



Quarterly report on the results from the monitoring of the public procurements process in the Republic of Macedonia (on a central level)

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Key notes

High percentage of annulled procedures for public procurements. 15% of the public procurements procedures that were a subject of the monitoring were annulled by decision of the contracting authorities. This high percentage of annulments is worrying if we take into consideration that it can serve as a legally justified argument for implementing the negotiated procedure without publishing a notice.

The broad privileges of the contracting authorities in determining the criteria for electing the best bid creates a possibility for subjectivity and abuse. In the findings from the monitoring a risk is confirmed - that the contacting authorities, through defining the criteria for electing the most favorable bid, would favor a certain firm, thus giving it an advantage by means of higher ranking of the price or the quality.

Postponing of the arrival at a decision for electing the most favorable bid up to 100 days. In 17.5% of the analyzed public procurements procedures, the decision on electing the best bid has not been reached even after 100 days have elapsed since the day of opening the bids. The contracting authorities themselves create an ambience of stalling with the public procurements decisions.

The tender documentation is sometimes used as a means of manipulation in the public procurements procedures. A consequence of a badly or tendentiously defined tender documentation is a premature cancellation of the economic operators from participating in the procedures, which results in reducing the competition and making the public procurements more expensive.

An exceptionally small number of procedures are conducted through the Electronic system for public procurements (e – auction). The share of the e – auctions in the total number of procedures for which a tender was published in the period January – March is minimal (0.65%), which brings into question the ability and the willingness of the contracting authorities to fulfill the legal obligation to procure 30% of the estimated value of the public procurements in 2010 via e – auction.

The high bank guarantees are problematic for the firms. In the monitoring sample of public procurements a bank guarantee was required in 62.5% of the procedures and in most cases the maximum sum of 3% of the value of the procurement was requested as a guarantee.

The participants in the tender do not receive an explanation for the reached decisions regarding the election of the best bid. No progress has been made in terms of the contents of the announcements about the best bid election. Where no transparency and accountability exists, a room for doubt and corruption charges is opened.

Stalling with the implementation of the awarded contracts on public procurements and delaying the processing of payments. In this manner, firms are directly affected, i.e. their solvency is reduced and they are disabled from planning and organizing the work process well.

The economic operators evaluate the conducting of the public procurements procedures with an average grade of 2.93. This grade was obtained from the offered scale of rating from 1 (the worst) to 5 (the best).

The State Appeals Commission for Public Procurements reached a small number of decisions whereby the primary decision and procedure of the contractor has been cancelled. The Commission most frequently rejects the appeals as unfounded, followed by a very brief and insufficient explanation.

The economic operators lodge a small number of appeals. As reasons for not lodging an appeal even in cases when they do have objections regarding the legality of the procedure, the firms state the high administrative expenses and the lack of trust they have in those who decide in the State Appeals Commission.

There is an increase in the number and value of the concluded contracts through negotiated procedures without publishing a notice in 2008, compared to 2007. Through a nontransparent procedure – negotiating without previously publishing a

notice, in 2008, 1,028 contracts were concluded, worth 1.5 billion denars (more than 24 million euros), which is 73%, i.e. 10 million euros more than in 2007.

Goals and methodology

The Center for Civil Communications from Skopje in the period from November 2008 to November 2009 has been analyzing the implementation of the public procurements process in the Republic of Macedonia, which is regulated with the Public Procurements Law. The purpose of the analysis is to assess how the public procurements process is conducted in the Republic of Macedonia in light of the new Public Procurements Law and whether and to what extent the basic principles of public procurements function: transparency, competitiveness, equal treatment of the economic operators, nondiscrimination, legality, economic, efficient, effective, and rational spending of the Budget, commitment to obtaining the best bid under most favorable conditions, as well as accountability for the money spent on procurements.

The analysis of the public procurements process in the Republic of Macedonia has been conducted on the basis of monitoring of a selected sample of procedures; analysis of the appealing process; a series of in – depth interviews with economic operators and an analysis of the summed data from the Public Procurements Bureau.

The selected sample which was the subject of monitoring is consisted of 40 public procurement procedures of contracting authorities on central level, for whose conducting contract notices were published in the Official Gazette in the period January – March 2009. The monitoring began with the public contract notices, followed by public opening of the bids, and by collecting data for the procedure through structured questionnaires which were administered both to the contracting authorities and the economic operators.

The analysis of the appeal procedure has been done on the basis of decisions reached by the State Appeals Commission for Public Procurements in the period January – March 2009, which are published on the web page of the Public Procurements Bureau.

For the purposes of this analysis the findings from the in – depth interviews conducted with 43 economic operators during April and May, 2009 were used. The biggest number of the interviewed economic operators have great experience regarding

participation on tenders, i.e. participate at least 2 – 3 times a month in the public procurements procedures by submitting bids. This is to suggest that the obtained responses, remarks, and suggestions need to be seriously taken into consideration, since they have been obtained from experienced firms which are knowledgeable and experienced in the problem area and whose everyday work is determined by the correct implementation of procedures.

This quarterly report also contains an analysis of the public procurements process for the entire 2008, based on the data from the last report of the Public Procurements Bureau, published in June 2009.

