MONITORING THE IMPLEMENTATION OF PUBLIC PROCUREMENTS

20 YEARS FOUNDATION OPEN SOCIETY MACEDONIA
ФОНДАЦИЈА ОТВОРЕНО ОПШТЕСТВО МАКЕДОНИЈА

Center for Civil Communications
Центар за граѓански комуникации

11

QUARTERLY REPORT

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

2011

FOUNDATION OPEN SOCIETY MACEDONIA
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MONITORING THE IMPLEMENTATION OF PUBLIC PROCUREMENTS IN THE REPUBLIC OF MACEDONIA

Eleventh Quarterly Report

2011

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Eleventh quarterly report

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QUARTERLY REPORT

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

CONTENTS

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
PPL	Public Procurement Law
RM	Republic of Macedonia
CCC	Center for Civil Communications

KEY FINDINGS

Selection of most favourable bids in tender procedures raises concerns due to inappropriate application of bid-evaluation criteria and elements. The most concerning problem in public procurement procedures was recorded in regard to criteria used for the selection of most favourable bid.

Low competition on tender procedures gains in intensity. 35% of public procurements monitored were marked by one or no bid submitted by companies. Moreover, together with the tender procedures where only 2 bids have been submitted, the share of public procurements marked by low competition accounts for as high as 52.5% of total public procurements procedures monitored. When compared to findings from the previous monitoring period, this period was marked by an increasing low interest on the part of companies to participate in tender procedures, which ultimately leads to lower competition.

High number of annulled tender procedures remains a bottleneck in the public procurement system. In the third quarter of 2011, a total of 444 decisions were taken to annul tender procedures, which accounts for 26.57% of the total number of public procurement procedures implemented in the same period. Analyses show that most frequently referred law-stipulated ground for public procurement annulment (indicated in as high as 51.03% of cases) was the failure to obtain any bids or failure to obtain an acceptable bid.

In the third quarter of 2011, the value of contracts signed by means of direct negotiations without previously announced call for bids amounts to 7.5 million EUR and is by 8.5% lower compared to the same period in 2010. Despite the modest decrease noted in the third quarter, the value of public procurement contracts signed by means of direct negotiations in the first nine months of 2011 remains at a record-high level for the last three years.

E-auctions were used in 46.26% of procurement procedures implemented in the third quarter of 2011 and this share is below the law-stipulated threshold set at 70% from the total number of calls for public procurement announced. In the third quarter of 2011, the law-stipulated threshold for e-auctions - which was intended as an instrument to reduce prices of goods and services or performance of works - remained unattained by the contracting authorities.

Tender specifications that favour a particular bidder were also recorded in this monitoring sample. Worrying is the fact that one of the largest tenders included in the monitoring sample – procurement of vehicles in the amount of 19 million MKD, i.e., approximately 310,000 EUR – was appealed in front of the State Commission on Public Procurement Appeals on the grounds of disputable tender specifications.

The law-stipulated obligation to sign procurement contracts within their estimated value, i.e., in the amount of initially secured funds and according to the decision on the public procurement's value is applied selectively. On one hand, the contracting authorities often annul tenders or reject bids submitted by companies when their respective amounts exceed the contract's estimated value from the decision on public procurements and, on the other hand, some institutions sign contracts whose respective values are significantly higher than the public procurement's estimated value.

Failure to comply with legally stipulated deadlines on taking the selection decision and submission of notifications on contracts signed results in holding tender participants in anticipation and deprives the broader public of the possibility to obtain timely information. 17.5% of monitored institutions did not comply with the legally stipulated deadline on taking the selection decision for the most favourable bid. 22.5% of them submitted the notifications with significant delays or have still not submitted any notification.

Bank guarantees as evidence for the bid's validity were required in 50% of procurement procedures monitored. In that, similar is the share of bank guarantees required for quality performance of contracts. Such approach pursued on the part of institutions is utterly unfavourable and, on one hand, tends to discourage tender competition, while on the other hand it does not provide mechanisms on adherent implementation of contracts signed.

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 Public Procurement Law. The analysis aimed to assess the implementation of public procurements in the light of the new Public Procurement Law and the application of the underlying principles of transparency, competitiveness, equal treatment of economic operators, non-discrimination, legal proceeding, cost-effectiveness, efficiency, effectiveness and cost-effective public spending, the commitment to obtain the best bid under most favourable terms and conditions, as well as accountability for the public spending as part of procurements.

The 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", followed by attendance on public opening of bids and data collection on the procedure course, and use in-depth interviews and structured questionnaires submitted to the economic operators, as well as data obtained from contracting authorities by means of Freedom of Information (FOI) applications.

The present analysis was performed based on 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 July – September 2011. In that, the analysis also considered data obtained from the Electronic Public Procurement System.

