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CORRUPTION SCHEMES IN HEALTHCARE PUBLIC PROCUREMENT DETECTED THROUGH PUBLIC PROCUREMENT APPEALS

RESEARCH

on corruption risks

in healthcare public procurement

Corruption Schemes in Healthcare Public Procurement Detected Through Public Procurement Appeals

Research on corruption risks in healthcare public procurement

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1. KEY FINDINGS

- The analysis of appeals lodged in healthcare public procurement reveals that, in 71% of all cases, companies have contested the decision on selection of the most advantageous bids, which shows that the main source of dispute arises from the bid-evaluation process as the procedure stage marked by the highest risk of favouring particular bidders.
- Bid-evaluation is conducted with insufficient precision and inequitable application of criteria, while the analysis of appeal procedures shows that, in some cases, contracting authorities select bids that do not meet the requirements defined in tender documents, thus creating conditions for subjective evaluation and favouritism of certain bidders.
- Based on appeals lodged by the companies, it was established that there are certain unclarities in respect to documents required for importing and placing medicines on the market which, in turn, create administrative obstacles and increasing the risk of subjective actions.
- As part of their tender procedures, contracting authorities include disproportional and selectively defined technical criteria or change them during the tender procedure, thus creating conditions for favouring certain companies and generating corruption.
- Based on analysed decisions, it could be concluded that the State Commission on Public Procurement Appeals has approved 42% of appeals lodged by companies against public healthcare institutions, which means that the Commission has established irregularities in almost every second healthcare public procurement.
- It is established that some public healthcare institutions do not act upon decisions taken by the State Commission on Public Procurement Appeals, which undermines the principles of lawfulness and legal security and creates doubts about hidden favouritism of certain companies.
- The research notes that companies often lodge appeals after expiration of the law-stipulated deadline, without providing relevant evidence in support, or they make other omissions in the appeal procedure, which is indicative of insufficient knowledge of appeal proceedings and burdens the system of legal protection with unfounded procedures.
- At national level, around 3% of tender procedures are appealed. In its own right, the low share of appealed tender procedures signals limited efficiency of legal protection mechanisms. However, in the healthcare sector, this share drops to 1.95% and is indicative of more prominent obstacles and reduced ability of the system to timely detect and prevent corruption.
- In the analysed 5-year period, a total of 39,559 public procurement contracts have been awarded in the healthcare sector and only 778 appeals have been lodged. Data show that an appeal is lodged to every 1.6 million EUR spent on public procurement, compared to 1.3 million EUR in all other sectors.

- The relatively low number of appeals create a situation in which public healthcare institutions are not under sufficient external pressure to comply with the legislative norms, which increases the risk of biased contract-awarding and abuse of public funds.
- 99 of 110 public healthcare institutions have been addressed with appeals, but their distribution is significantly unbalanced. In absolute figures, the highest number or appeals are recorded with the City General Hospital "8th September" Skopje (58), while the Ministry of Health holds a prominent position in terms of the share of appeals in the total number of tender procedures (10%), which is almost five times higher than the average share of appeals in the healthcare sector.
- Detected weaknesses limit the competitive environment, which leads to higher prices and potentially lower quality of medicines and medical supplies that are being procured.

2. CONTEXT AND METHODOLOGY APPROACH

Efficient implementation of public procurement procedures is a precondition to prevent corruption, ensure cost-effective public spending, and encourage competition. On the contrary, inconsistencies, insufficient control, and poor performance of legal protection mechanisms could lead to abuses, irrational public spending and erosion of the public interest.

The significance associated with the issue of corruption in healthcare public procurement does not arise only from the financial scope of such procurements, but also from the fact that irregularities in implementation of public procurement reduce the effectiveness and fairness of the public healthcare system, i.e. prevent equal access to healthcare for the citizens and lead to decreased quality of healthcare services provided.

In addition to regulating public procurement procedures, the established legal framework also anticipates an effective legal protection mechanism. The State Commission on Public Procurement Appeals (SCPPA) plays a central role in this system as an independent and autonomous state body tasked to control the lawfulness of public procurement procedures and to protect the rights and interests of economic operators.

By means of analysis of appeal procedures led before the State Commission on Public Procurement Appeals, the purpose of this research is to identify irregularities, structural weaknesses and potential corruption schemes and limitations on competition in healthcare public procurement.

Data used as basis for this research endeavour include decisions taken and published by SCPPA in the period 2020 - 2024, i.e. decisions related to public procurement procedures implemented by public healthcare institutions in the Republic of North Macedonia. The analysis covered a total of 778 decisions taken in appeal proceedings led before the State Commission in the defined period.

In addition to contested decisions and actions taken during tender procedures and the types of decisions taken by SCPPA, in-depth analysis was made of reasons for appeals lodged by economic operators and those enlisted in SCPPA's decisions relating to public procurement of medicines and medical supplies.

This research is conducted as part of the project "Combating Corruption in Healthcare Public Procurement", implemented by the Center for Civil Communications with financial support from the National Endowment for Democracy (NED).

