

CHALLENGES AND OPPORTUNITIES TO IMPROVE CONTROL IN PUBLIC PROCUREMENTS

These policy documents are developed to help the civil society organizations and, generally, the citizens, to engage in informed debate and to have access to expert knowledge, opinions and views on topics relevant for EU integrations. Areas in which the Republic of North Macedonia will lead the accession negotiations are both complex and diverse, while reforms to be taken by the country will open numerous dilemmas that require expert debates. Contents created within the project “CSO Dialogue – Platform for Structural Participation in EU Integration” are available on the website: www.dijalogkoneu.mk

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On annual basis, enormous sums of taxpayer money are spent under procedures to award public procurement contracts. In the last several years, the value of public procurement contracts awarded in the Republic of North Macedonia varied in total amount and ranged from 621 million euros in 2017 to 956 million euros in 2016. The public procurement's budget share also varied, from 19% in 2017 to 30% in 2016. Finally, funds spent under public procurement contracts accounted for 6% of GDP in 2017, i.e. 10% of GDP in 2016.

Overview of funds spent under public procurements in the Republic of North Macedonia

	2015 ^[1]	2016 ^[2]	2017 ^[3]	2018 ^[4]
Amount of funds spent (in EUR)	755 million	956 million	621 million	755 million
Share in the state budget (%)	25 %	30 %	19 %	22 %
Share in GDP (%)	8 %	10 %	6 %	7 %

In comparison, member-states of the European Union (EU) spend around 2,000 billion euros on public procurement contracts annually, accounting for around 14% of GDP at the EU level.[5]

Based on these figures, the high risk of abuse in the field of public procurements does not come as surprise. At global level, it has been assessed that 10% to 30% of the value of public procurement contracts “fall victim” to corruption. This trend is mainly due to insufficient control over implementation of public procurement procedures.[6]

Under the new Law on Public Procurements (LPP), which was adopted and entered into effect in 2019, an effort was made to reflect the need and the intention for increased control in this field, through cooperation between more institutions and imposing sanctions for perpetrators. The goal is to attain purposeful and transparent spending of taxpayer money under public procurement procedures organized to meet the needs of contracting authorities.

[1] 2015 Report on Activities of the Bureau of Public Procurements in Functioning of the System of Public Procurements (Skopje, 2016), p. 50, available at: http://www.bjn.gov.mk/wp-content/uploads/2014/08/Godisen-izvestaj-2015-godina_final.pdf

[2] 2016 Report on Activities of the Bureau of Public Procurements in Functioning of the System of Public Procurements (Skopje, 2017), p. 57, available at: <http://www.bjn.gov.mk/wp-content/uploads/2014/08/Godisen-izvestaj-2016-1.pdf>

[3] 2017 Report on Activities of the Bureau of Public Procurements in Functioning of the System of Public Procurements (Skopje, 2018), p. 49, available at: <http://www.bjn.gov.mk/wp-content/uploads/2019/09/Godisen-izvestaj-BJN-2017.pdf>

[4] 2018 Report on Activities of the Bureau of Public Procurements in Functioning of the System of Public Procurements (Skopje, 2018), p. 47, available at: http://www.bjn.gov.mk/wp-content/uploads/2020/05/Godisen-izvestaj-2018_BJN.pdf

[5] Communication from the Commission to the EP, the Council, the ECOSOC and the Committee of the Regions - Making Public Procurement Work in and for Europe (Strasbourg, 2017), p. 2, available at: <https://ec.europa.eu/docsroom/documents/25612>

[6] (Non)Functionality of the System for Prevention of Corruption in Public Procurements in Macedonia, Center for Civil Communications (Skopje, 2018), p. 4, available at: <http://balkantenderwatch.eu/local/uploaded/MKD%20local/Policy%20and%20Media/Policy%20brief%20-%20BTW%20-%20North%20Macedonia%202018%20Local.pdf>

02

The alignment status of the national legislation in the field of public procurements with the EU *acquis*

The Parliament of the Republic of North Macedonia adopted the new LPP on 28 January 2019, with delayed enforcement from 1 April 2019.[1] In particular, the new law is aligned with the Directive 2014/24/EU on public procurements in traditional public sectors, Directive 2014/25/EU on public procurements in specific sector activities, and further alignment with Directive 2007/66/EC on legal remedies in public procurement procedures.[2] The new law's alignment with the EU *acquis* is assessed as high, as it reflects the underlying principles of transparency, equal treatment and non-discrimination from the Treaty on the Functioning of the European Union.[9]

The new law streamlines procedures and increases transparency. More specifically, transparency will be increased due to the new obligation for contracting authorities to publish their plans for public procurements, procurement notices and notifications, tender documents and public procurement contracts, including amendments thereto, thereby allowing the public to follow a particular public procurement from its beginning (planning stage), all the way to contract performance. Also, the law attempts enhanced control over public procurements by introducing new mechanism in the form of administrative controls, based on experiences from certain countries in Europe.

