days) cause problems for potential bidders, knowing that they need to visit the institution in order to obtain the tender documents. At the same time, they prevent greater competition because sometimes the companies have to travel hundreds of kilometres to obtain insight in tender documents and assess whether they can participate in the tender procedure. Ultimately, this increases the cost of public procurements because the companies have already paid their registration fee for EPPS and it would be logical for them to benefit from the advantages offered by the electronic system.

Recommendation: Without any exception, the contracting authorities should publish the complete tender documents as early as the call's announcement, thereby relieving the companies of additional financial and administrative costs. The contracting authorities should be legally obliged to publish their tender documents in electronic form, which would also imply financial compensation for the EPPS registration fee paid by the companies.

- **Disrespectful of the public interest, some contracting authorities continue to avoid the legal possibility whereby they can request the companies to demonstrate serious intent for contract performance by means of declaration, instead of bank guarantees.**

As high as 40% of monitored tender procedures required the companies to present a bank guarantee for their bids and set the amount thereof at 3% of the bid's value. Unclear is the institutions' need to increase companies' administrative and financial burden for participation in tender procedures, especially having in mind that low competition has become a chronic problem. In that, it should be noted that consequences created by company's default on the declaration of serious intent, which LPP offers as alternative to bank guarantees, have the same weight and in both cases withdrawal from contract performance results in issuance of negative references for the companies and prohibition for tender participation in duration of one to five years.

As high as 60 of tender procedures from the monitoring sample required the companies to deposit bank guarantees for quality contract performance. Moreover, dilemmas are raised whether these bank guarantees provide actual protection or this function is already assumed by the recently introduced negative references.

Recommendation: Considering the already high administrative and financial burdens for participants in public procurement procedures, the possibility to request bank guarantees for bid submission should be revoked. As for bank guarantees on quality contract performance, a unified position needs to be taken whether and in what areas will this possibility be used, in order to avoid individual and discretionary decisions by the contracting authorities.

- **14 negative references were issued in this monitoring period, whereby 12 new companies were black listed and prohibited to participate in public procurements.**

In the period April-June 2013, by means of 14 negative references, a total of 12 companies were prohibited to participate in public procurement procedures in duration of one year, while another two companies – considering the fact that they

had been issued negative references in the past - had their prohibition period extended by two and five years, respectively.

Negative references are mainly issued due to companies' refusal to sign the procurement contract, although their bid was selected as the most favourable one and in cases when their bank guarantees on quality contract performance were activated due to default.

Recommendation: BPP should make an analysis whether the rules that govern negative references are adherently applied in terms of their issuance and in terms of risks associated with contracting authorities that consciously exculpate certain companies in order to avoid them being "black listed".

ANALYSIS OF APPEALS LODGED IN FRONT OF THE STATE COMMISSION ON PUBLIC PROCUREMENT APPEALS IN THE PERIOD JANUARY-JUNE 2013

- **Contrary to ever-increasing number of tender procedures, the number of appeals lodged by the companies continues to decrease. In the first half of 2013, the State Commission on Public Procurement Appeals was presented with a total of 281 appeals.**

Significant increase in the number of announced tender procedures (from 4,175 in the first half of 2012 to as high as 9,046 tender procedures for the same period in 2013) was not mirrored in the number of appeals lodged in front of SCPPA. In the period January-June 2013, a total of 291 appeals were lodged, compared to 338 appeals recorded in the first half of 2012 and 502 appeals recorded in the first half of 2011.

As regards the structure of decisions taken by SCPPA, most numerous are decisions on rejecting appeals, i.e. they account for 41.24% of all SCPPA decisions. In the first half of 2013, the share of appeals approved accounts for 29.55%. In that, SCPPA has taken a total of 86 decisions on approving appeals, 46 of which concern tender annulment and 40 decisions were taken to revoke the contracting authority's selection decision and return the procedure for re-evaluation of bids. In the first half of 2013, 54 appeals lodged by the companies (18.56%) were denied on the grounds of non-compliance with law-stipulated deadlines or failure to settle fees for initiation of appeal procedures.