3. RESEARCH FINDINGS

3.1 Low number of appeals in healthcare public procurement: a signal for greater systemic risk of corruption

Competences of the State Commission on Public Procurement Appeals (SCPPA) are stipulated in the Law on Public Procurement and concern decision-making upon appeals contesting actions, decisions or omissions on the part of contracting authorities in all stages of public procurement procedures. The State Commission takes decision upon appeals contesting tender documents, criteria for tender participation, bid evaluation and bid selection, as well as decisions on tender procedure annulment or decisions on contract award. By means of its decisions, SCPPA should not only resolve specific disputes, but also contribute to establishment of good practices and adherent application of legal provisions.

The appeal procedure is regulated as a formal and time-bound process, aimed at ensuring fast and efficient legal protection without undue delay of public procurement procedures. Appeals are lodged by economic operators which have or have had an interest in being awarded the procurement contract and which believe that some of their rights in the tender procedure had been violated by unlawful action taken by the contracting authority.

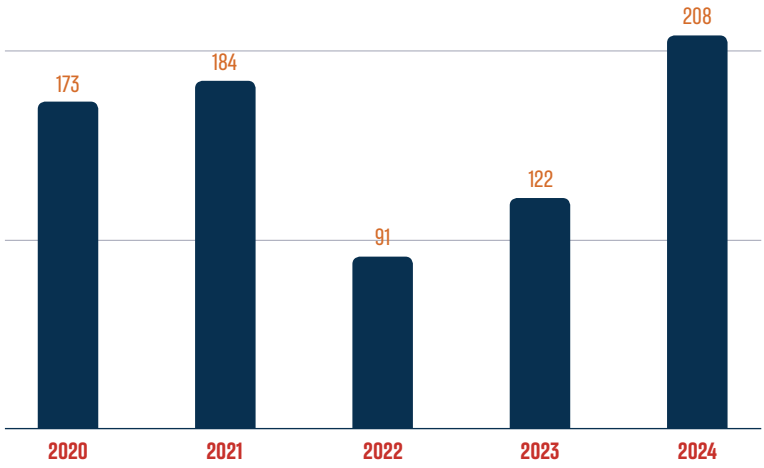
When taking its decisions, the State Commission examines the tender procedure's lawfulness and compliance with the basic principles of public procurement, such as transparency and equitable treatment of tender participants, as well as the impact of established violations on the tender procedure's outcome. Hence, the scope and content of SCPPA's decisions directly depend on the number and nature of appeals lodged, which renders the appeal mechanism a key indicator for the system's performance.

Analysis of SCPPA's decisions is of great importance as it allows insight into the most common reasons for economic operators to lodge appeals, what practices are being established in terms of actions taken by contracting authorities, and how are legal provisions enforced in the practice, especially within the healthcare sector where market conditions have a significant effect on use of legal protection.

In the analysed period, i.e. from 2020 to 2024, SCPPA was presented with 778 appeals contesting public procurement procedures where public healthcare institutions appear as the contracting authority. In that, it should be noted that significant portion of healthcare public procurement concern procurement subjects for which there are limited number or only one authorized economic operator, which decreases the possibility for lodging appeals. Nevertheless, the possibility to lodge appeals contesting tender documents remains valid in this sector as well.

In the same period, public healthcare institutions have awarded between 7,000 and 8,500 public procurement contracts, based on a total of 116,000 bids submitted by companies. This high number of contract awards and the correspondingly high number of bids are accompanied by a relatively low number of appeals that ranges from 91 to 208 on annual level. The lowest number of appeals is noted in 2022 (91), while the highest number of appeals were lodged in 2024 (208), representing an evident growth in appeals by 70% compared to 2023.

Number of public procurement appeals in the healthcare sector



The relatively low number of appeals is also evident when compared to the national average: while around 2.79% of all public procurements were presented with appeals relative to the number of contracts awarded, in the healthcare sector this share stands at 1.95%. Should the number of appeals in the healthcare sector correspond to the national average, there would have been 1,097 instead of 778 appeals recorded in the analysed 5-year period.

Difference between the expected number of appeals according to the national average and the actual number of appeals lodged is a strong indicator of demotivation and greater corruption risk in healthcare public procurement. Such disproportion cannot be explained only by the behaviour of economic operators or the appeal mechanism's performance, but should be viewed in the context of the specific structure of healthcare public procurement wherein a significant portion of goods and services are marked by limited number of authorized bidders, which further narrows the possibility for lodging appeals.

This is additionally confirmed by the fact that, in 2024, 40% of tender procedures in the healthcare sector were presented with only one bid each, with the value of these procedures accounting for around 55% of the total value of healthcare public procurement. Such state-of-affairs in public procurement directly affects use of the legal protection mechanism given that, under conditions of limited or non-existent competition, the possibility for economic operators to lodge appeals and to contest lawfulness of tender procedures is decreased as well. Instead of allowing appeals to correct the system, tender procedures marked by only one participant create circumstances wherein the procurement procedure is only formally implemented. This increases the risk of setting discriminating requirements in tender documents and limiting competition among companies, which could have direct consequences on the quality and price of medicines and medical supplies being procured. On that account, the increased number of such tender procedures is yet another indicator of the potentially weakened role of legal protection as mechanism for detection and prevention of corruption practices in healthcare public procurement.