The present report on the monitoring of public procurement process was developed in cooperation and the financial support from the Foundation Open Society – Macedonia.

QUARTERLY PUBLIC PROCUREMENT MONITORING REPORT

> **Selection of most favourable bids in tender procedures raises concerns due to inappropriate application of bid-evaluation criteria and elements.**

The most concerning problem in public procurement procedures was recorded in regard to criteria used for the selection of most favourable bid. In that, the use of "lowest price" as the selection criterion is not necessarily accompanied with appropriate and precise tender specifications that would guarantee quality of goods or services purchased, whereas the criterion "economically most favourable bid" is usually marked by inappropriate elements used to define it.

"Lowest price" is the most frequently used selection criterion for the most favourable bid, but it should be noted that it does not necessarily imply cost-effective public spending. This was particularly noticed in the analyses of tender documents and technical specifications where the emphasis is put on companies' eligibility to participate in tender procedures, rather than on the precise definition of characteristics and quality of good and services procured. Such practices result in selection of the cheapest goods or services bided, which does not necessarily mean that the best value was obtained for the funds spent. Instead of developing precise tender specifications on goods or services procured, institutions tend to focus on the eligibility criteria for companies' participation in tender procedures, thereby enabling only large companies or companies with whom they have previously cooperated to submit bids. Thus, for example, tender documents and technical specifications do not imply any interest on the part of institutions as regards the quality of goods and services procured or in the future costs implied by such procurements. This approach only seemingly enables the institutions to select the winning bidder from the line of companies that can deliver quality goods or services, but in reality it does not guarantee that tender proceedings will ultimately result in the selection of quality goods or services. Common are also cases where the companies that have bided the lowest prices for goods or services are not included in the bid-evaluation process, notably because they failed to meet eligibility criteria for tender participation. An addition problem was identified in the selective enforcement of Article 163 from the Public Procurement Law, which stipulates that the contracting authorities can request the companies to provide an explanation for the unusually low price bided. Cases were recorded where the institutions have excluded companies from the bid-evaluation process although they had submitted economically reasonable explanation for the low price bided, while on the other hand there were also cases where the institutions did not request any explanation from the bidding companies. This selective application of legal provisions raises doubts on the part of bidding companies as regards the motives behind institutions' behaviour.

Serious concerns were also raised in cases where the institutions use "economically most favourable bid" as the selection criterion, which is comprised of several elements (price, quality, and like). Institutions do not differentiate between eligibility criteria for tender participation and bid-evaluation criteria. Analysis of elements included in the criterion "economically most favourable bid" confirms that there are still cases where these elements pertain to companies' professional eligibility and such practices are unacceptable. Moreover, the quality evaluation of bids predominantly relies on elements that again demonstrate company's eligibility rather than the quality of goods or services bided. For example, the tender procedure on procurement of food for hospital patients - in addition to requests related to submission of evidence on timely, efficient and quality delivery of goods, as considered appropriate – used bid-evaluation elements such as technical equipment, storage facilities, food preparation equipment and facilities, and reference list of main clients. This approach raises concerns due to the fact that sub-criteria (technical equipment and reference list) do not guarantee the quality of food for hospital patients, but are rather criteria used to confirm company's ability to implement the procurement in question and therefore they should and can be used only as eligibility criteria. The institutions must use different elements that guarantee the quality of food being procured.

In addition to goods, inappropriate use of bid-evaluation elements was also noted in procurement of services. As part of one tender procedure included in the monitoring sample which concerned procurement of consulting services on strategy implementation and guidelines on internal financial audit, where the quality was allocated 60 from the total of 100 points, the bid-evaluation process was based on proposed staff's working experience and education background. This is yet another example of confusing eligibility criteria and bid-evaluation criteria for the purpose of assessing the quality of services bided. Thus, in order to define the quality of consultants, the companies were required to propose a methodology that will be subject of evaluation and to present evidence on quality performance of similar services in the past.

There were also cases where the institutions – as part of their tender documents – indicated that when evaluating the quality of bids the public procurement commission will take into consideration all documents submitted as evidence in support of companies' technical and professional eligibility.

Another serious problem related to the use of the criterion "economically most favourable bid" should be noted as well. Despite all indications made, significant portion of tender procedures do not provide detailed and precise definition and subdivision of the "quality" element. Notably, as part of their tender documents the institutions enlist only the points that will be allocated to the quality of bids submitted, but fail to describe the manner in which quality will be evaluated. Such practices imply high risks for subjective point-allocation and create mistrust on the part of companies as regards the proper selection of the most favourable bid.

Having in mind the above-noted problems related to selection criteria used for the most favourable bid, inevitable is the conclusion that although four years have passed from the adoption of the Public Procurement Law, institutions still demonstrate non-compliance with the legal provisions that govern this field. Moreover, knowing that the past period was marked by a number of training sessions delivered with a view to guarantee proper enforcement of the PPL, the question is raised whether these shortcomings are due to ignorance of legal provisions or they are result of deliberate intentions.