In spite of the progress made, several inconsistencies with the EU *acquis* or jurisprudence of the European Court of Justice still remain under the new LPP, and they include:

keeping a list of negative references;

automatic exemption of economic operators for defined period of time from participation in public procurements as a result of being issued negative reference;

LPP's failure to anticipate an equivalent to provisions concerning "self-cleaning" among economic operators; and

automatic exemption from public procurement procedures for entities that have participated in development of tender documents, without opportunity to demonstrate that their participation in development of the relevant procedure does not disturb competition.[10]

03

Requirements under the Directive 2014/24/EU in respect to monitoring public procurements and reporting on identified irregularities

Article 83 of the Directive 2014/24/EU on public procurements stipulates an obligation for EU member-states to ensure implementation of tasks enlisted under this article on the part of one or more national authorities, bodies or structures. More specifically, member-states should ensure monitoring in respect to application of rules that govern public procurements.

[7] Law on Public Procurements ("Official Gazette of the Republic of Macedonia" no. 24/2019 from 01.02.2019)

[8] DIRECTIVE 2014/24/EU of the European Parliament and of the Council from 26 February 2014 on public procurements and repealing Directive 2004/18/EC, CELEX no. 32014L0024;

DIRECTIVE 2014/25/EU of the European Parliament and of the Council from 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, CELEX no. 32014L0025; and

DIRECTIVE 2007/66/EC of the European Parliament and of the Council from 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts, CELEX no. 32007L0066.

[9] Monitoring Report: The Principles of Public Administration (NORTH MACEDONIA), OECD (2019), pp. 21-22, available at:

<http://www.sigmaweb.org/publications/Monitoring-Report-2019-North-Macedonia.pdf>

[10] COMMISSION STAFF WORKING DOCUMENT North Macedonia 2019 Report, p. 61, available at: <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20190529-north-macedonia-report.pdf>

In the cases where monitoring authorities or structures have identified specific violations or systemic problems, on their own initiative or upon receipt of information, they shall be authorized to notify the national auditing authorities, courts, tribunals or other appropriate authorities or structures, such as the ombudsman, national parliaments or committees therein.[11]

04

Brief overview of the legal and institutional framework on monitoring and control of public procurements in other countries

This part provides a brief comparative overview of the systems for monitoring and control of public procurements in the region, covering both EU member-states and candidate countries. At the same time, this overview allows insight in the genesis behind the new system for control of public procurements in the Republic of North Macedonia, and allows comparisons in respect to similarities or deviations from systems present in the region.

Croatia	
Type of control	Administrative supervision
Competent authority	Central Authority for Public Procurement Policies
Scope	No specific limitations, except that supervision is not performed after expiration of the absolute statute of limitations in duration of three years after completion of the public procurement
Specificities	Administrative supervision does not discontinue implementation of the public procurement procedure; In cases of established irregularity with elements of misdemeanour, the Central Authority may initiate a procedure before the misdemeanour court and notifies the State Attorney thereof;
Misdemeanour fines	1,300 to 130,000 euros for the contracting authority; 660 to 6,600 euros for responsible person at the contracting authority;
Slovenia	
Type of control	Control
Competent authority	State Audit Commission
Scope	/
Specificities	State Audit Commission may impose sanctions on perpetrators
Misdemeanour fines	10,000 to 100,000 euros for contracting authorities whose budget exceeds the law-stipulated threshold and/or can be classified as medium or large enterprises; 5,000 to 25,000 euros for contracting authorities whose budget is below the law-stipulated threshold and/or can be classified as small enterprises; 100 to 2,000 euros for responsible person at the legal entity;

[11] DIRECTIVE 2014/24/EU of the European Parliament and of the Council from 26 February 2014 on public procurements and repealing Directive 2004/18/EC, CELEX no. 32014L00244