Public procurement appeals in all sectors versus the healthcare sector

Year	Total number of contracts	Total number of appeal decisions	Total share of appeal decisions	Number of contracts in the healthcare sector	Number of appeal decisions in the healthcare sector	Share of appeal decisions in the healthcare sector
2020	32,603	983	3.02%	7,842	173	2.21%
2021	34,149	1,008	2.95%	7,663	184	2.40%
2022	33,104	751	2.27%	7,211	91	1.26%
2023	34,587	981	2.84%	8,309	122	1.47%
2024	33,426	964	2.88%	8,534	208	2.43%

These trends reaffirm the conclusion that the low number of appeals does not mean absence of problems, but rather limited use of legal protection. Unlike the situation in all other sectors, marked by participation of more economic operators and greater competition among them, the healthcare sector is dominated by limited number of pharmacies and economic operators with exclusivity, which significantly narrows the space for actual selection and the possibility for selection decision to be contested. The appeal procedure is an essential mechanism for external control of lawfulness in public procurement. This mechanism is of exceptional importance as an addition to other forms of control, given that it provides direct and timely examination of decisions though active participation of economic operators. When this mechanism cannot be activated, when it is not used or when it is minimally used, contracting authorities practically do not have any real risk of their decisions being contested or re-examined. Such conditions increase the risk of corruption practices, such as favouring certain economic operators, selective application of the criteria, and non-transparent and irrational public spending.

Absence of appeals and competition in public procurement also means absence of effective pressure on contracting authorities to take lawful actions, and create an environment wherein it is much easier for corruption practices to emerge and more difficult to detect them.

In a sector marked by high-value contracts and limited competition, the relatively low number of appeals serves as red flag for potential market capture, risks related to market conditions and absence of effective anti-corruption mechanisms. In the healthcare sector, one appeal is lodged to approximately every 1.6 million EUR spent on public procurement, while this parameter in other sectors accounts for one appeal to around every 1.3 million EUR.

3.2 99 of 110 public healthcare institutions addressed with appeals for implemented tender procedures

In the Republic of North Macedonia there are 110 public healthcare institutions, whilst 99 of them have been addressed with appeals for tender procedures implemented in the last five years. Among them, the highest number of appeals were lodged against PHI City General Hospital "8th September" Skopje, i.e. 58 appeals, followed by the Ministry of Health with 40 appeals, and the Public institution in the Field of Healthcare for the Needs of Public Healthcare Facilities, University Clinics, Bureau and Emergency Centre, with 31 appeals.

Public healthcare institutions with the highest number of appeals in the period 2020 – 2024

Institution	Number of appeals
PHI City General Hospital "8th September" Skopje	58
Ministry of Health	40
Public Institution in the Field of Healthcare for the Needs of Public Healthcare Facilities, University Clinics, Bureau and Emergency Centre – Skopje	31
PHI University Clinic of Surgery Diseases "St. Naum of Ohrid" Skopje	29
PHI Clinical Hospital Bitola	28
PHI University Clinic of Gynaecology and Obstetrics Skopje	28
PHI Clinical Hospital – Shtip	25
PHI General Hospital Kumanovo	21
PHI Health Centre of Skopje, Central Board Skopje	21

Analysis of the number of appeals lodged against the top 10 contracting authorities with highest-value contracts in the healthcare sector shows that the contracting authority holding the top position in terms of high-value contracts, i.e. the Ministry of Health, is also marked by the highest share of appeals standing at 10%. Other institutions in the healthcare sector marked with shares above-the average calculated at 1.95% include the Institute of Transfusion Medicine of RNM (3.22%), Public Institution in the Field of Healthcare for the Needs of PHFs, University Clinics, Bureau and Emergency Centre – Skopje (3.17%), PHI Clinic of Haematology (2.99%), PHI Clinical Hospital Bitola (2.29%,) and PHI City General Hospital "8th September" Skopje (2.20%).

Top 10 contracting authorities with the high-value contracts in the healthcare sector and the number of appeals lodged against tender procedures implemented by them in the period 2020 – 2024

Institution	Total number of contracts	Total value (in EUR)	Number of appeals lodged	Share of appeals in the number of contracts
Ministry of Health	401	306,435,872	40	9.98%
PHI University Clinic of Radiotherapy and Oncology	439	83,757,185	6	1.37%
PHI City General Hospital "8th September" Skopje	2,636	73,058,567	58	2.20%
PI in the Field of Healthcare for the Needs of PHFs... – Skopje	979	61,566,409	31	3.17%
Clinic of Cardiology – Skopje	619	33,186,073	11	1.78%
PHI Clinic of Haematology	368	33,068,883	11	2.99%
PHI Clinic of Children's Diseases	668	31,118,193	10	1.50%
PHI Institute of Transfusion Medicine of RNM	373	30,622,421	12	3.22%
PHI Clinical Hospital Bitola	1,222	24,706,566	28	2.29%
PHI Clinical Hospital Tetovo	928	24,664,987	14	1.51%

Reasons for failure to use the right to appeal could vary and range from lack of trust in the institutions, the length of appeal proceedings, costs related to submission of appeals and possible initiation of court proceedings, to fear among economic operators from retaliation by contracting authorities whose tender procedures they have appealed. Some reasons are related to the structure of public procurements themselves. Significant share of high-value contracts concern procurement of specific medicines, especially biological therapy for the Clinic of Oncology, haematology therapy at the Clinic of Haematology, as well as medicines for treatment of rare disease, mainly for the Clinic of Children's Diseases, supplied by single holders of approval for market placement of such medicines. In such cases, the public procurement procedure is only formally implemented, with actual competition is reduced to minimum, which is further confirmed by data on the high share of tender procedures presented with only one bid among the institutions that have not been addressed with appeals in the analysed period. Nevertheless, the numbers are also indicative of a broader problem relating to the manner in which this market operates. It is observed that for some parts of healthcare public procurement, certain economic operators rarely appear as direct competitors in same tender procedures. Instead of competition among companies, this creates an impression of a "divided" market wherein everyone operates within their market segment. In its own right, this does not necessarily imply illegal arrangements among bidders, but raises serious questions whether a number of economic operators have informally divided the market and avoid competition among themselves.