Recommendation: The Bureau of Public Procurements must continue its serious efforts on awareness-raising among contracting authorities as regards the appropriate use of selection criteria for the most favourable bid. If it is deemed that the problem is not related to lack of education, immediate measures are needed with a view to guarantee adherent application of PPL's provisions that stipulate selection criteria for the most favourable bid and thus secure cost-effective public spending.

> **Low competition on tender procedures gains in intensity. 35% of public procurements monitored were marked by one or no bids submitted by companies. Moreover, together with tender procedures where only 2 bids have been submitted, the share of public procurements marked by low competition accounts for as high as 52.5% of total public procurement procedures monitored.**

Increasingly low number of companies that participate in public procurement procedures and thereby limited competition are indicators of serious shortfalls in the public procurement process and failure to apply in practice the underlying principles of public procurements. Absence of strong competition undermines the main goal of public procurements: to obtain the best value for the funds spent. Maximum two companies submitted bids in as high as 52.5% of tender procedures from the monitoring sample, while this share accounted for 42.5% in the previous quarter (April-June 2011).

As shown on the chart below, no bids were obtained in 7.5% of procurement procedures monitored, one bidder was noted in 27.5% of procedures and 2 bidders appeared in 17.5% of procedures. More than 3 bidding companies were noted in 47.5% of procedures monitored. In that, the average number of bidders in procedures were more than 3 bids were obtained is 4.6 companies per tender procedure, which indicates that these procedures have secured high and desired competition.

Competition in procurement procedures monitored (July-September 2011)

Although the reasons for low number of companies that participate in tender procedures can be identified also in the bidders' mistrust as regards objective bid-evaluation, doubts for unequal treatment, discrimination and favouring of certain bidders, one of the most obvious obstacles is identified in the unattainable eligibility criteria for companies' participation in tender procedures. This problem was recorded in majority of tender procedures marked by low number of bidders.

One of the most obvious examples for such practices was noted in the procurement procedure on chemicals for technological processes at a waste-water treatment plant where for the purpose of participating in the tender procedure companies were required to demonstrate minimum annual turnover in the amount of 100 million MKD, i.e., 1.6 million EUR for each of the last three years, to have achieved profits of at least 50 million MKD, i.e., 813,000 EUR in the last three years, to have a minimum of 30 full-time employees, to have signed at least 5 contracts in the same field of procurement, to have at least 5-year experience in the relevant field, and like. Understandably, only one company appeared as a bidder on the call for bids and was awarded the contract. In that, it should be noted that this approach on defining unattainable eligibility criteria for the companies and thus the blatant limitation of tender competition is utterly tendentious. Particularly symptomatic was the requirement that bidding companies should demonstrate high profits gained in the last three years, which is absolutely not a parameter of interest for the buyer (contracting authority) given that it procures goods and does not buy shares in the company. Moreover, interesting is also the fact that the contract's value for this procurement amounted to 5 million MKD, i.e., 81,300

EUR, which is one-tenth of the required profits that bidding companies were to demonstrate for the previous three years. Additional problem created by eligibility criteria that insist on companies' past experiences is the fact that the public procurement market remains closed for newly established companies. Another important fact pertaining to this tender procedure is that it was implemented 4 times, where the first call for bids was announced as early as 10.05.2010. The pursuit for adequate bidder lasted for whole five months.

Another example of highly unattainable eligibility criteria for companies' participation in tender procedures was identified in the procurement procedure for sensor-operated aluminium doors. Companies that wished to participate in this tender procedure were required to have at least 25 employees and demonstrate total annual turnover for 2010 in the amount of minimum 60 million MKD (1 million EUR) earned from the procurement type in question. It should be stressed that the contract's value for this procurement amounted to 3,764,410 MKD, i.e., 61,210 EUR, which is 16 times lower than the required annual turnover.

Furthermore, the monitored procurement procedure for hot meal food products (meat and meat products, milk and dairy products, fruits and vegetables, bread, desserts and beverages, etc.), where only one company submitted a bid, required potential tender participants to have a minimum turnover of 45 million MKD, i.e., 730,000 EUR. This is a rather high threshold on annual turnover given that the contract's total value amounted to 1.36 million MKD, i.e., 22,100 EUR. Thus, the contract's value is 33 times lower than the average turnover required from bidding companies.

The procurement procedure analysed below provides the best example on absence of standards and rules as regards the annual turnover required from bidding companies to participate in tender procedures. Notably, the procurement procedure for production of TV films with educative component required the companies to have an annual turnover of 3 million MKD, i.e., approximately 49,000 EUR, which is significantly lower than the contract's value, which was signed in the amount of 5.2 million MKD, i.e., 84,500 EUR.