The report was made in cooperation with and the financial support of FOSIM.

Report on the quarterly monitoring of the public procurements procedures

High percentage of annulled public procurements procedures. Up to 15% of the public procurement procedures that were a subject of the monitoring were annulled by the decision of the contracting authorities. In the annulment decisions the state institutions concluded that none of the submitted bids was acceptable despite the fact that, for the greater part, the number of participants in these procedures varied from 3 to 7 economic operators, i.e. firms. In contrast, in 12.5% of the procedures a bid was obtained from only one firm and a public procurement contract was signed with that firm, although it concerned goods and services for which more economic operators could have submitted bids. Thus, it seems that the contracting authorities decide more easily which is the most favorable bid when they have only one bid, rather than when they have bids from more economic operators. These findings raise a doubt with the economic operators that in certain cases the tenders are cancelled because certain calculations of the contracting authorities did not come to fruition.

This high percentage of annulments is worrying if we take into consideration that it can serve as a legally justified argument for implementing the practice of negotiating without publishing a notice. In this case, the contracting authority may have at his disposal two legally given alternatives for concluding a direct contract. The first alternative is that no acceptable bid was received in the open procedure and the second concerns a situation in which the tender is cancelled and urgency is used as a justification for concluding a direct contract with a firm that the contracting authority will elect himself without observing the principle of openness and transparency as a guarantee for rational spending of the public money.

Unless ulterior motives exist behind the cancellation of the procedure, this practice points to incompetence in preparing the tenders and results in untimely procurement and a waste of time, money, and trust of the economic operators.

Recommendation: *Narrowing the broad legal framework for cancellation of the public procurement procedure. A more precise definition is needed in terms of under*

which conditions and when a procedure can be annulled; also, there should be a responsibility to explain and provide arguments why none of the submitted bids was acceptable.

In order to increase the percentage of successful public procurements procedures a thought should be given to introducing monitoring of the grounds for annulling the procedures and sanctioning the members of the commissions if subjective oversights are found.

The broad privileges of the contracting authorities in establishing the criteria for electing the most favorable bid create an opportunity for subjectivity and abuse.

In the public procurements procedures which were a subject of this monitoring the *lowest price* was the criterion for electing the best bid in 35% of the procedures, while in the remaining 65% it was the *economically most favorable bid* where certain criteria were separately ranked (price, quality, deadline for payment, etc.) In addition, the criterion of the lowest price was applied in the procurement of medicine and other medical material, IT equipment, building schools and roads, procurement of chairs and desks for schools. In comparison, the quality of the products was a priority in the procurement of stationery, communication systems, boots and shoes for employees in uniform, as well as design and printing promotional material.

In the monitoring it was concluded that different contracting authorities have different criteria for electing the same goods. For instance, one contracting authority on the procurement of vehicles has the following criteria: price – 90 points; delivery deadline – 5 points; manner, deadline and terms of payment – 5 points, while another contracting authority determines that the criteria for the procurement of vehicles should be the following: price – 55 points, technical possibilities for vehicle maintenance – 20 points; safety of the vehicles according to a crash test – 15 points; determined value for average fuel consumption based on a catalogue – 10 points.

Precisely this broad terrain left to the contracting authorities for defining the criteria for electing the most favorable bid opens up a possibility for subjectivity in establishing the criteria and favoring a certain firm in terms of its advantage, price, or quality.

The problem of defining the criteria for electing the most favorable bid was also confirmed by the firms with which in – depth interviews were conducted. A large part of their complaints has to do exactly with the choice of criteria. Firstly, the firms disagree with the choice of the lowest price as a criterion, and secondly, they believe that in the criterion economically most advantageous bid the key issue is the subjectivity in ranking the quality of the product, i.e. service.

The opponents of the criterion of lowest price think that in such an instance the contract enables firms whose goods and services are with a far lower quality to conclude it, which creates very quickly the need of a new procurement of the same product and thus, instead of saving money, a greater expense is incurred. On the other hand, the problem with which firms are faced when the quality of the goods, i.e. services is assessed, is imprecision in awarding the points. Namely, for the greatest part, the state institutions, instead of precisely determining the points for the separate characteristics of quality, practice adding or subtracting points for quality without any realistic grounds. This conclusion of the firms is substantiated by their appeals which most often concern the irregularly conducted evaluation of the criterion quality.

A striking example of such problems the firms face is a tender worth more than 600,000 euros, which was part of the monitoring. The firm that lost the tender claims in the appeal procedure that their bid was not elected as the most favorable although they were 22% cheaper. They lost their advantage because of the small number of points they received for the quality as an economic operator compared to their rivals.

On the other hand, through the monitoring a case was detected in which in the procurement of tests for medical apparatuses and lab expendable material according to the criteria of electing the lowest price, both firms that offered the lowest price, instead of being chosen, were disqualified. The reason for their rejection was “previous bad experience with goods purchased from them.”

A third indicative example confirmed in the course of the monitoring concerns a procurement of services for passenger transportation. The case, which at the time this report was being prepared reached the Administrative Court, was started by a dissatisfied firm which claims that the contracting authority, in the process of

awarding points, gave more points to the firm he favored for parts of the bid that were unfeasible on the market.