3.3 Companies most often appeal the decisions on selection of the most advantageous bid

In the analysed period, 255 economic operators lodged appeals before SCPPA contesting tender procedures implemented by public healthcare institutions. The highest number of appeals, i.e. 27 in total, were lodged by the Company for Document Scanning, Processing and Storage KONTEGO LLP Skopje, while the Trade and Service Company BIOTEK LLP export-import Skopje and the Trade and Service Company AVICENA LLP export-import Skopje have lodged 25 appeals each.

Top 10 companies with the highest number of appeals lodged in the period 2020 – 2024

Company	Number of appeals
Company for Document Scanning, Processing and Storage KONTEGO LLP Skopje	27
Trade and Service Company BIOTEK LLP export-import Skopje	25
Trade and Service Company AVICENA LLP export-import Skopje	25
Trade, Production and Service Company PROMEDIKA LLP Skopje	23
Production and Service Company NET-ELECTRONICS LLC Skopje	21
JSC for Production of Medicines, Medical Equipment and Supplies, Trade and Service D-R PANOVSKI Skopje	18
Trade, Service and Consulting Company EURO TIM LLC import-export Skopje	14
Service and Trade Company BIGOR CLEANING LLC Skopje	13
Company for Servicing, Overhaul and Assembly of Elevators, Wholesale and Retail import-export SERVICE DAKA, Poposki Trajan Bitola LLC	13
Trade and Service Company PHARMALINE LLC import-export Skopje	12

Most often, i.e. in 71.3% of cases, economic operators have contested the decision on selection of the most advantageous bid. The content of procurement notices or tender documents appear as basis for appeals lodged in 14.6% of cases, and decisions on tender procedure annulment have been contested in 5.2% of appeal cases.

Type of appealed decisions and actions

Decision/action	Share (%)
Decision on selection of the most advantageous bid	71.3
Content of procurement notice or tender documents	14.6
Decision on tender procedure annulment	5.2
Omission by the contracting authority to properly respond to timely posed questions or requests for clarification	4.7
Decision on selection of the most advantageous bid and annulment of some procurement lots	2.5
Publication of notices on changes made to tender documents and additional information	1.7

As regards decisions taken by the State Commission, in 42.3% of cases it has approved the appeal, in 38.1% of cases it has rejected the appeal as unfounded, in 12.2% of cases it has discontinued appeal proceedings, in 6.4% of cases it has denied the appeal, and in 1% of cases it has annulled the tender procedure in ex-officio capacity on the grounds of significant violations to the Law on Public Procurement.

Types of SCPPA's decisions taken in analysed cases

Decision	Share (%)
Approved appeal	42.3
Rejected appeal	38.1
Discontinued appeal proceedings	12.2
Denied appeal	6.4
Annulled tender procedure in ex-officio capacity	1

Based on analysed decisions, it could be concluded that 42.3% of appeals have been approved, which means that in almost half of cases SCPPA has established irregularities in actions taken as part of healthcare public procurements. The high share of approved appeals is indicative of systemic weaknesses relating to preparation and implementation of tender procedures, such as insufficient expertise, inadequate application of legislation or possible abuses. This creates legal uncertainty, extends the duration of public procurements, and reduces the efficiency of public spending. Hence, the trend observed here should be understood as a signal for the need to promote relevant capacity, control and system professionalization, all for the purpose of providing adherent protection of the public interest.

The structure of decisions taken in appeal procedures related to healthcare public procurement does not differ from the structure of such decisions related to public procurements in general.

4. TYPICAL IRREGULARITIES AND POTENTIAL CORRUPTION SCHEMES

4.1 Manipulation of criteria for tender participation

The most frequent reason on whose basis economic operators lodge appeals before SCPPA concerns unclarities in relation to documents needed for importing or placing medicines on the market.

In the bid-evaluation stage, frequent reason for rejection of bids implies lack of necessary documents for importing or placing medicines on the market.

Hence, in the tender procedure for procurement of medicines, the bid submitted by one economic operator had been assessed as unacceptable with the explanation that the operator in question has not attached a decision on placement of final medicine on the market or approval for parallel import (for registered medicines) or approval for import (for unregistered medicines) in compliance with the Law on Medicines and Medical Supplies. The appealing party had presented the Agency of Medicines and Medical Supplies with an application, attaching relevant documents and certificates of quality, after which the Agency issued a document certifying that, should the company be selected as the most advantageous bidder in the public procurement, the Agency could issue an approval for importing medicines that are not authorized for market placement in justified cases. However, during the bid-evaluation, the contracting authority has assessed this bid as unacceptable believing that such document could not be considered as authorization decision. This was confirmed by SCPPA, which approved the appeal and established that the document provided does not amount to authorization decision for market placing of final medicine or approval for parallel import, or even to approval for import, elaborating that based on the document provided it could not be established in advance that the Agency will, without any exception or condition, issue the import approval if the appealing party's bid had been selected as the most advantageous one.