Some institutions continue to pursue practices whereby they provide conspicuously precise descriptions of the company's staff profile required for tender participation. For example, tender documents in the procurement procedure for interior designs at one Ministry building, where only one company submitted a bid, included extremely high and precise requirements as minimum criteria for companies' technical and professional eligibility. In order to qualify for tender participation, companies were required to have performed same or similar services as the given procurement subject in the last five years, to dispose with highly qualified staff that has at least three-year working experience (minimum staff requirements: 1 architect, 1 civil engineer and 1 electrical engineer), as well as to dispose with following high-qualified workers as minimum requirement: 3 locksmiths, 10 plaster workers, 10 wall painters, 10 ceramists, 2 carpenters and 5 electricians. In that, the procurement works defined for the required staff was to paint walls at the Ministry building, to place travertine tiles, to place wallpapers and decorative lines, to install 14 vanity mirrors, and like. The conclusion is inferred that bidding companies were required to dispose with 43 employees in order to qualify for partial interior design works, which is highly irrational and resulted in low, if any, competition.

Unclear remains why prior to setting high requirements on companies' financial ability the contracting authorities refrain from carrying out in-country market research targeting the structure of market participants and in particular their financial ability, in order to define appropriate, instead of discriminating, eligibility criteria for companies. In that, when setting eligibility criteria, institutions should be guided by the idea of encouraging rather than restraining competition among companies in tender procedures.

As regards tender competition, it should be stressed that there is low interest on the part of foreign companies to participate in tenders announced in the Republic of Macedonia. Moreover knowing that calls for tenders on procurement of goods and services exceeding the amount of 500,000 EUR (VAT excluded) and tenders on procurement of works exceeding the amount of 2,000,000 EUR (VAT excluded) are published in the Official Journal of the European Union or other appropriate publications. The low presence of foreign companies in Macedonia's open market is supported by data obtained from the Electronic Public Procurement System, where in the period July-September 2011 only 8 from the total of 1,194 public procurement contracts were signed with foreign companies. Their relevant share accounts for 0.67%. In terms of contract value, procurement contracts signed with foreign companies amount to a total of 269,468,344 million MKD, i.e., 4.4 million EUR. In the same period last year (July-September 2010) 10 public procurement contracts were signed with foreign companies and amounted to 561,696,98 MKD in total, i.e., 9.1 million EUR. For the purpose of enabling data comparisons, 2010 calculations do not include the values of procurement contracts signed with foreign companies by means of direct negotiations without previously announced call for bids, i.e., those that concern production of mass scenes needed as exhibition pieces for the Museum of the Macedonian Fight, the Museum of VMRO and the Museum of Victims of Communism. Thus, obvious is the declined participation of foreign companies in public procurements, which is a negative phenomenon that should be monitored on annual basis as well.

Recommendation: BPP should issue an interpretation and recommendation for contracting authorities in regard to appropriate application of eligibility criteria used to assess bidding companies' economic and financial ability, as well as their technical and professional competence. Current malpractices on using eligibility criteria for companies' participation in tender procedures as an instrument for discriminating bidders and limiting the competition must be immediately abandoned. At the same time, thorough analysis on foreign companies' participation in public procurements must be developed, as well as a comparative analysis with the countries in the region, notably for the purpose of determining objective and subjective factors that affect the current situation. In other words, the analysis should identify the reasons for the current situation and whether low participation of foreign companies in public procurements is a result of their mistrust in the Macedonian system on public procurements or a consequence of their lack of interest for entering such contracts. The increasing low interest on the part of economic operators to participate in procurement procedures, which ultimately leads to lower competition, should be the focal interest of Chambers of Commerce and the business community, in order to identify the reasons thereof and propose specific measures to be taken by competent authorities with a view to eliminate contracting authorities' subjectivity in implementing public procurements and discourages companies to participate in this process.

- **High number of annulled tender procedures remains a bottleneck in the public procurement system. In the third quarter of 2011, a total of 444 decisions were taken to annul tender procedures, which accounts for 26.57% of the total number of public procurement procedures implemented in the same period.**

All annulment decisions taken in procedures from the monitoring sample were made by the contracting authorities. Some annulment decisions were taken due to the fact that there were no bids obtained, while others were based on the fact that bids submitted were deemed unacceptable because the companies failed to fulfil the eligibility criteria or the bid's value exceeded the funds allocated for the planned procurement.

According to data obtained from the Electronic Public Procurement System, in the third quarter of 2011, decisions on procedure annulment were taken in 26.57% of all calls for public procurement announced, which represents an increase by 2.35 % compared to the same period in 2010, or an increase by 6.14 % compared to the same period in 2009.