Serbia	
Type of control	Monitoring
Competent authority	Public Procurement Office
Scope	<p>Legal grounds for monitoring:</p> <ol style="list-style-type: none"> 1. adopted annual plan on monitoring; 2. upon request from natural or legal entities, including state administration bodies and public institutions; 3. in ex officio capacity, for negotiation procedures without announcement of call for bids
Specificities	Monitoring does not discontinue implementation of the public procurement procedure
Misdemeanour fines	<p>850 to 8,500 euros for the contracting authority;</p> <p>250 to 680 euros for responsible person or other officers involved in public procurements at the contracting authority;</p>

Bulgaria	
Type of control	Control
Competent authority	Public Procurement Agency
Scope	<ol style="list-style-type: none"> 1. randomly selected procedures, based on risk assessment; 2. all negotiation procedures whose estimated value exceeds the law- stipulated threshold; 3. amendments to public procurement contracts that increase their value by at least 20%
Specificities	<p>Checks are performed in two stages: before announcement of procurement notice (on technical specifications) and after announcement of procurement notice</p> <p>In case of checks related to technical specifications, the Agency may use external experts, specialists in the relevant field, who draft opinions</p> <p>Control over amendments to contracts signed is conducted prior to signing the annex contract and covers verification that conditions for change of contract exist</p> <p>Ex-post controls on implementation of public procurement procedures, including control of contract performance, are performed by the National Bureau of Audit and Agency of State Financial Inspection for all bodies falling under its competences</p>
Misdemeanour fines	/

4.1. Croatia

In addition to incorporating requirements from the EU Directive related to monitoring, control and reporting on public procurements, the Croatian Law on Public Procurements further elaborates the mechanism of administrative control over implementation of the law and other regulations in the field of public procurements. Administrative supervision is performed by the Central Authority for Public Procurement Policies in order to prevent, eliminate or detect irregularities, i.e. violation of the regulations in effect. Performance of administrative supervision does not discontinue implementation of public procurement procedures. Exemptions from performance of administrative supervision are allowed, including expiration of the absolute statute of limitations in duration of three years after completion of the public procurement procedure. The Central Authority presents both contracting authority and entity that requested supervision with its opinion, including detected irregularities and recommendations to eliminate them. When the supervision has established irregularities with elements of misdemeanour, the Central Authority may initiate a procedure before the misdemeanour court and notify the State Attorney thereof. The law stipulates fines for misdemeanours committed by contracting authorities in the range of 1,300 to 130,000 euros, and fines for responsible persons at contracting authorities in the range of 660 to 6,600 euros.[12]

4.2. Slovenia

The Slovenian Law on Public Procurements does not include additional provisions related to requirements under the EU Directive. It only defines the State Audit Commission as the body competent to perform control over public procurements and to issue sanctions for perpetrators of misdemeanours. In establishing whether conditions are fulfilled for initiation of misdemeanour procedure against contracting authority, bidding company, candidate or subcontractor, and against responsible persons at these entities, they are obliged to present the State Audit Commission with all documents and evidence requested, within a deadline of three working days after receipt of such request in written. Fines that could be issued for misdemeanours committed by legal entities, i.e. contracting authorities whose budget exceeds the law-stipulated threshold and/or can be classified as medium or large enterprises, are set in the range of 10,000 to 100,000 euros, while in the case of contracting authorities whose budget is below the law-stipulated threshold and/or can be classified as small enterprises, fines are set in the range of 5,000 to 25,000 euros. Responsible persons at legal entities may be issued misdemeanour fines in the range of 100 to 2,000 euros.[13]

4.3. Serbia

The Serbian Law on Public Procurements regulates monitoring in respect to application of public procurement rules by the Public Procurement Office, in order to prevent, eliminate or detect irregularities, i.e. violations of the regulations in effect. Legal grounds for conducting monitoring in specific procedures include: 1) adopted annual plan on monitoring; 2) upon request from natural or legal entities, including state administration bodies and public institutions; or 3) in ex officio capacity, for negotiation procedures without announcement of call for bids. Monitoring does not discontinue implementation of the public procurement procedure. In order to entrust greater competences to the Office in respect to monitoring, contracting authorities are obliged to submit all data required within a deadline of 15 days from receipt of such request. The law stipulates fines for misdemeanours committed by contracting authorities in the range of 850 to 8,500 euros, while responsible person or other officers involved in public procurements are liable to fines in the range of 250 to 680 euros.[14]

[12] Zakon o javnoj nabavi (Naroden Novine 120/16)

[13] Zakon o javnem naročanju (Uradni list RS, št. [91/15](#) in [14/18](#))

[14] Закон о јавним набавкама ("Службени гласник РС" бр. 91/2019)

4.4. Bulgaria

According to the Bulgarian Law on Public Procurement, the Public Procurement Agency is competent to perform control over public procurements, as follows: 1) randomly selected procedures, based on risk assessment, 2) all negotiation procedures whose estimated value exceeds the law-stipulated threshold, and 3) amendments to public procurement contracts by means of which the contract value is increased by at least 20%.