There are examples where SCPPA has relied on the same reason to annul tender procedures organized upon procurement notices. More specifically, as part of its public procurement for troponin tests, D-dimer tests, Pro-BNP tests, and blood gas analysis tests, technical specifications developed by the contracting authority enlisted that the selected economic operator is obliged, within a deadline of 10 days from signing the public procurement contract, to submit an import approval issued by MALMED concerning unregistered medical supplies for which the economic operator awas selected as the most advantageous bidder. Although the appealing party had indicated a different reason in its appeal, acting in ex-officio capacity, SCPPA has established that, pursuant to the law, bidders should meet the eligibility criteria on the day when bids are opened, and proceeded to annul the tender procedure on that ground.

However, SCPPA has taken an opposite decision in a public procurement organized as negotiation procedure without previously announced procurement notice. Notably, back in 2020, one contracting authority organized negotiation procedure without previously announced procurement notice for procurement of liquefied oxygen for medical use and was presented with bids from two companies. The economic operator whose bid had not been selected as the most advantageous one lodged an appeal against the selection decision contesting the evaluation of the bid submitted by the chosen economic

operator and relating to technical specifications of goods that are being procured, claiming that the selected economic operator should have been disqualified from the tender procedure. According to the appealing party, as part of its invitation for submission of bids, the contracting authority should have established the need and should have adequately stipulated an obligation for bidding companies to submit approval for market placement of medicine, instead of import approval issued 10 days after the most advantageous bid was selected, knowing that there are economic operators holding valid registrations with the Agency of Medicines and Medical Supplies. In order to prove this claim, the appealing party addressed the Agency of Medicines and Medical Supplies with an information request inquiring whether, for a medicine to be placed on the market, it should hold a valid approval for market placement, to which the Agency responded that a medicine could be placed on the market provided there is an approval for market placement issued in compliance to the Law on Medicines and Medical Supplies. In this specific case, the appealing party claimed that the decision on selection of the most advantageous bid implied a violation in this respect, on the grounds that the selected economic operator did not possess such approval for market placement of medicine, but rather a statement indicating that it would secure an import approval once the contract is signed. In its response to the appeal, the contracting authority indicated that, pursuant to Article 55, paragraph 11 of the Law on Public Procurement, it is not obliged to determine ability of economic operators given that the public procurement is organized as negotiation procedure without previously announced procurement notice. Acting upon appeal claims and in ex-officio capacity, SCPPA denied the appeal as unfounded, and assessed appeal claims made by the appealing party in respect to tender documents as untimely. However, the appealing party did not stop here and in 2021 motioned a lawsuit before the Administrative Court against SCPPA's decision. In its decision, the Administrative Court approved the lawsuit, annulled SCPPA's contested decision, and returned the case for repeated proceedings and decision-making. The Court was of the opinion that SCPPA had not acted in ex-officio capacity and within the boundaries of the appeal lodged, especially in respect to eliminating certain important violations made by the contracting authority in the bid-evaluation stage and selection of the most advantageous bid relating to the manner in which criteria for establishing bidder's ability have been defined in tender documents, which are incompatible with the Law on Medicines and Medical Supplies. Dissatisfied with the decision taken by the Administrative Court, SCPPA and the selected economic operator appealed before the Higher Administrative Court, which rejected their lawsuit as inadmissible. Once the Higher Administrative Court had taken its decision, SCPPA repeated its proceedings upon the appeal submitted by the appealing party in 2022, but again rejected the appeal as unfounded, providing an identical rationale as the one featured in its 2020 decision.

In the tender procedure for procurement of goods – treatment of rare diseases, tender documents drafted by the contracting authority indicated that the bids should include approval for market placement of medicines in the Republic of North Macedonia or import decision, and if the relevant medicine does not hold such approval in the state, bidding companies should provide an approval for market placement in any EU member-state, Norway, Switzerland, the United States of America, Canada or Japan, with an indication that if a bidding company holds such approval for RNM, then the approval for EU or other enlisted states would not be taken into account. Despite this, the contracting authority has chosen as the most advantageous the bid accompanied by approval for EU and other enlisted states whilst rejecting the bid accompanied by approval for RNM although the bid in question was acceptable. On that account, SCPPA approved the appeal, annulled the selection decision in respect to the procurement lot concerning the medicine in question.

Analysis of cases elaborated above indicates that inconsistent definition of criteria for tender participation is a serious source of legal uncertainty and creates potential space for selective treatment of economic operators. Unclear, inconsistent or non-aligned requirements relating to medicine permits and approvals create opportunities for discretionary decisions, which could lead to limited competition and favouritism of certain bidders. At the same time, different practices applied by competent authorities further disrupt the predictability and integrity of tender procedures.

4.2 Limiting competition through technical and professional ability criteria

Limiting competition remains one of the main reasons for economic operators to lodge appeals before SCPPA.

Appeal proceedings led by SCPPA show there is still favouritism of certain economic operators in implementation of public procurement procedures. One contracting authority published a notice for procurement of penetration testing services and was presented with bids from two companies, but the tender procedure was annulled due to technical reasons. When another notice was published for the same procurement subject, tender documents included higher minimum criteria on technical and professional ability that could be met by only one of the two bidders that participated in the previously annulled procurement notice. The bidder which did not met the new criteria lodged an appeal contesting the tender documents. SCPPA approved the appeal claims and annulled the tender procedure, establishing that tender participation criteria defined by the contracting authority limit competition.