All of the above suggests that the practical application of the points system is accompanied with serious problems.

Recommendation: *The Ministry of Finance should make more precise the methodology of criteria for awarding the public procurement contract, while the Public Procurement Bureau should define recommendations for determining more precise criteria in order to decrease subjectivity. Moreover, the contracting authorities need to devote as much time and attention as possible to defining the tender documentation well, particularly the technical specification so that certain criteria would not be a subject of ranking, but only of verification whether they satisfy the condition (criterion). In this way, the contracting authorities will define the criteria of lowest price as unique, but will also ensure that in the evaluation stage (prior to ranking) the bidders satisfy the other conditions and criteria so they can be ranked according to the price at all.*

Postponing of the arrival at a decision for electing the most favorable bid up to 100 days. In 17.5% of the analyzed public procurements procedures the decision for electing the most favorable bid was not reached even after more than 90 days passed since the opening of the bids. This high percentage of procedures in which no decision was reached for electing the most favorable bid confirms the conclusion from the first quarterly monitoring of public procurements that, in practice, the absence of a legally final deadline for making decisions for electing the most favorable bid is abused. If, to this period of 100 days we add the appeals deadline and the duration of the process of appealing, we will arrive at absurdly long terms from the moment the tender was announced to the conclusion of the contract. Thus, it follows that the contracting authorities themselves create an ambience of stalling with time in the public procurements procedures. This tendency increases the expenses of the economic operators not only for the issued bank guarantee but also in other respects depending on the nature of the business or the origin of the goods. Ultimately, this practice may force the firms to calculate in their bids the risk of postponing the public

procurements procedures and increase the price of the goods, i.e. the services they are competing with in the procedures.

***Recommendation:** For purposes of greater speed and efficiency of the procedure, as well as for not leaving the economic operators in a state of uncertainty and with tied financial means, there should be determined a legal deadline for reaching a decision, which may vary depending on the worth of the procedure or the number of bidders.*

The tender documentation as a means of manipulation in the public procurements procedures. The practice of not publishing the tender documentation in an electronic form on the web pages continues; rather, the contracting authorities take it over for a certain fee which often reaches a price of 6,000 denars. Only in 12.5% of the procedures the tender documentation was undertaken without a compensation.

However, in addition to increasing the expenses of the firms for participating in the public procurements, not publishing the tender documentation on the web pages of the contracting authorities disables the wider public from having an insight into the procedures. This would be a way of examining the worrying assessment of the firms that the tender documentation and the technical specification are very often unclear, and sometimes tendentiously construed and that they lack a more precise elaboration of the criteria for determining the most favorable bid.

The consequence of a badly or tendentiously defined tender documentation is premature withdrawal of the economic operators from participating in the procedures, whereby the competition and selection are reduced. This also results in a bad and incorrect conducting of the evaluation and the choice of the most favorable bid, and, ultimately, to cancellation of the procedures. All this means a waste of time and money.

A case of favoring a certain firm through the tender specification was also noticed in the analyzed sample concerning the procurement of vehicles worth 1.4 million euros. Two economic operators, despite picking up the tender documentation, prematurely withdrew from participating in the public tender, with a claim which was entered in

the records from the opening, that the contracting authority, in the last possible moment, i.e. 6 days prior to opening the bids, made a crucial change in the tender specification and effectively disabled them from participating in the procedure.

***Recommendation:** Despite the precision of the Public Procurements Law in the part concerning the publication and taking over of the tender documentation in terms of improving the efficiency and decreasing the expenses of the participants, the practice points to an inappropriate application of these regulations. Hence, the publishing of the tender documentations on the web pages should be promoted, as well as decreasing the practice of charging fees for undertaking the tender documentation in cases where no real expenses exist.*

An exceptionally small number of procedures are conducted via the electronic System for Public Procurement (e – auction). In the first three months of 2009 only 11 public procurements procedures which were conducted through the electronic system were published, out of which 8 from contracting authorities on central level. The share of the e – auctions in the total number of procedures for which tenders were published in the period January – March are minimal 0.65%. The number of procedures is too small if we consider several facts: the system has been functional and available for use for several years now; to use the system no additional expenses, formality or advanced knowledge of IT are required; the system reduces the necessary time for conducting the procedures; it improves the insight into information, and with using the e – auctions, a decrease in corruption and an increase in the saving of Budget money are expected.

***Recommendation:** Having in mind that from 2010 the e – auctions will be obligatory, by the end of the year, the contracting authorities have to increase the number of conducted e – auctions in order not to face serious problems the following year.*

The high bank guarantees are problematic for the firms. In the monitored sample of public procurements a bank guarantee was requested in 62.5% of the procedures. In addition, although the Public Procurements Law stipulates that the height of the guarantee should not exceed 3% of the value of the bid, in practice, precisely this highest amount of 3% is requested, which puts a large number of the economic

operators in an unfavorable position, especially those who participate in more tenders. Due to this problem, a large part of the complaints of the economic operators are in the direction of limiting the requests for a bank guarantee, as well as reducing the amount of the 3% according to the law.