Structure of SCPPA decisions, January-June 2013

Type of decision	Number of appeals	%
Rejecting an appeal	120	41.24%
Approving an appeal	86	29.55%
Denying an appeal	54	18.56%
Withdrawing an appeal (procedure is cancelled)	18	6.18%

Appeals approved by the contracting authority (procedure is discontinued)	13	4.47%
Total	291	100

Comparison of these findings against SCPPA's past performance results in the conclusion that there are no significant deviations, except for the increased number of rejected versus approved appeals.

Comparison of SCPPA decisions, per type

Type of decision	January-June 2011	January-June 2012	January-June 2013
Rejected appeals	44.62%	36.98%	41.24%
Approved appeals	21.71%	30.77%	29.55%
Denied appeals	17.93%	19.53%	18.56%
Cancelled/discontinued appeal	15.74%	12.72%	10.65%
Total	100%	100%	100%

In-depth analysis of appeals lodged and decisions taken by the SCPPA shows that dominant are appeals lodged by economic operators whose bids have been assessed as unacceptable, primarily due to non-fulfilment of eligibility criteria for participation in tender procedures. As part of their appeals, the bidding companies claim that the contracting authorities are in breach of the law by eliminating their bids from further evaluation. Notably, in several cases appeals were lodged when the companies were denied their right to demonstrate professional and technical capacity by means of previous performance (reference lists) enlisted as support from another company (joint venture or subcontractor). In this regard, SCPPA has assumed a firm position that another legal entity's support (by means of subcontract) cannot include reference lists and previous contract performance. According to SCPPA, the purpose served by another legal entity's support is provision of relevant technical and professional resources related to 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 provides the conclusion that in matters related to assessment of companies' eligibility for participation in tender procedures SCPPA makes clear distinction between past experience and future capacity for contract performance. However, by doing so, the Commission acts contrary to its decision wherein it allowed the bidders to demonstrate economic and financial ability (total annual turnover in the last several years) by joint ventures.

Understandingly, this creates confusion about the bidding companies' right to demonstrate capacity for participation in tender procedures by another legal entity's support. All these result in the need for development and publication of manuals for participants in tender procedures, which should include straightforward and precise guidelines on legally acceptable forms of joint ventures and referrals to support by another legal entity.

As shown in the structure of decisions taken by SCPPA, 18.56% of appeals lodged by companies were denied. In that, analysis of these decisions shows that major share of appeals were denied as inadmissible because they have been prematurely lodged. Frequently, these appeals are submitted by bidding companies that have objections about the tender documents and lodge an appeal immediately after having performed insight therein. As illogical as it may seem, Article 216, paragraph 2 of the LPP stipulates that economic operators that are dissatisfied with the tender documents can lodge appeals within eight days (in cases of open procedures) and within 3 days (in cases of bid-collection procedures) from the public opening of bids.

Actually, appeals are lodged prematurely because the economic operators rely on the logic that they are entitled to appeal the tender documents after the call's announcement and after they have obtained copy of tender documents. However, pursuant to LPP, should the potential bidders wish to object certain requirements defined in the tender documents (eligibility criteria for tender participation, selection criteria, tender specifications, etc.), they can lodge an appeal in front of SCPPA within 8 or 3 days respectively from the public opening of bids. Most certainly, this creates confusion and complicates the entire process and prevents potential bidders to react from the beginning, i.e. from the tender's announcement. In that, it should be

noted that appeals mainly concern favouring tender documents or specifications, discriminating eligibility criteria or eligibility criteria that prevent fair competition, remarks about assessment criteria for selection of the most favourable bid, information that tender documents contain significant shortcomings that are in collision with LPP, etc. Given the high number of appeals rejected by SCPPA as inadmissible on the grounds of being prematurely lodged, additional efforts are needed to educate the companies about their rights to appeal. At the same time, requests put forward by the business sector must be duly addressed, in particular by amending the Law on Public Procurement with a view to enable economic operators to lodge appeals related to tender documents immediately after the call's announcement.