Procedure annulments in the third quarter of the year

Period	Number of announced calls for bids	Number of decisions on procedure annulment	Share of annulled procedures
July - September 2009	1,566	320	20.43%
July - September 2010	1,561	378	24.22%
July – September 2011	1,671	444	26.57%

In that, it should be stressed that from the total of 444 decisions on procedure annulments taken in the third quarter of 2011, 358 decisions considered complete tender annulment, while 86 decisions concerned partial tender annulment.

Considering the gravity of tender annulments, the present monitoring report includes a thorough analysis of reasons behind tender annulments in the third quarter of 2011.

Reasons behind tender annulments in the third quarter of 2011

Reason for tender annulment	Number of decisions	Share %
Failure to obtain single bid or single acceptable bid	231	52.03
Assessments that tender documents contain significant shortcomings or are incomplete	47	10.59
Contracting authorities' procurement needs have changed due to unpredictable and objective circumstances	45	10.14

Bidders offered prices and terms and conditions on public procurement contract performance that are less favourable than the actual market prices or terms and conditions	35	7.88
Contracting authority cannot select the most favourable bid due to significant violations to the Law, in compliance with Article 210 of the Law	18	4.05
Acceptable bids were obtained, but they cannot be compared due to different approach pursued in developing the technical or financial portion of bids	17	3.83
Unpredictable changes have been made to the contracting authority's budget	17	3.83
The procedure is annulled by the State Commission on Public Procurement Appeals	16	3.60
The bidder selected as the most favourable one has withdrawn from contract signing	9	2.03
Number of bidding companies is lower than the minimum number for public procurement contract awarding, as stipulated under PPL	9	2.02
Total	444	100

It can be concluded that the most frequently referred legal provision on procedure annulment, as indicated in as high as 52.03% of cases, is that there is no bid obtained or there are no acceptable bids. This means that no bids were submitted in the tender procedure or the companies that submitted their bids failed to fulfil the eligibility criteria, i.e., did not provide evidence in support of their economic, financial, technical or professional ability. The high share of tender annulments based on the failure to obtain single bid or failure to obtain single acceptable bid only confirms that the contracting authorities have defined unattainable eligibility criteria for companies and are considered to represent tendentious practices. Namely, pursuant to Article 99, paragraph 1 of the Public Procurement Law, institutions are given the possibility to pursue direct negotiations without previously announced call for bids in cases when they did not obtain any bids in the open procedure. Quite understandably, this can be considered to be one of the ulterior motives for the institutions to set eligibility criteria that are inadequate to the actual market situation, notably for the purpose of discouraging companies to participate in tender procedures and to create legal preconditions that would allow them to sign procurement contracts by implementing non-transparent procedures: direct negotiations without previously announced call for bids.

Second most often referred legal ground for annulment of public procurement procedures, as indicated in 10.59% of cases, is the assessment that tender documents contain major shortfalls. Unclear is how these errors are being determined only after the receipt of companies' bids rather than earlier in the procedure when companies have the opportunity to raise questions or request additional explanations for tender documents and are even entitled to appeal the tender documents in front of the state second-instance commission. Given these practices, immediate measures are needed in order to limit the possibility on procedure annulment due to shortfalls in tender documents, in particular knowing that contracting authorities have the possibility to change and correct tender documents until the expiration of 6-days period prior to the deadline stipulated for submission of bids or letters of interest for tender participation.

High share of decisions (10.14%) on procedure annulment were based on changes that have been made to contracting authorities' procurement needs. Unclear remains why these changes appear after the contracting authorities have opened companies' bids, moreover given that this legal ground on procedure annulment does not imply possible changes made to the contracting authority's budget, but rather changes in their procurement needs. Contracting authorities adopt their relevant annual procurement plans by 31 January in the current year and are given the possibility to make changes thereto throughout the year. Hence, justifying the procurement procedure annulment with the fact that contacting authority's procurement needs have changed after they have announced the call for bids is considered utterly unprofessional and tendentious.

In addition to quarterly figures, the trend on increased annulments was noted also for the first nine months of the year. In that, 23.01% from the total number of calls for bids announced in the period January-September 2011 were annulled, compared to 20.47% recorded for the same period in 2010 and 16.76% for the same period in 2009.

Procedure annulments in the first nine months of the year

Period	Number of announced calls for bids	Number of decisions on procedure annulment	Share of annulled proce-dures
January-September 2009	5,106	856	16.76%
January-September 2010	5,295	1,084	20.47%
January-September 2011	5,684	1,308	23.01%

It can be concluded that from year to year the number of annulled procedures increases by 3 to 4 % in average and has reached an alarming level.

Recommendation: BPP should take specific measures to implement the recommendation given in the 2010 Annual Report: "to reduce the number of annulled procedures and provide detailed rationale on reasons for procedure annulment (significant shortcomings in tender documents) in order to enable direct and specific measures aimed to address the negative trend identified."