***Recommendation:** In order to create conditions for greater competition of the firms in the public procurements procedures, and thus influence the improvement of the quality and cheapening the goods and services, it is necessary for the contracting authorities to determine a lower bank guarantee.*

The participants in the tender do not receive an explanation for the decision made in electing the most favorable bid. No progress has been made in the contents of the statements for electing the most favorable bid. In 2009 as well the participating firms in the public procurements procedures confirm that they receive announcements for the election by the public procurements commissions, but, in most cases, they do not contain an explanation for the reached decision. By this practice, part of the contracting authorities violate the Public Procurements Law which expressly states that the announcements need to state the name of the tenderer whose tender was elected as the most favorable as well as the manner and reasons for the choice made. The current attitude of the contracting authorities significantly decreases the transparency, i.e. the possibility for the economic operators to have a clear picture of how the evaluation was conducted and in what way the decision was made. Where no transparency and accountability exist, a room for doubts and corruption charges is opened. It is essential that the lack of a detailed explanation for the decisions prevents the firms from preparing well - argued and corroborated appeals.

***Recommendation:** To introduce a unified form for reporting with a detailed outline of the manner of evaluation and the reached decision. In order to increase the transparency of the procedure it remains to also consider placing a law regulation for compulsory submitting of the report from the conducted evaluation of the bids to all participants.*

Stalling with the implementation of the awarded contracts on public procurements and delaying the processing of payments. Those economic operators

whose bid was chosen as the most favorable and concluded contracts with the contracting authorities face yet another group of problems, which is stalling with the implementation of the signed contracts. In this way, a direct blow is dealt to the operation of the firms in the Republic of Macedonia, i.e. their solvency is reduced and they are prevented from planning and organizing the work process well. Although the PPL does not regulate this segment – the contracting relations between the contracting authority and the economic operator, still, the need arises to give greater attention to these issues.

Recommendation: *The current regulations that address this kind of contracts are not sufficient, i.e. they need to be specially regulated because of the numerous particularities.*

Findings about the public procurements procedures from in – depth interviews with the economic operators

The main problems that the economic operators are faced with in the public procurements procedures:

Description of the problem	in %
Badly chosen criteria for awarding the contract – too many points for the criteria price	51.2
Unclearly construed tender documentation and technical specification	46.5
Irregular awarding of points to the bids and favoring a certain bid	39.5
A long period for making the decision for choosing the best bid	34.9
Insufficiently explained announcements by the contracting authorities about the chosen bid	30.2
Postponing the implementation of the awarded contract	30.2
Problems with payments on the part of the contracting authorities	30.2
Badly chosen criteria for awarding the contract – too many points for the criteria quality or other “subjective” criterion	25.6
Unfounded rejection of an appeal	21.0
A high amount as a bank guarantee	18.6
Unreal and hardly achievable criteria determining economical - financial and technical competence	14.0
Defining of criteria and manner of payment	4.6
Defining of criteria for realization deadline	2.3
Frequent cancellation of the procedure	2.3
Non – compliance with the requested technical specifications	2.3
Unrealistically determined low estimation by the contracting authority	2.3
Not having insight in the documentation after the procedure completion	2.3
Stating a brand in the technical specification	2.3
Great expenses for picking up the tender documentation	2.3
Unnecessary requesting of documents whose provision requires time and money	2.3
Inability to express the prices in a foreign currency	2.3
Incompetent persons on the part of the contracting authorities	2.3

The most frequent complaints of the interviewed economic operators are that the law concerning the public procurements procedures in which they participated was not respected (while picking up the tender documentation or submitting a tender):

A frequent complaint (registered with 4 interviewed economic operators) is that the tenders were set up in advance, i.e. that certain economic operators are favored, which becomes most pronounced in terms of the manner in which the tender documentation and the technical specification are construed or in the manner in which the evaluation is conducted. The other observations that law regulations are not respected do not recur and have to do with:

- the documents and tenders submitted by the economic operators (forged creditworthiness, fictitious employments or contractual employments for doing temporary work, election of a bidder whose product did not comply with the technical specification),
- unequal treatment of the economic operators or the procured services (unequal treatment of domestic and foreign goods, appointing the producer/ the quality of the goods),
- problems of cheating on the criteria for awarding the contract (when it concerns the criteria “economically the most favorable bid” the ratio price – quality is inappropriately defined whereby 80 – 90 points are awarded for the price, which in a way means that the criterion lowest price was elected; incorrect and subjective awarding of points for the criterion quality),
- unfounded rejection of an appeal

The average grade that the economic operators gave for conducting the public procurements procedures in the Republic of Macedonia is almost good – 2.93 (on a scale from 1 to 5)

This grade should not be deemed satisfactory. It is unrealistic to expect most economic operators to grade with the highest mark the process of public procurements in the Republic of Macedonia. However, until a move of one grade higher is achieved,

i.e. until the process is graded as very good, serious work needs to be done for removing the pointed problems, which partly stems from legal solutions, but far more from the bad practice of the contracting authorities.