Checks are performed in two stages: before and after announcement of the procurement notice. Checks related to technical specifications, as the most important document in the first stage, concern verification in terms of compliance of the requirements defined with the rules on developing technical specifications. As a result of checks performed, the Agency develops initial and final opinion and forwards them to the contracting authority, which has to take action, and in case it fails to act, the latter has to provide written justification and attach it to procurement procedure records. When performing checks on technical specifications, the Agency may engage external experts, specialists in the relevant field, from the list kept by the Agency. As regards the outcome of these checks, external experts draft opinions that are integrated in the Agency's initial opinion.

Control in respect to amendments to contracts signed is pursued on the annex contract and covers verification in respect to existence of conditions for change of contract. Contracting authorities enlist reasons for the need to sign annex contracts, supported by evidence. The Agency issues an opinion on legality of planned contract changes and forwards it to the contracting authority.

Ex-post external controls on implementation of public procurement contracts, including control over performance of public procurement contracts, are conducted by the National Bureau of Audit and the Agency for State Financial Inspection, each in respect to bodies falling under their competences.[15]

05

National legal and institutional framework on monitoring and control of public procurements, and issuing sanctions in cases of identified irregularities

Republic of North Macedonia does not have a single national authority holding all competences enlisted under Article 83 of the Directive 2014/24/EU. In continuation, this document elaborates the status and the role of all authorities holding competences in respect to control of public procurements and/or actions to sanction irregularities. Also, information is provided on the types of misdemeanour and criminal sanctions for perpetrators.

5.1. Status and role of the Bureau of Public Procurements

Pursuant to Articles 43 and 45 of LPP, matters related to development of the system of public procurements, and matters related to ensuring cost-effectiveness, efficiency and transparency in implementation of public procurements, are performed by the Bureau of Public Procurements (hereinafter: BPP or Bureau), in the capacity of state administration body within the Ministry of Finance. Among other things, BPP is also competent to perform following matters by means of which it participates in monitoring, identification and/or sanctioning irregularities in public procurements:

[15] Закон за обществените поръчки, 15.4.2016, <https://www.lex.bg/laws/ldoc/2136735703>

to monitor and analyse application of public procurement regulations, functioning of the system of public procurements, and to initiate changes aimed at improvements;

to provide opinion on fulfilment of conditions for organization of negotiation procedure without announcement of call for bids, pursuant to LPP;

to perform administrative control pursuant to LPP and to draft instructions as internal guidelines for internal organization at BPP in performance of administrative control;
and

to immediately inform contracting authorities and competent bodies, when needed, about established irregularities in notifications obtained.

Subject of the new control mechanism called **administrative control** are public procurement procedures whose estimated value exceeds 500,000 euros in MKD counter-value for procurement of goods and services and 2,000,000 euros in MKD counter-value for procurement of works. In addition, the Bureau can perform control over any public procurement procedure on the basis of risk assessment in respect to violation of provisions under LPP, and on randomly selected sample.

Control is performed prior to submission of selection decision or tender annulment decision to all participants in the public procurement procedure. After initiation of administrative control, contracting authorities stop their respective procedure for the duration of said control, which should be completed within a deadline of 10 days from the day when notification on initiation of control is submitted. Administrative controls are completed with submission of relevant minutes compiled by officers from the Bureau tasked with performance thereof.

In cases when administrative control does not result in identification of irregularities that affect the procedure's outcome, contracting authorities will continue their respective procurement procedures. However, when the Bureau has found irregularities that affect the procedure's outcome, it issues instructions for actions to be taken by the contracting authority to eliminate irregularities or to annul the procurement procedure when corrective actions are impossible in the current stage of implementation.

Contracting authorities are obliged to act upon instructions issued by the Bureau, unless they provide additional explanation. In case the Bureau does not accept such explanation, all documents related to the procurement procedure are forwarded to the State Commission on Public Procurement Appeals (SCPPA), which takes final and binding decision in respect to the explanation. In order to avoid unnecessary delay of procurement procedures that are subject to administrative control, all deadlines for action under this procedure are rather short.