- **In the third quarter of 2011, the value of contracts signed by means of direct negotiations without previously announced call for bids amounts to 7.5 million EUR and is by 8.5% lower compared to the same period in 2010. Despite the modest decrease noted in the third quarter, the value of public procurement contracts signed by means of direct negotiations in the first nine months of 2011 remains at a record-high level for the last three years.**

The third quarter of 2011 marked the discontinuation of head-spinning increase of contracts signed by means of non-transparent procedure, i.e., direct negotiations without previously announced call for bids. According to data obtained from the Electronic Public Procurement System, a total of 152 contracts of this type were signed in the period July-September 2011 and their total value accounts for 461 million MKD, i.e., 7.5 million EUR. This represents a decrease of 8.5% compared with the value of contracts signed in the same period in 2010 when they accounted for 9.4 million EUR. Nevertheless, the decreased value of contracts signed under direct negotiations in the third quarter of the year did not have significant effect in mitigating differences noted on annual level and concerning the period January- September.

Value of contracts signed under direct negotiations without previously announced call for bids

Period	Value of contracts (million EUR)
January-September 2009	15.8
January-September 2010	19.6
January-September 2011	29.2

However, an additional problem that raises concerns in regard to contracts signed under direct negotiations without previously announced call for bids, which due to their non-transparency should be used only in exceptional cases, is the delayed notification and registration of such contracts. Data from the Electronic Public Procurement System show that institutions ignore their legal obligation on submitting notifications for contracts signed within a period of 30 days. Such practices result in major differences in the total value of these contracts depending on the period when the database was browsed. Likely is the fact that the total value of contracts signed by means of direct negotiations without previously announced call for bids in the first nine months of 2011 will actually be higher than the currently calculated amount of 29.2 million EUR.

Recommendation: Having in mind the several-year trend on increased value of public funds spent as part of contracts signed by means of direct negotiations without previously announced call for bids, urgent is the need to establish a monitoring mechanism for these contracts. This mechanism will limit the possibilities for signing such contracts and will identify possible shortfalls in the applicable legislation that are conductive to such practices.

> **E-auctions were used in 46.26% of procurement procedures implemented in the third quarter and this share is below the law-stipulated threshold set at 70% from the total number of calls for public procurement announced.**

In the third quarter of 2011, the law-stipulated threshold for e-auctions - which was intended as an instrument to reduce prices of goods and services or performance of works - remained unattained by the contracting authorities. At the same time, according to data obtained from the Electronic Public Procurement System, e-auctions or downward bidding were applied in 46.62% from the total number of calls for bids announced in the period July - September 2011. This fact indicates a modest increase in utilization of e-auctions compared to the previous quarters. In the period January - March 2011, the share of e-auctions accounted for 36.6%, and in the period April - June 2011 they accounted for 43.68%. In terms of the first nine months in 2011, e-auctions were used in 41.89% of procurement procedures. Knowing that certain contracting parties are consistent in complying with this obligation and in almost all procedures use e-auctions, whereby they demonstrate over-performance in regard to the law-stipulated threshold, obvious is that high number of contracting authorities fail to implement e-auctions even within the average share of procedures (46.26%).

E-auctions

Period	Number of e-auctions	Share of e-auctions	Law-stipulated threshold
January-September 2011	2,381	41.89%	70.00%
January-September 2010	615	11.65%	30.00%

Knowing that non-enforcement of laws in effect on the part of state institutions is completely unacceptable, it should be noted that both the ministries and the municipalities underperformed in regard to the law-stipulated threshold for e-auctions in public procurements. Namely, the ministries used e-auctions in 44.44% instead of the mandatory 70% of tender procedures, while the municipalities implemented e-auctions in 40.31% of their public procurements.

This significant underperformance related to the legal obligation on e-auctions raises serious concerns, in particular knowing that in 2012 the contracting authorities will be obliged to use e-auctions in 100% of procurement procedures implemented.

These deviations raise the following question: why did competent institutions insist on higher thresholds being set, if their practical implementation in lacking.

Recommendation: In order to guarantee adherent enforcement of the law, the Bureau of Public Procurements should pursue technical measures against inconsistent use of the Electronic Public Procurement System. At the same time, greater efforts are needed on the part of the Government and aimed to comply with this legal obligation. Contracting authorities should use e-procurements and in particular e-auctions more frequently, because on one hand they enable greater efficiency and budget savings, and, on the other hand, they are regulated as a legal obligation.