Suggestions for changes and additions to the Public Procurements Law given by the interviewed economic operators:

Tender documentation

- not to request payment for picking up the tender documentation
- to have the right of insight into the technical specification prior to paying the fee for picking it up

Criteria for awarding contracts for public procurement:

- the awarding of a greater number of points for the criteria quality and technical equipment of the economic operators should be made obligatory
- eliminating or decreasing the possibility for electing “subjective” criteria
- eliminating or decreasing the possibility for choosing as a criterion the deadline for payment

Criteria for determining the competence of the economic operators

- simpler/ easily achievable criteria for determining competence
- not to request reference lists since they contain business secrets
- not to request evidence of annual income from the economic operators
- obligatory requesting of evidence for determining competence regardless of the type of procedure

Bank guarantee

- not to request bank guarantee for the tender
- requesting a bank guarantee less frequently
- determining a lower percentage/ amount for the bank guarantee (3 economic operators)
- enabling the economic operators to request a guarantee from the contracting authorities

Using electronic means in the procedures:

- eliminating the human factor during the evaluation, i.e. introducing electronic evaluation for well specified conditions
- obligatory e – auction for all procurements of greater value

Open procedure

- obligatory reading of all documents during the open procedure (3 economic operators)
- eliminating economic operators who do not have complete documentation in the open procedure itself
- for greater efficiency of the open procedures the contracting authorities should have the obligation to give each participant a copy of each financial bid so that the reading of the prices would be avoided

Special sector rules:

- PPL needs to regulate separately the specific procurement sectors
- the agencies for temporary employment should be excluded from the application of PPL
- specific rules for procurement of medicines should exist, especially regarding the reference prices which prevent competition

Additional responsibilities of the contracting authorities:

- the contracting authorities should commit to ordering a certain percentage from the procurement (it refers to framework agreements)
- a deadline for reaching a decision on election or cancellation should be stipulated
- punitive measures should be introduced for the contracting authorities

Other:

- reducing the legal grounds for cancellation of the procedure (2 economic operators)

- more clear definition of the regulations that refer to the part “a group of tenderers”, “support from a third party” and “subcontractor”

Analysis of the procedures in the State Appeals Commission for Public Procurements in the period January – March 2009

The State Appeals Commission for Public Procurements in the period January – March 2009 reached 225 decisions/conclusions, out of which 41 decisions for termination of the procedure, 33 decisions for refutation of the appeal, 102 decisions for rejection of the appeal due to insubstantiality, 27 decisions for revocation of the primary decision, 11 decisions for abolition of the primary decision and 11 decisions regarding requests for continuation of the procedure.

The most frequent reason for **termination of the appeal procedure** was that the plaintiff himself submitted an application whereby the appeal was withdrawn. However, there are situations (20%) when the contracting authority himself after the lodged appeal recognized his mistake and without any further reason for continuation of the appeal procedure changed his original decision.

The most frequent reason for **refutation of the appeal** (the presence of certain formal flaws in the appeal) is because the plaintiff did not make a payment, i.e. did not submit evidence for paying the legally stipulated fee for a lodged appeal, while in fewer cases the reason for refutation was the untimely submission of the appeal.

The most frequent reason for **rejection of the appeal** is that the State Appeals Commission considers that the contracting authority consistently conducted the evaluation in compliance with the regulations in the PPL and the corresponding bylaws, i.e. the stipulations in the appeal which question the decision for election or annulment of the procedure are ungrounded. Moreover, the greatest number of appeals refer to the incorrectly conducted awarding of points to the bids, i.e. the plaintiffs believed that either the chosen bid does not satisfy the criteria or that their bid was given less points without any grounds.

A substantial part of the appeals refer to the decision of the contracting authority not to accept or evaluate the plaintiff's bid. A smaller part of the appeals were rejected as ungrounded because they had not stated any reasons or arguments in their appeals

that the State Appeals Commission could consider and reach an appropriate decision. Finally, although a large number of economic operators point out that one of the greater problems in the public procurements procedures are the contents of notices and the tender documentations, still, a small number of them decided to appeal the procedure on these grounds (oversights concerning the data, actions, or failing to take action stated in the notice).

The most frequent reason for **revocation of the primary decision** of the contracting authorities is the incorrectly conducted evaluation, i.e. wrongly grading the bids and the accompanying documentation. In addition, the oversights made during the evaluations of the bids are diverse, i.e. range from wrongly awarded points due to not taking into consideration certain documents during the evaluation to not acting according to the instructions given by the State Appeals Commission, etc. Only in 2 appealed procedures there was a case where the head person of the contracting authority did not accept the choice of the Public Procurements Commission and made a decision contrary to the proposed one and the report of the conducted procedure. In this manner, the head person violated the law regulation that obligates him to accept the choice of the Public Procurements Commission, unless he determines unlawfulness in the conducted procedure or the choice made.

The State Appeals Commission for Public Procurements reached a small number of decisions for **abolition of the primary decision and procedure** of the contracting authority. This means that in most cases the Commission considered that there were no substantial or serious oversights in the procedure. In almost all the decisions whereby the procedure was annulled, different reasons for the annulment are stated, i.e. different types of oversight.