During administrative controls, when BPP has established one or more irregularities with elements of misdemeanour or criminal offence, it is entitled to motion criminal changes before the competent court or notify the competent prosecution service in the Republic of North Macedonia. [16]

5.2. Status and role of the State Commission on Public Procurement Appeals

SCPPA is independent state body with the status of legal entity, competent to take decisions upon appeals related to procedures for award of public procurement contracts and public-private partnerships, and provides legal protection on the basis of the principles of legality, efficiency, cost-effectiveness and adversary proceedings. The Parliament of the Republic of North Macedonia

[16] Articles 172 to 178, Law on Public Procurements ("Official Gazette of the Republic of Macedonia" no. 24/2019 from 01.02.2019)

selects and appoints members of SCPPA. In appeal procedures, SCPPA takes action within the boundaries of appeal allegations and, in ex officio capacity, it checks for significant violations to LPP.[17]

5.3. Status and role of the State Audit Office

Matters related to state audit in the Republic of North Macedonia are performed by the State Audit Office (SAO), in capacity of state body with the status of legal entity, which is independent in its operation. SAO is managed by the Chief State Auditor, appointed and dismissed by the Parliament of the Republic of North Macedonia.[18]

Pursuant to Article 180 of LPP, SAO is competent to audit use and spending of public funds under public procurement procedures organized by contracting authorities. In cases when audit findings include elements of criminal offence, SAO notifies the competent prosecution service thereof.

5.4. Status and role of the State Commission for Prevention of Corruption

The State Commission for Prevention of Corruption (SCPC) is autonomous and independent in performance of its competences and has the status of legal entity. The Parliament of the Republic of North Macedonia selects and appoints members of SCPC.[1] Among other things, SCPS holds competences in respect to:

taking action upon reports made by natural and legal entities related to doubts for corruption and conflict of interests;

raising initiatives before competent bodies for initiation of procedures to establish responsibility with officials; and

raising initiatives for initiation of criminal prosecution for cases in which it has acted.

5.5. Status and role of the Commission for Protection of Competition

The Commission for Protection of Competition (CPC) is autonomous state body with the status of legal entity, and it is independent in its operation and in taking decisions on matters falling within its competences. The Parliament of the Republic of North Macedonia selects and appoints members of CPC.[20]

In the context of public procurements, CPC investigates and sanctions cases in which competition among economic operators has been limited and ensures equal treatment and non-discrimination of economic operators.

5.6. Status and role of the Public Prosecution Office of the Republic of North Macedonia

The Public Prosecution Office is standalone and autonomous state body tasked to prosecute criminal offences and other crimes that are liable to sanctions by law and performs other matters established by law.[21] Chief State Prosecutor of the Republic of North Macedonia is held accountable by the Parliament of the Republic of North Macedonia.

[17] Членови 130-135, 141, Закон за јавните набавки, „Службен весник на Република Македонија“ бр. 24/2019 од 1.2.2019 година

[18] Закон за државната ревизија, „Службен весник на Република Македонија“ бр. 66/10, 145/10, 12/14, 43/14, 154/15, 192/15, 27/16 и 83/18)

[19] Закон за спречување на корупцијата и судирот на интереси, „Службен весник на Република Македонија“ бр. 12/2019 од 19.1.2019 година

[20] Закон за заштита на конкуренцијата, „Службен весник на Република Македонија“ бр. 145/10, 136/11, 41/14, 53/16 и 83/18

[21] Law on the Public Prosecution Office (“Official Gazette of the Republic of North Macedonia” no. 42/2020 from 16.02.2020)

5.7. Cooperation among bodies in detection of irregularities

In 2007, BPP, SAO and SCPC signed a memorandum of cooperation according to which they should regularly exchange information among them. Commonly, they organize coordination meetings on semi-annual or annual basis. Sometimes these institutions exchange information about specific cases.

5.8. Misdemeanours and criminal offences related to public procurements

Unlike the old Law on Public Procurements, which was amended with a view to integrate penal provisions, the new LPP restored the old concept in respect to categorization of violations to legal provisions as misdemeanours, which are liable to fines. More specifically, Article 181 of LPP stipulates:

misdemeanour fine (covers 15 violations of different legal provisions) in the amount of 500 to 1,000 euros for responsible person, i.e. authorized person at the contracting authority; and

misdemeanour fine (also covers 15 violations of different legal provisions) in the amount of 1,000 to 2,000 euros for responsible person at the contracting authority.