> **Tender specifications that favour a particular bidder were also recorded in this monitoring sample.**

Worrying is the fact that one of the largest tenders included in the monitored sample - procurement of vehicles in the amount of 19 million MKD, i.e., approximately 310,000 EUR - was appealed in front of the State Commission on Public Procurements Appeals on the grounds of disputable tender specifications. Namely, only two vehicle dealers submitted bids in this tender procedure, one of which insisted that changes should be made to the favouring tender specifications as early as the announcement of the call for bids and after receiving the tender documents. Even though SCPPA rejected the appeal, it should be noted that the accusations were serious. Notably, the appeal allegations claimed that the contracting authority purchasing the vehicles tailored its tender specifications in favour of one bidder, which was later awarded the procurement contract, and that tender documents were not in compliance with the law and thereby led or would have led to discrimination of economic operators or to limited market competition, pursuant to Article 210 of the PPL.

Adjustments to tender specifications whose aim is to favour certain bidders should be identified as one of the reasons behind the low number of bidding companies in a significant portion of procedures monitored.

Having in mind these problems, it seems that in cooperation with the Chambers of Commerce efforts should be made to raise awareness among the companies with a view to protect their right to tender participation and to duly lodge appeals in front of the State Commission on Public Procurement Appeals, as well as to react in front of the Bureau of Public Procurements for the purpose of limiting institutions' possibilities to use tender specifications in order to favour certain bidding companies.

Recommendation: Additional education and training is needed for state institutions' staff tasked with development of tender documents, as well as to educate and encourage economic operators to lodge appeals in front of SCPPA whenever they determine that tender specifications provide references to a specific product or bidder.

- **Tender documents were available in electronic form at the EPPS for only 39.41% of procedures implemented. Although this share is almost twice as high as the share recorded in the previous year, it indicates the insufficient use of electronic system's advantages that facilitate companies' participation in public procurement procedures.**

Continuous indications that tender documents should be issued free-of-charge started to reap results. Growing is the number of public procurements monitored where bidding companies are issued tender documents free-of-charge. Despite the growing number of institutions that understand the need to reduce companies' costs for tender participation, EPPS's utilization rate for that purpose is unsatisfactory. Namely, in the third quarter of 2011, only 668 from the total of 1.695 calls for bids announced made the relevant tender documents available in the electronic system. Their share accounts for 39.41% and is considered significant, but fails to represent a satisfactory improvement compared to the same period in 2010 when tender documents were published in the electronic system for only 23.83% of procurement procedures. Although significant portion of institutions issue their tender documents free-of-charge, they still require the companies to obtain a hard copy as well. Such behaviour demonstrated on the part of contracting authorities is incomprehensible, in particular given the electronic system's penetration in the field of public procurements.

Recommendation: Considering the advantages of the Electronic Public Procurement System, all institutions should strive towards issuing free-of-charge tender documents in electronic form to all companies interested to participate in public procurement procedures.

> **The law-stipulated obligation to sign procurement contracts within their estimated value, i.e., in the amount of initially secured funds and according to the decision on the public procurements' value is applied selectively.**

Contracting authorities pursue subjective interpretation of Articles 26 and 28 from the PPL and related to the estimated value of procurements. On one hand, the contracting authorities often annul tenders or reject bids submitted by companies when their respective amounts exceed the contract's estimated value from the decision on public procurements and, on the other hand, some institutions sign contracts whose respective values are significantly higher than the public procurement's estimated value. Thus, it should be noted that the monitoring sample included a three-year procurement procedure for cleaning services whose value accounted for 1 million EUR and was appealed in front of the State Commission on Public Procurement Appeals on two occasions, notably because one of the bidding companies – although first-ranked according to the bid-evaluation - was not selected as the most favourable bidder due to the fact that its contract value exceed the procurement's estimated value. This would not have been a matter of dispute if the monitoring results did not indicate several procurement procedures where the contracting authorities have signed procurement contracts whose amount exceeded the procurement's estimated value by as high as 25%.

Contracting authorities explain that acceptance or rejection of bids whose amount exceeds the procurement's estimated value is a matter of assessment and depends on the fact whether they have sufficient funds to cover the difference between the procurement's planned and obtained price. Nevertheless, such justifications indicate that contracting authorities pursue a rather flexible interpretation of Article 28 from the PPL.

The monitoring sample included a procedure where the estimated value was conspicuously identical to the last digit with the price bided and disclosed on public opening of bids, i.e., 5,792,304 MKD. This is most certainly a confusing coincidence and needs to be duly noted.

Recommendation: Considering the new amendments to the PPL, which will enter into effect in 2012 and are related to this type of cases, an official opinion is needed to specify the cases where the contracting authorities can refer to these legal provisions and can sign contracts with the most favourable bidder, although the bid's price is higher than the procurement's initially estimated value.

- **Failure to comply with legally stipulated deadlines on taking the selection decision and submission of notifications on contracts signed results in holding tender participants in anticipation and deprives the broader public of the possibility to obtain timely information.**

17.5% of monitored institutions did not comply with the legally stipulated deadline on taking the selection decision for the most favourable bid. Deadline breaches range from several days to 1 month.