As part of its tender procedure for procurement of medical and technical gases, liquefied medical oxygen and nitrogen, and supplies for maintenance of oxygen cylinders and the oxygen system, the contracting authority made changes to the tender documents during the procedure, indicating that necessary technical and professional ability requirements for quality performance of the contract will be determined by the contracting authority on the basis of a list with main deliveries of goods and performance of services in the last three years, including values, dates and buyers, by means of certificates of completion for delivery of goods or performance of service, and by providing at least three certificates of completion for delivery of medical gases in the last three years to hospital healthcare facilities in RNM issued by the recipients or, if such certificates cannot be secured due to reasons beyond the economic operator's control, it would suffice if they provide a statement on such deliveries. According to the appealing party, the initially published tender documents did not contain such requirements and these were imposed after the changes. In its claims, the appealing party enlisted that, in the past years, the chosen economic operator held a dominant position on the market and that the newly-introduced requirements could be met only by that company. SCPPA approved this appeal on the grounds that, when defining criteria for technical and professional ability, in addition to applying provisions under LPP, contracting authorities should also make due consideration of the need to facilitate and encourage competition among economic operators.

As regards the tender procedure for procurement of goods, i.e. medicines on the positive, reference and commercial lists, the appealing party contested the tender documents believing that these are in violation of LPP. More specifically, as part of its tender documents, the contracting authority included an exclusive requirement for originator medicine, and although the appealing party was able

to offer a biosimilar medicine under significantly lower price which, in its opinion, is approved for use by the European Medicines Agency, as well as by MALMED. SCPPA rejected this appeal as unfounded indicating that the contested tender documents do not discriminate the appealing party and do not limit competition.

Similarly, in the tender procedure for procurement of oral and injectable therapy, the appeal lodged by the bidder that was able to offer biosimilar medicines had been rejected as unfounded. In this procedure, the contracting authority had made changes to technical specifications with addition of the word "originator". Within the deadline allowed for inquiries, another economic operator had requested this change from the contracting authority, to which the appealing party had responded, indicating that the change in question would limit market competition and would favour a particular manufacturer. Moreover, the appealing party indicated that MALMED had issued a decision on market placement of biosimilar medicine and that the same is already in use at different clinics in Skopje. Be that as it may, SCPPA rejected the appeal as unfounded, establishing that the appealing party had not provided evidence that would, with all certainty, allow the conclusion that the required originator medicine limits competition on the market, and took into consideration the opinion provided by the professional college at the clinic in question wherein it is noted that the medicine must be originator, not biosimilar.

In another tender procedure for procurement of medicines, the appealing party contested the decision on selection of the most advantageous bid, claiming that it held exclusivity for the specific medicines in questions. According to the appealing party, the originator medicines meet the requirements for data and market exclusivity for a period of 10 years and one additional year, i.e. 11 years in total, because a new therapeutic indication had been approved in the first eight years, which serves as precondition for extension of the exclusivity. After the exclusivity period expired, other generic medicines were registered in RNM, which is in compliance with the law, but in the opinion of the appealing party, these medicines could not be placed on the market until expiration of the exclusivity period for the originator medicine. In its response to the appeal, the contracting authority indicated that the appealing party has not submitted an approval issued by MALMED and that there is no adequate registry of approvals that could serve as source of information to establish existence of exclusivity for market placement of originator medicines. SCPPA established the same and rejected the appeal as unfounded.

Examples elaborated above confirm the conclusion that definition of disproportionate or selectively defined technical and professional criteria is a commonly used mechanism to limit competition in public procurement. Such practices, especially when eligibility criteria are changed during the tender procedure or are adjusted to the ability of particular operators, raise doubts about favouritism and undermine the principle of equitable treatment. In turn, this practice reduces the number of potential bidder, limits market competition, and increases the risk of irrational public spending. That is why eligibility criteria must be objective, professional and clearly defined in advance, in order to ensure fair competition and adherent protection of the public interest.

4.3 Favouritism of certain economic operators

Appeal claims made by economic operators often challenge fulfilment of requirements from tender documents by bids that have been selected as the most advantageous ones.

Appealing parties often claim that bids selected as the most advantageous ones actually do not fulfil requirements defined as part of technical specifications.

In the tender procedure for procurement of medical supplies, SCPPA approved the appeal clams made by the appealing party and established that the contracting authority has engaged in irregular evaluation of bids, selecting the bid submitted by a bidding company that has failed to provide authorization or certificate for professional staff member responsible for equipment servicing issued by the equipment manufacturer, as requested in tender documents, but submitted a document issued by another legal entity, i.e. the equipment distributor.

In the tender procedure for procurement of molecular diagnostic reagents, SCPPA approved the appeal after it had established that the bid submitted by the chosen economic operator only contained a statement on compatibility of offered testing kits with the amplification apparatus, but not a certificate issued by the manufacturer, as requested in the tender documents.