Moreover, economic operators' remarks about the tender documents- usually concerning high and disproportional eligibility criteria defined by the contracting authorities - should be distinguished from remarks related to the eligibility assessment process, i.e. verification of documents submitted as eligibility proof. In the first case, the relevant deadline for appeal starts from the public opening of bids, while in the second case it starts after the economic operator has been presented with the contracting authority's selection decision. It had been noted that some economic operators do not differentiate between these two appeals.

At the same time, having in mind the short deadlines of 8 and 3 days respectively, cases were noted where the economic operators fail to comply with them, especially the deadline defined in bid-collection procedures. On this account, it would be desirable to reconsider the relevant experiences from other European countries related to unified deadlines for appeals, irrespective of the type of procurement procedures in question. Actually, the issues appealed are identical and do not differ depending on the type of procurement procedures (open or bid-collection).

Monitoring activities identified a high number of appeals lodged without the relevant payment of appeal procedure fees. This raises major concerns about the economic operators' knowledge of the Law on Public Procurement. Namely, Article 229, paragraph 1 of the LPP stipulates that when motioning an appeal in front of SCPPA, in addition to administrative fees, the applicant shall also pay fee for initiation of appeal procedure in an amount proportionate to the procurement's value: 100 EUR

in MKD counter-value for tender procedures in the value of up to 20,000 EUR; 200 EUR in MKD counter-value for tender procedures in the value of 20,000 to 100,000 EUR; 300 EUR in MKD counter-value for tender procedures in the value of 100,000 to 200,000 EUR and 400 EUR in MKD counter-value for tender procedures whose value exceeds 200,000 EUR.

As regards other SCPPA decisions taken in the reporting period, it should be stressed that SCPPA annulled procurement procedures in which the quality management standards were used for bid-evaluation and ranking. According to LPP, quality management standards cannot be used as bid-evaluation or point-allocation elements, but as eligibility criteria for companies, in addition to their status, registered business activity, economic and financial ability and technical and professional capacity. Quality management standards are designed as specific eligibility criteria, but not as bid-assessment elements that are assigned certain number of ranking points.

By means of its decisions, SCPPA confirmed the position that contracting authorities are not allowed to present inconsistent data about any parameter of the public procurement in the call for bids and the relevant tender documents. According to SCPPA, the contracting authorities are fully responsible to correct the errors made in calls for bids and tender documents and shall bear the consequences thereof.

On the basis of appeals lodged by economic operators, obvious is the different approach on the part of contracting authorities in enforcing Article 140 paragraph 3 of the LPP which stipulates that when assessing the company's eligibility and in the bid-evaluation process, commissions on public procurements shall be allowed to request the bidding companies to provide clarification or to complement their documents, provided it is a matter of insignificant deviation from the requirements. In reality, some contracting authorities disqualify a number of bidders from further evaluation on the grounds of, for example, failing to submit the statement of serious intent in original, reference lists are missing information about the contract's value or year of performance, missing documents on the legal entity's status, etc. On the other hand, monitoring activities identified cases in which the commissions on public procurements allow the economic operators to complement or complete the bid (for example: the company indicated price per item, but forgot to indicate the bid's total

value). It seems that these examples should be used as positive or desirable practices, i.e. in cases when economic operators fail to include certain documents that can be considered minor administrative oversight, the contracting authorities should act in compliance with Article 140 paragraph 3 of the LPP and ask the companies to complement their documents. Only in this way the contracting authorities will truly exercise the overall goal of public procurements as mechanisms for selection of the most favourable bid and not as tools whereby administrative oversights are abused for the purpose of eliminating the competition.