This behaviour demonstrated on the part of institutions confirms the rule that absence of sanctions further encourages them to ignore their legal obligations. Hence, the message sent to economic operators that participate in tenders is utterly unfavourable and speaks of selective enforcement of PPL provisions. In that, the companies are required to demonstrate discipline and consistent compliance with the law, while the institutions pursue discretionary rights to ignore the law in question.

Analysis on compliance with the legally stipulated deadline on submission of notifications on contracts signed, as important in regard to securing transparency of public spending, shows that significant portion of institutions still fail to comply with this obligation. This problem was already stressed in regard to contracts signed by means of direct negotiations without previously announced call for bids, and was noted also in regard to contracts signed by means of implementing open procedures. 22.5% of contracting authorities from the monitoring sample submitted the notifications with significant delays or have not submitted any notification. In that, 10% of them submitted notifications to the EPPS 18 to 70 days after the deadline has expired, and 12.5% of contracting authorities did not submit any notifications until the cut-off date for the present analysis although they have adopted the selection decisions for the most favourable bid in the course of October and November, and these decisions were not appealed by economic operators.

Such behaviour on the part of institutions is unacceptable since it endangers the transparency of the public procurement process and prevents timely insight in contracts signed. In that, one must take into consideration the fact that the PPL already stipulates unreasonably long deadlines of 30 days for submission of such notification and hence any delay or non-compliance with this obligation can be interpreted as an attempt to conceal relevant data on public spending.

Recommendation: Mechanisms should be established for adherent enforcement of the legal obligation on timely selection decision-taking for the most favourable bid, as well as for submission of notifications on contracts signed within the deadline of 30 days. Current practices pursed by the institutions in this regard undermine the transparency in public spending.

- **Bank guarantees as evidence for the bid's validity were required in 50% of procurement procedures monitored. In that, similar is the share of bank guarantees required for quality performance of contracts. Such approach pursued on the part of institutions is utterly unfavourable and, on one hand, tends to discourage tender competition, while on the other hand it does not provide mechanisms on adherent implementation of contracts signed.**

Institutions are reluctant to waive their law-stipulated right on requesting bank guarantees for companies' participation in tender procedures, i.e., to prove their bids' validity. Hence the conclusion that significant portion thereof do not believe that they should reduce costs and administrative barriers for companies' participation in tenders.

In that, institutions predominantly set the bank guarantees at 3% of the bid's value. Contrary to the broadly-present requirements on bank guarantees for submission of bids, significant is also the number of institutions that do not require bank guarantees on quality performance of contracts. Specifically, bank guarantees were requested from the contract-awarded companies in only 57.5% of procedures included in the monitoring sample.

Absurd situations indicate that certain contracting authorities request bank guarantee for the bids' validity, but refrain from setting guarantees for quality performance of contracts signed. The need for changed behaviour on the part of institutions is primarily due to the fact that bank guarantees for the bids' validity result in increased costs for the companies' participation in tender procedures, whereas bank guarantees for quality performance of contracts is an important instrument made available to institutions in order for them to receive goods, services or works from the contract-awarded companies as initially anticipated.

Recommendation: Bank guarantees should not be defined as formal requirements for public procurement participation, whereas in the cases when they are required, efforts should be made to set the guarantees in a value lower than the law-stipulated threshold of 3% from the bid's value. As regards bank guarantees for quality performance of contracts, the contracting authorities should use them without exceptions therefrom.

Tender participants do not receive notifications with detailed rationale on the selection decisions taken. Such practices on the part of contacting authorities are contrary to the PPL and are deemed harmful both for the companies and the public procurement system.

The legal obligation stipulated under Article 168 of the PPL and concerning submission of detailed notifications to companies on the selection decision taken in the tender procedure, the reasons behind the decision to reject certain bid or the explanation why the bid was not considered the most favourable one is not complied with. These notifications are of particular importance in cases where the selection criterion used in the bid-evaluation process is "economically most favourable bid".

These notifications are of essential importance for developing a functional public procurement system. Only if contracting authorities provide timely and detailed information for companies as regards the tender outcome they can demonstrate the business community that public procurements in the country are fair and open and can thereby stimulate continuous participation in tender procedures and promote competition. On the other hand, detailed notifications are important for the bidders as they create trust in the process and provide them information on how to improve their competitiveness. Of course, they are an important tool for the bidders in cases where they deem that the bid-evaluation is disputable and enable them appropriate knowledge needed to lodge an argument-supported appeal to the SCPPA.

Recommendation: Contracting authorities should fully comply with their obligation stipulated under Article 168 of the Public Procurement Law and thus contribute to improved public procurement system.