Also, in the tender procedure for procurement of pathology equipment – light microscope, and as part of tender documents, the contracting authority included a tender participation criterion whereby economic operators are required to submit an equipment servicing authorization issued by the equipment manufacturer, but moved forward to select the bid that was accompanied by authorization issued by the authorized distributor of the equipment relating to contract-signing and supply of instruments. SCPPA approved the appeal and annulled the selection decision.

In another tender procedure for procurement of medical equipment, the contracting authority selected as the most advantageous the bid which, according to the appealing party, was literally drafted by the bidder by copying and pasting specifications from the procurement notice. SCPPA performed an insight into documents uploaded on EPPS and established that the selected economic operator had provided proof issued by the manufacturer ascertaining that offered goods fulfil the requirements defined in tender documents, while the appealing party had provided proof issued by the same manufacturer, but of different content, on the basis of which it could be concluded that the manufacturer does not dispose with the goods offered by the selected bidder. On the grounds of this contradiction, SCPPA approved the appeal and annulled the decision on selection of the most advantageous bid.

In the tender procedure for procurement of immunology analysis reagents, controls and supplies, including free use of equipment, the appealing party claimed that detailed description of the procurement subject had been tendentiously made to limit competition and to favour just one economic operator. According to the appealing party, the contacting authority had completely translated equipment characteristics, even supplies required for necessary tests with exact quantities, thereby fully limiting participation of more economic operators. SCPPA approved the appeal and annulled the tender procedure after having established that, as part of its technical specifications, the contracting authority has violated the principle of proportionality. Furthermore, in the description of required apparatus that is not subject of procurement, the contracting authority enlisted parameters exclusive to immunology testing instruments, but did not provide guidelines about immunology analysis reagents,

controls and supplies that are the initial purpose for organization of this public procurement. Also, technical specifications drafted by the contracting authority required economic operators to provide a document issued by the manufacturer authorizing them to sell, service and participate in tender procedures, which is contrary to the procurement subject, and anticipated other requirements and evidence relating to the apparatus described in the technical specifications.

In the tender procedure for procurement of reagents, controls and supplies for an immunology analysis apparatus, SCPPA approved the appeal contesting the content of tender documents. The State Commission established that requirements and evidence required for technical and professional ability are contrary to LPP. As part of these tender documents, the contracting authority defined a minimum requirement whereby, inter alia, economic operators should provide a document indicating they dispose with adequate personnel to ensure 24/7 service support, i.e. at least two employees with completed service training, thus limiting the possibility for economic operators to outsource and rely on the ability of other entities.

In order to assess whether bids meet the required technical specifications, contracting authorities often engage external experts. Hence, in the tender procedure for procurement of medical equipment, the external experts have assessed that only the bid submitted by the chosen bidder fulfils technical requirements enlisted in the technical specifications and, in the opinion of the contracting authority, it was obliged to accept this assessment. However, one participant in the tender procedure whose bid had been rejected as unacceptable lodged an appeal contesting the selection of the most advantageous bid. These appeal claims were approved by SCPPA, indicating that the expert evaluation of technical bids does not instil any certainty whether the selected bid fulfils the requirements or not, i.e. the requirements laid down in the technical specifications, which the appealing party had contested in its appeal.

Examples elaborated above show that assessments performed to verify compliance of bids with technical specifications is a sensitive stage of the tender procedure that is prone to irregularities and disputable interpretations. Frequent disputes raised by economic operators uncover lack of precision in tender documents and inequitable application of selection criteria during the bid-evaluation process. Even in the cases where outsourced experts are engaged to assess the bids, lack of clear and verifiable parameters could led to subjective assessments and legal insecurity. This gives rise to the need for establishment of transparent, measurable and adherently applied standards for technical evaluation, in order to protect the integrity of public procurements and the public interest.

4.4 Failure to act upon decisions taken by SCPPA

In the tender procedure for procurement of medical equipment, the contracting authority took a decision on selection of the most advantageous bid, but after having performed an administrative control, the Bureau of Public Procurement has found that the contracting authority had committed irregularities that affected the tender procedure's outcome. Nevertheless, once the contracting authority provided an additional explanation, the Bureau of Public Procurement made changes to its official minutes and established that no irregularities had been made in the selection process, i.e. the selected bid fulfils the required characteristics. In spite of that, one economic operator that participated in the tender procedure lodged and appeal before SCPPA indicating that the bid selected as the

most advantageous one contains shortcomings relating to technical and professional ability. More specifically, the appealing party claimed that tender documents relating to technical and professional ability of economic operators developed by the contracting authority include a requirement for authorization issued by the manufacturer of offered apparatus, while the technical specifications impose submission of valid CE certificate/declaration of conformity/FDA or equivalent and, in its opinion, the selected bid included shortcomings in respect to fulfilment of these requirements. SCPPA approved the appeal, annulled the decision on selection of the most advantageous bid, and returned the case for repeated evaluation and decision-making by the contracting authority. What raises concerns in this case is the fact that the contracting authority did not act upon SCPPA's decision. Namely, in the repeated procedure, the contracting authority took a decision on selection of the same bid. Dissatisfied with this decision, the same economic operator lodged a new appeal. SCPPA established that the contracting authority had not acted upon its decision taken in the previous appeal procedure, has not submitted additional adequate evidence on actions taken in compliance with SCPPA's decision and made an identical selection decision. On that ground, SCPPA approved the appeal, yet again annulled the selection decision, and returned the procedure for repeated evaluation and selection by the contracting authority. During the repeated selection process, the contracting authority acted in compliance with the State Commission's decision, and after the repeated evaluation of bids, awarded the contract to the appealing party.