Under Article 275-a, the Criminal Code stipulates the criminal offence of abuse of procedure for public call, award of public procurement contract or public-private partnership, which is liable to sanctions in the form of fine or imprisonment in duration of up to 3 years. Higher sanctions are stipulated for offences that result in significant personal proceeds or have caused significant difficulties. In cases when abuse of public office and duty was committed in respect to organization of public procurement procedures or has caused damages to the Budget of the Republic of North Macedonia, public funds or other state funds, the sanction stipulated under the Criminal Code is imprisonment in duration of at least 5 years. Moreover, Article 96-b of the Criminal Code stipulates secondary sanction, i.e. prohibition for participation in procedures for public call, award of public procurement contracts or public-private partnerships, for the legal entity that has abused its business activity and imposes threat for repetition of such offence in the future.[22]

06

Statistical data on performance of relevant competences by different authorities in the field of public procurements

In the first incomplete year after the new LPP entered in effect, BPP performed administrative control in 128 public procurement procedures, while in the course of 2020 (by 30.09.2020), the number of administrative controls accounts for 160. Below is an overview of the outcomes from administrative controls performed to present date:

in 121 procedures, the Bureau has not found irregularities that would affect the procedure's outcome and issued instructions to contracting authorities to continue their respective procedures in compliance with the law;

in 37 procedures, the Bureau has found irregularities that would affect the procedure's outcome but cannot be eliminated, and issued instructions to contracting authorities to adopt tender annulment decisions;

[22] Criminal Code ("Official Gazette of the Republic of Macedonia" no. 37/96, 80/99, 4/02, 43/03, 19/04, 81/05, 60/06, 73/06, 7/08, 139/08, 114/09, 51/11, 135/11, 185/11, 142/12, 166/12, 55/13, 82/13, 14/14, 27/14, 28/14, 41/14, 115/14, 132/14, 160/14, 199/14, 196/15, 226/15, 97/17 and 248/18)

in 22 procedures, the Bureau has found irregularities that affect the procedure's outcome but could be eliminated, and returned these procedures for repeated bid-evaluation;

in 9 procedures, the Bureau has amended its initial minutes after competent authorities have presented it with additional explanation; and

in 7 procedures, the Bureau has not accepted additional explanation provided by contracting authorities and initiated procedure before SCPPA.[23]

As regards administrative controls performed in 2019, the Bureau has not motioned any criminal charges before the competent court and has not notified the competent prosecution service.[24]

In 2018, SCPPA was presented with a total of 737 appeals, of which 715 were resolved, while 22 cases were still pending due to incomplete documents or were transferred for decision-making in 2019. Court protection before the Administrative Court was sought by parties in 95 cases from total of 715 cases resolved, which means that 13.29% of all decisions taken by SCPPA have been contested. [25]

In 2019, as part of its planned audits, SAO has audited public procurements organized by entities that were subject of *ex-post* audits and established 35 findings in its final audit reports.[26] Most frequently established irregularities in public procurement procedures concern tender documents that are not developed in compliance with LPP and award of procurement contracts without organization of relevant procedure. Moreover, SAO has established weaknesses in the stage for bid-evaluation and proposal for selection of the most favourable bidder, but also in stages related to contract signing and planning of public procurements.

According to official data at SCPC, in 2014 this commission was presented with 25 reports on potential corruption, in 2015 – 10 reports, in 2016 – 3 reports, and in 2017 it was presented with 7 reports. In the first three months of 2018, SCPC acted upon two reports for which, after it reconsidered allegations made, it has found there are no elements to continue the relevant procedure.[27] Although it is the most common response by SCPC in the last several years, in the past this commission had also established existence of grounds for criminal offences in performance of public office and duty by responsible persons at contracting authorities because, in implementing public procurement procedures, they have failed to ensure adequate and lawful use and protection of public funds disposed by the institutions.[28]

According to most recent information from CPC, in 2018 this commission has not established serious or less serious violations in the field of public procurements and competition in such procedures, which was the case in the past as well.[29]

[23] Decision on positive response to the information request under the instrument for free access to public information no. 03-1505/2 from 12.11.2020, Bureau of Public Procurements

[24] Report on Monitoring Public Procurements No. 33 (July-December 2019), Center for Civil Communications (Skopje, 2020), p. 6, available at: <http://www.ccc.org.mk/images/stories/33mk.pdf>

[25] 2018 Annual Report of the State Commission on Public Procurement Appeals (Skopje, 2019), p. 8, available at: https://dkzjn.gov.mk/sites/default/files/dokumenti/4.%D0%93%D0%BE%D0%B4%D0%B8%D1%88%D0%B5%D0%BD_%D0%B8%D0%B7%D0%B2%D0%B5%D1%88%D1%82%D0%B0%D1%98_2018%D0%BA%D0%BE%D0%BD%D0%B5%D1%87%D0%B5%D0%BD.pdf