The most serious oversights are those when it can be concluded that the contracting authority has no knowledge of the matter and the procedure for public procurements, as a result of which the following oversights were made: reaching a decision for electing 2 most favorable bids, although the procedure was indivisible; reaching a decision without any previously conducted evaluation and an incorrectly written report; evaluating a criterion which was not stipulated in the notice, etc. Part of the oversights concern defining the subject of the procurement and the contents of the

tender documentation, as a result of which it was concluded that they led to discrimination of the economic operators.

For the several requests filed by the contracting authorities for **continuation of the procedure and concluding a public procurement contract**, although an appeal was lodged, the State Appeals Commission stated that the legal conditions for accepting their request were not met. The only two exceptions from this attitude of the State Appeals Commission are the cases concerning the requests of the State Elections Commission during the election process, for which the State Appeals Commission considered that irreparable damages may occur unless the procedure continues, i.e. unless the contract is concluded.

The most frequent formulation contained in the decisions of the State Appeals Commission is: *“The State Appeals Commission for Public Procurements found the appeal to be ungrounded, while the procedure from the notice was conducted with a consistent application of the regulations from the Public Procurements Law”*, followed by a very short and insufficiently explained addition as to why it was ungrounded, i.e. insufficient explanation why the Public Procurements Commission conducted the evaluation correctly. On the basis of such a decision the dissatisfied party can not determine precisely why its appeal was rejected. In this way, on the one hand, the party is denied a substantiated argumentation that might dissuade it due to the strength of the arguments, thus enabling it to realize that the procedure was correctly conducted and in compliance with the law regulations.

On the other hand, the plaintiff's options for a grounded and well – argued initiating of an administrative lawsuit are limited, which would enable him to know which part of the decision and in which direction he could contest. Such demeanor is contrary to the regulations in the Law on general administrative procedures according to which the decision of Appeal Court must be explained in detail.

A great flaw of these decisions is that they do not state fully and literally the appeals, which is a customary practice for any court or administrative decision. The same conclusion applies to the contents of the explanation of the decision, regardless of whether it refers to rejecting or acknowledging the appeal, which does not contain

deeper observations of the determined factual case nor the reasoning of the members of the State Appeals Commission. Given that the State Appeals Commission does not have authority to reach a meritorious decision, it is necessary that the guidelines it provides to the contracting authority are defined more precisely. In this way, the contracting authority himself will be able to realize in which part he committed a violation and in which direction he needs to remove the determined irregularities. Actually, the decisions of the State Appeals Commission whereby the primary decision is annulled, need to contain in some form the new decision that the contracting authority should implement. In this manner, the possibility for a repeated appeal of the new decision would be avoided, as well as an unnecessary postponement of the procedure.

The contracting authorities against whom appeals are lodged are diverse, i.e. there are no contracting authorities whose public procurement procedures are often a subject of appeal. Even those who had more than 5 appealed procedures are most often big contracting authorities in terms of having more affiliations/divisions that independently conduct public procurement procedures and have a large number of procedures in the course of the year (over 100). Hence, it is logical proportionally to the number of procedures and the participants involved for them to be often a subject of appeal.

Moreover, in these procedures the State Appeals Commission most often finds the appeals ungrounded, i.e. determines that the procedures were correctly conducted. It is evident that a larger number of oversights and irregularities in the procedures have been made by contracting authorities on a local level, especially by primary and secondary schools, kindergartens and health institutions, while on central level the biggest oversights have been observed with contracting authorities from the field of health, especially clinics and specialized health institutions.

Findings from the economic operators about the appeal procedure

The economic operators do not decide that often to appeal the public procurement procedures and when they do decide they have little success. The reasons they stress for the small number of lodged appeals, i.e. not lodging an appeal even in cases when they have remarks about the legality of the procedure, are the high administrative expenses and the lack of trust they have in the Commission. A very small part of them stated that the reasons why they do not lodge appeals are fear, pressures, etc. A small number of economic operators decided on several occasions to initiate an administrative lawsuit against the decision of the State Appeals Commission.

Number of appealed procedures by the interviewed economic operators in front of the State Appeals Commission:

NUMBER OF APPEALED PROCEDURES	NUMBER OF ECONOMIC OPERATORS
None	17.2%
Up to 5 procedures	62.0%
More than 5 procedures	20.8%

Number of accepted appeals lodged by the interviewed economic operators:

NUMBER OF ACCEPTED APPEALS	NUMBER OF ECONOMIC OPERATORS
None	45.8%
Up to 5	54.2%
More than 5	0%

Number of initiated administrative lawsuits by the interviewed economic operators against the decisions on the appeals reached by the State Appeals Commission:

NUMBER OF INITIATED ADMINISTRATIVE LAWSUITS	NUMBER OF ECONOMIC OPERATORS
None	83.3%
From 1 to 3 cases	16.7%
More than 3 cases	0%

Most frequent reasons why the economic operators do not contest the decisions of the public procurements commissions in front of the State Appeals Commission, i.e. why they do not initiate an administrative lawsuit before the Administrative Court:

REASONS FOR NOT CONTESTING/ NOT DISPUTING	NUMBER OF ECONOMIC OPERATORS
A high amount of expenses in the procedure	39.3%
Lack of trust in these institutions	35.7%
Fear that they will be eliminated from further public procurement procedures with the specific contracting authority	14.3%
Other reasons (ex. fear of threats, pressures, etc.)	10.7%