In the tender procedure for procurement of insulin needles and blood sugar test stripes, insulin pumps with supplies and glucose monitoring sensors, two economic operators whose bids had been rejected lodged appeals contesting the decision on selection of the most advantageous bid although the administrative control has found there are no irregularities that affect the tender procedure's outcome. The appeals contested the manner in which samples and necessary certificates on fulfilment of tender participation criteria were supplied and both were approved by SCPPA, which moved to annul the selection decision and returned the case for repeated evaluation and selection. In this case, the contracting authority took into consideration the indications made by SCPPA and, in the second round of evaluation and selection, adopted a decision on selection of the most advantageous bid whereby it awarded the contract to one of the economic operators that appealed its previous decision. Dissatisfied with such decision, the economic operator whose bid was selected in the first round of evaluation lodged an appeal, but the same was rejected as unfounded.

Failure to act upon SCPPA's decisions is a serious disruption to the principles of lawfulness, legal security and institutional hierarchy in the system of public procurement. Such behaviour on the part of contracting authorities does not only devaluate the role of this control mechanism, but also creates an impression of arbitrariness and possibility of hidden favouritism of certain bidders. Repeated adoption of identical decisions without any crucial proceeding upon indications made by the competent body extends the duration of tender procedures and reduces the trust of economic operators in legal protection. Hence, adherent and timely implementation of decisions taken by SCPPA is a key precondition to ensure integrity, accountability and effective protection of the public interest.

4.5 Appeals based on possible process omissions

It often happens for economic operators to appeal the content of tender documents, however, beyond the law-stipulated deadline of eight days from the day when bids are opened, and contest actions or omissions to take actions relating to tender documents, i.e. relating to the bid-opening process, but rather lodge such appeals after the decision on selection of the most advantageous bid is taken. In such cases, SCPPA establishes that appeal claims relating to tender documents are late and are therefore not reconsidered.

Furthermore, economic operators often dispute certain irregularities in the tender procedure.

There are cases in which economic operators whose bids had been rejected during the evaluation process lodge appeals on the grounds of omissions made during the procedure, without actually contesting the reasons for which their bids had been rejected. For example, in the tender procedure for procurement or ECG eco-paper, the appealing party claimed that it had not been informed of its disqualification before the auction, nor it was informed about the reasons for rejection of its bid, requesting the selection decision to be annulled and the tender procedure to be returned for repeated bid-evaluation. In its response to this appeal, the contracting authority enlisted that it had informed the appealing party about the reasons for bid rejection, but has not informed it about the disqualification before the auction, as the latter had not taken place at all. SCPPA rejected the appeal as unfounded on the grounds that Article 113 of LPP was not violated because the auction did not take place because only one acceptable bid remained for the disputed procurement lot.

In tender procedures with participation of only two bidder, rejection of the appealing party's bid results in selection of the bid submitted by the other economic operator, assessed as acceptable, although these bids are often much more expensive. Appealing partes are convinced that their bids should not have been rejected, but the commission establishes that the bid in question contained shortcomings relating to required characteristics and has not been developed in compliance with indications defined in the technical specifications. After bids are submitted, the contracting authority is allowed to only request bid clarification, but not submission of additional documents that would imply changes to the financial and technical offer, and therefore such appeals are rejected as unfounded.

Similarly, in the tender procedure for procurement of rare disease medicines, the appealing party has not submitted all required certificates and later lodged an appeal indicating that the contracting authority should have requested bid clarification or addition before rejecting the bid. Nevertheless, SCPPA rejected the appeal as unfounded with an explanation that the contracting authority has the right, but not an obligation to request clarification or addition if the matter at hand does not concern significant deviations from required documents and must not create advantage for certain economic operator by using the possibility for bid clarification or addition.

On the other hand, when contracting authorities reject any bid as unacceptable, they are obliged to inform the bidder in detail about the reasons thereof. Hence, in the tender procedure for procurement of medical supplies, the contracting authority had informed the bidder whose bid was rejected as unacceptable that the reason thereof is "non-compliance with the requirements laid down in the technical specifications (dimensions)". The economic operator believed that the explanation is unclear and biased, and moved to lodge an appeal against the decision on selection of the most advantageous bid. In its response to the appeal, the contracting authority enlisted other reasons why the bid had

been rejected. On that account, SCPPA approved the appeal after it had established lack of detailed explanation of reasons for bid rejection and that, by failing to enlist all reasons for bid rejection, the contracting authority has denied the bidder's right to appeal in respect to reasons enlisted by the contracting authority in its response to the appeal.

There are cases where, as part of their response to the appeal, contracting authorities fully accept appeal claims made by the appealing party and take action to put contested decisions out of force. In such cases, SCPPA adopts a conclusion on discontinuation of appeal proceeding given that any further action has been made purposeless.

In other cases, SCPPA rejects appeals on the ground of being incomplete. One reason behind incomplete appeals concerns failure to electronically sign the appeal motion by the appealing party, which amounts to violation of LPP and the Rulebook on the Method of Using the Electronic Public Procurement System.

Furthermore, there are cases where economic operators do not comply with deadlines for submission of appeals, on the account of which these are rejected as being untimely.