[27] 2019 Annual Report on Audits Performed and Operation of the State Audit Office (Skopje, 2020), p. 20, available at: https://dzt.mk/sites/default/files/2020-06/Godisen_izvestaj_2019_MKD.pdf

[27] 2018 Report on Activities of the Bureau of Public Procurements in Functioning of the System of Public Procurements (Skopje, 2018), p. 30

[28] 2014 Report on Activities of the Bureau of Public Procurements in Functioning of the System of Public Procurements (Skopje, 2015), p. 30, available at: http://www.bjn.gov.mk/wp-content/uploads/2014/08/izvestaj_2014_BJN.pdf

[29] 2018 Report on Activities of the Bureau of Public Procurements in Functioning of the System of Public Procurements (Skopje, 2018), p. 31

In 2019, criminal cases in the field of corruption included issuance of 17 orders for initiation of investigation, dominant number of which concern corruption in public procurements. In the same year, a total of 9 new cases of high profile corruption are recorded, and all of them maintained the status “underway” for the entire duration of 2019. A total of 10 indictments were raised in the same year, followed by 10 court verdicts, one of which is an acquittal verdict.[30]

07

Concluding observations and recommendations

7.1. Observations

Long-standing demands by the expert and stakeholder public, as presented in numerous reports and at various conferences, and related to introduction of relevant mechanisms that would identify and sanction violations of relevant regulations in implementation of public procurement procedures, are finally integrated under the current LPP. A period of time needs to pass in order to be able to make reliable assessment on efficiency and effectiveness of administrative controls. Below is the summary of initial observations based on official data and expert experiences.

It should not be expected for the new mechanism of administrative control or any other mechanism of same or similar purpose to have the broadest scope possible. Instead of quantity, this type of controls should gain in quality because, on the contrary, it might happen that “we cannot see the forest for the trees”. Expectations for high number of procedures to be subject of administrative control are practically impossible and irrational. Notably, the number of employees at BPP, especially those that hold relevant experience and expertise to perform such controls, and the number of possible outsourcing experts, are limited. At the moment, only five civil servants are employed at BPP’s department on administrative control. Also, efficiency is among the underlying principles of public procurements and requires these procedures to be implemented under minimum costs and within given deadlines. Hence, performance of administrative controls on higher number of procedures, especially on procedures of smaller value whose deadlines are shorts, would impose a serious risk of making the system of public procurements slow and inefficient.

Having in mind the above presented, it is necessary to establish selectiveness in respect to procedures that will be subject to administrative control. The approach selected under LPP, by setting a value threshold above which all procurement procedures shall be subject to control during their implementation can be assessed as good. In that, all procurements of high value implying a risk for abuse of higher amounts of funds will be controlled during their implementation stage, which means that possible abuses could be timely prevented. The legal solution anticipates other procedures to also be subject of administrative control, according to the following selection criteria: 1) risk assessment on the basis of indicators implemented in the Electronic Public Procurement System; and 2) random sample selected by EPPS. In both cases, the selection process is fully automated.

Although SCPPA’s primary function is to serve as corrective mechanisms for irregularities in public procurement procedures when participants have lodged appeals, LPP stipulates authorizations and obligation for this commission to check and detect serious violations to LPP made under procedures appealed before this commission. As regards the group of serious violations, LPP stipulates that serious violations include indications of abuse and malpractice such as: failure to e As regards the group of serious violations, LPP stipulates that serious violations include

[30] Communication on statistical data about criminal cases in the field of corruption for the year 2019, available at: <https://vlada.mk/node/22484>

indications of abuse and malpractice such as: failure to exempt a bidder that should have been exempted, setting eligibility criteria for tender participation that are not in compliance with LPP and publication of tender documents that have led or could have led to discrimination of economic operators or limited competition. Additionally, in cases of disagreement between BPP and contracting authority in respect to findings and instructions from performed administrative control, SCPPA is given competences to take a merit-based decision. These legal solutions under LPP provide additional filter for identification of irregularities until finality of relevant decisions on selection of the most favourable bid or decisions on tender annulment.

The state's general policy reflected in the Misdemeanour Law is to reduce fines in order for these to correspond to the size of the entity that has made the violation, and therefore it could be concluded that the amounts of fines stipulated under LPP are in line with this policy. In comparison, the amount of fines that could be issued for responsible persons are within the range of amounts established under relevant laws adopted in other countries from the region. However, unlike in these examples, the national LPP does not stipulate fines for violations made by legal entities, i.e. contracting authorities, which in countries taken as comparators range from 800 to 130,000 euros.