Analysis of the public procurements procedures in 2008

The scope of public procurements is increased from one year to another. This is especially the case in the last two years which, among other factors, is a result of an increased economic activity, which resulted in an increased Budget of the Republic of Macedonia in that period. Namely, during 2006, the scope of the public procurements was 8.9 billion denars or 3 % of the gross domestic product (GDP), in 2007 it increased to 21.8 billion denars or to the level of 6% of the GDP, while in 2008 it reached 27.6 billion denars or 7% of the GDP of the Republic of Macedonia. Such proportions and dynamics of growth in the scope of the public procurements are exceptionally big reasons for their permanent monitoring, analyzing, and enhancing in order to accomplish the final goals in using the public means: economy, efficiency, and effectiveness.

Announcing the public procurement procedures

Ratio of the procedures announced in the Official Gazette and those who only get published on the web page of the Public Procurements Bureau. According to the PPL, the contracting authorities are obligated to publish their notices and announcements for public procurements on the web page of the Public Procurements Bureau. During 2008, 6.867 such notices were published. Out of them, 4.057 refer to notices for public procurements with application of an open procedure, restricted procedure, procedure with competitive dialogue and negotiated procedure after a previous publishing of a notice. A considerable part (2.790 or 40%) of the notices (and the concluded contracts) refers to public procurements on the bases of simplified competitive procedure. This procedure was mostly practiced by contracting authorities that perform an activity of special public interest (hospitals, clinics, schools, public kindergartens, cultural centers, part of the communal institutions, etc.)

On the one hand, this is a simpler procedure for realizing a public procurement, which is of interest for all parties involved in the procedure. However, on the other hand, this new procedure has not managed to enable competitiveness of bids so far, since far too often there were either no bids at all or there were very few bids.

Risks of procedures for which no commitment exists to publish notices. The economic operators have no obligation on the web information system of the Public Procurements Bureau to publish the simplified competitive procedures for realizing so – called small procurements whose value is up to 5000 euros. The economic operators do not have such an obligation even for the negotiated procedure without previously publishing a notice. According to the current practice, the Public Procurement Bureau receives announcements ex post for the realization of these procedures, i.e. after the corresponding contracts are concluded. This means that there is a possibility for a large part of the previous procedures until the concluding of the contracts to be realized without observing the essential principles of transparency and competitiveness.

***Recommendation:** The Public Procurements Bureau should establish a mode of receiving notices by the economic operators for the simplified competitive procedures for realization of public procurements up to 5000 euros worth and for the negotiated procedure without prior publishing of notices before concluding the contracts for their realization.*

During 2008 only 157 notices for public procurement were published with application of shortened deadlines. Such an occurrence may be interpreted in two ways: maybe the contracting authorities are implementing a longer, and thus a more objective procedure for realizing the public procurements; or, alternatively, the shortened procedure does not fit them because of its high transparency, which stems from its application only in cases of previous publishing of the complete tender documentation, after a prior indicative notice, etc.

The framework agreements are used, but there are no indicators of their purposefulness and success. During 2008, 527 notices were published for concluding a framework agreement and 131 notices for simplified competitive procedure for concluding a framework agreement. For this kind of notices the Public Procurement Bureau gives no other indicators and does not conduct any analysis, which may be deemed as a flaw.

***Recommendation:** In the future, the Public Procurement Bureau should gather, present, and analyze a greater number of data concerning framework agreements that would in turn provide a better insight into their purposefulness and efficiency.*

A far too large number of notices are published in the last 2 – 3 months of the current year. A greater dynamics has been noticed in regards to publishing notices for conducting public procurements towards the end of the year, which is confirmed with the data on concluded public procurements contracts in this period. Such a practice is illogical and points to a number of questions, out of which the following are most important: a) from which Budget money the concerned contracts are being realized: from the current Budget (which is logical and legally allowed) or the next year's Budget (which is illogical, since it has not been made yet)? In such a short time (the last 2 – 3 months of the year) it is possible (for the most part) to realize only public procurements through simplified competitive procedure. This procedure, on its part, is characterized as less competitive.

***Recommendation:** To assess the need for taking measures whereby the notices would be reduced, as well as the contracts for conducting public procurements through a simplified competitive procedure for amounts above 5000 euros in the last two months of the year. It is likewise desirable for the Public Procurement Bureau to make an analysis of the concluded public procurements contracts in the last three months of the year to determine which procedure was the most exploited in that period and what repercussions it may have on the public procurements system.*

Concluded contracts for public procurements

The number of concluded contracts in an open procedure is decreased compared to contracts concluded in less transparent procedures. During 2008, 22,053 contracts for public procurements were concluded in a total worth of 27.6 billion denars, which is 5.8 billion denars or 26% more than their worth in the previous year. Within these frameworks, the greatest number of contracts (12,246 or 55.5% of the total number of concluded contracts) involves contracts concluded through a simplified competitive procedure without publishing a notice (so – called small procurements worth up to 5,000 euros). Their total worth was 1.8 billion denars or

6.7% of the worth of the total public procurements in 2008. The contracts concluded through a simplified competitive procedure with publishing a notice amount to 2.425 or 11% of the total number of concluded contracts. Their worth was 1.7 billion denars or 6% of the worth of the total public procurements in 2008.