Fast and efficient processing and sanctioning of violations to LPP is missing. Findings from BPP's administrative controls (*ex-ante*) and from SAO's reports (*ex-post*) include serious indications about existence of corruption. Official number of such cases, i.e. misdemeanour and criminal cases related to corruption in public procurements, initiated and processed by bodies such as SCPC and PPO is extremely low, especially in respect to cases that have been processed before court and have resulted in sanctions for relevant perpetrators. This is particularly important when compared against high level of corruption in public spending, as reported in several relevant research studies conducted by renowned international organizations. Very often, many of these institutions announce opening of cases into abuses and corruption, but shortly afterwards provide little if any information to the public about further course of said cases, which eventually end up forgotten.

7.2. RECOMMENDATIONS

In order to increase transparency and effectiveness of the system of administrative controls, several aspects thereof need to be further regulated under LPP, as follows:

1. BPP should be able to conduct administrative controls on the basis of requests submitted by natural or legal entities (including state administration bodies or public institutions), which already exists within the systems of administrative or similar control on public procurements in countries from the region. In that, entities submitting such request do not need to demonstrate individual interest in said procurement, but should enlist grounds that give rise to doubts that irregularities and abuses have been made under the initiated public procurement procedure or existence of such risk. The current legal solution does not allow any flexibility in selection of procurement procedures that will be subject to control, because “the selection is made” by LPP or EPPS.

2. Law-stipulated value thresholds for performance of administrative control should be lowered. If the year 2019 is taken as benchmark, then lowered value thresholds (for example, 1 million euros for works and 300,000 euros for goods and services) for mandatory administration control will cover around 210 procurement procedures annually. According to the already acquired experience and increased capacity at BPP for performance of administrative controls, this should be the maximum number of procedures controlled on this ground.

3. External experts should be involved in performance of administrative controls, as is the case in Bulgaria’s system of public procurements. Their engagement would be particularly useful in respect to assessing compliance of published tender documents and technical specifications with law-stipulated conditions and requirements. Advantages from introduction of this possibility include increased transparency of administrative controls and consequently of public procurement procedures, and greater trust among stakeholder public in respect to functionality and purposefulness of this mechanism. Finally, the additional number of people involved in controls will allow higher number of public procurement procedures to be subject of administrative control. Disadvantages of this solution include the fact that it requires adoption of additional rules on requirements to be met by external experts, the method of selection, i.e. appointment, their formal role in the controls, and the need to find ways to attract them to get engaged and secure funds to reimburse them for their engagement.

4. Public procurement procedures that are subject to administrative control according to random selection should not be discontinued during performance of such controls. Such general rule for all procedures that are subject to administrative control or similar monitoring is present in systems of public procurements in the countries from the region. The suspensive character of administrative controls is justified only in the case of procedures of high value or those which EPPS has assessed as high-risk procedures on the basis of predefined parameters. However, in the case of procedures with lower value and short implementation deadlines, discontinuation of procurement procedure might create greater damages than the possible irregularities detected.

5. SCPPA's annual reports need to include information on the share of appeal procedures where it acted in ex-officio capacity and have resulted in identification of significant violations to LPP and for which tender annulment decisions taken. Without such information, it would be impossible to assess SCPPA's effectiveness in performance of this competence. Consequently, it would be impossible to establish whether this systemic solution is effective in the practice.

6. LPP should stipulate fines for serious violations by legal entities, i.e. contracting authorities, the amount of which should be aligned with the framework given under the Misdemeanour Law. According to this general law, LPP may stipulate fines whose maximum amount for contracting authorities that dispose with budgets that correspond to income of large companies might reach up to 20,000 euros. Introduction and issuance of fines for legal entities will result in greater responsibility and timely activity on the part of responsible persons and officers at contracting authorities in respect to taking actions under public procurement procedures.

7. Official websites of bodies competent to investigate misdemeanour and criminal offences in the field of public procurements and/or competent for prosecution of relevant perpetrators, especially SCPC, should be regularly updated with information on the course of such cases, in systemic and user-friendly manner. The more information is available to the public about the status of specific cases, the greater pressure on the competent authorities for fast resolution thereof and possible sanctions for perpetrators in cases of established guilt. Consequently, there will be greater trust in performance or purposefulness of these institutions.