The number of contracts concluded through using an open procedure is 4.897 or 22.2% of the total number of contracts, with a total worth of 20.9 billion denars or 77% of the worth of the total public procurements in 2008. Their share in the total worth of the public procurements in the last three years is constantly decreasing (84.5% in 2006, i.e. 81.64% in 2007). The decrease of the share of such a procedure for public procurements is, of course, a result of the increasing usage of the previously mentioned public procurements procedures, which are simpler, but also significantly less transparent in their application.

Accordingly, the high percentage of contracts concluded on the basis of a simplified competitive procedure with and without notice is evident. These procedures point to possible situations in which the contractors share the procurement of certain parts or of smaller (in)dependent parts in order to avoid the more complex procedures of the other public procurements methods, thus violating the principles of competitiveness and equality in the public procurements. In addition, the high share of the so – called small procurements up to 5,000 euros (procurements in a simplified competitive procedure without publishing a notice) points to the high probability of awarding those contracts to one's "own" firms.

***Recommendation:** The Public Procurement Bureau should enforce the control and analysis of the comprehensiveness and the compliance with the law of the simplified competitive procedures with or without a notice; and/or minimize the possibility for using that procedure in making public procurements.*

The application of a small number of rules from the PPL during the procurement of so – called non – priority services reduces the transparency and the accountability of the contracting authorities. The contracting authorities can procure different types of services according to Article 17 from the PPL. It divides the services in two parts: "priority" and others or "non – priority". The regulations from

the PPL that apply all other types of public procurements are used for the first group of services. For the so – called “non – priority services” a more liberal regime for awarding public procurements contracts is ascribed.

This concerns public procurement of services for temporary employment, transportation, hotel, catering, legal, educational, health, social, cultural, sports and other services. When they are procured, the contracting authorities have no obligation to apply the stipulated deadlines and forms for their publishing, they can modify the concrete rules for conducting the procedures determined with the PPL, etc.

In the course of conducting such procedures it is necessary for the contracting authorities to secure a certain degree of transparency and not to discriminate the economic operators. However, the practice confirms that due to the specifics and the great flexibility, with some of those public procurements it is not possible to fully abide by those principles, since to a large extent it is up to the personal responsibility of the contracting authority to decide whether and to what extent he would uphold them. In practice, this is especially the case when public procurements are made of services whose worth is below 20,000 euros, for which, according to the mentioned report of the Public Procurement Bureau, during 2008, the average number of bids per contract was only 1!

During 2008, 1,418 contracts for public procurement of services were concluded, in a total worth of 381 million denars. However, in the report of the Public Procurement Bureau, their size is not distributed according to “priority” and “non – priority” services, as a result of which they cannot be analyzed in – depth. Within these frameworks, no differentiation of the “non – priority services” up and above 20,000 euros was made.

Recommendation: *The Public Procurement Bureau should conduct an analysis of the comprehensiveness, legal compliance, transparency, and competitiveness and, if it deems it opportune, to suggest reducing the flexibility for using that procedure for making public procurements or certain types of non – priority services for which practice shows that the public procurements regulations can be applied, to be excluded from this group.*

The number of concluded contracts with negotiated procedures without publishing a notice is increasing. In 2008, 1,028 contracts were concluded with negotiated procedure without previously publishing a notice in total worth of 1.5 billion denars, i.e. more than 24 million euros and 17 contracts on the basis of negotiating with a published notice in a total worth of 928 million denars, i.e. more than 15 million euros. It is alarming that the worth of the concluded contracts through a negotiated procedure without prior publishing of a notice in 2008 is bigger by 10 million euros, i.e. 73% from those concluded in 2007.

Concluded contracts with a negotiated procedure without publishing a notice

	2006	2007	2008
Number of contracts	520	652	1,028
% of increase of number	/	25%	58%
Value of contracts (in million denars)	544	851	1,472
% of increase of value	/	56%	73%

The simplicity and the speed are probably the main reasons for the intense growth of the public procurements contracts with a negotiated procedure without prior publishing of a notice compared to the previous two years. On the other hand, the intense increase in those contracts points to the dubiousness in the regularity of the procedures for their realization. Namely, despite the mentioned positive aspects, these contracts (procedures) contain more possibilities for manipulations in the process of public procurement, such as: “fabricating” a reason that they are conducted “in extreme emergency”; that the additional things could not be technically or economically separated from the basic contract or that it is necessary to do things which are indispensable for completing the basic contract. In this way a possibility is created for a conscious avoiding of inserting appropriate elements in the basic contract and eliminating the competition.

Recommendation: *The Public Procurement Bureau should establish a mode of obtaining reports from the contracting authorities for the negotiated procedure without prior publishing of notices before concluding the contract for their realization. The contracting authorities need to inform the Public Procurement Bureau about the process of the realization of the procedure until concluding the contract; giving options for other operators to join in cases of gathering data (bids) for performing the remaining things and electing the lowest price for the same quality of work, which would be arranged with the main contractor.*