

Public Policy Document

**Key Challenges in
Public Procurements
of State-Owned
Enterprises**

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INTRODUCTION

The key challenges in public procurements of state-owned enterprises were identified on the basis of a series of activities implemented in the last period under the project “Towards Accountable State-Owned Enterprises”. The project was implemented in the period October 2019 – September 2021 and included following activities and outputs:

- ✓ Corruption risks in all stages of public procurements were detected on the basis of in-depth analysis of 167 tender procedures and cross-referencing data from a total of 3,342 public procurement contracts implemented by 37 enterprises founded by the Government, the City of Skopje and the Municipalities of Gostivar, Kavadarci and Struga.
- ✓ Individual screening was conducted at each of these enterprises about the manner in which they organize and implement public procurements.
- ✓ Indicators to measure corruption risks were developed, followed by drafting proposals to reduce corruption in public procurements that were discussed with 130 representatives from state-owned enterprises and their founders.
- ✓ A number of proposals were integrated by the Government in its anticorruption plan called Action 21. These concern introduction of procedures for public procurement implementation, adoption of integrity plans or anticorruption programs, measures to stimulate competition, increased transparency in public procurements, etc.
- ✓ Educational program was designed and delivered to strengthen skills for implementation of tender procedures, covering 46 persons responsible for implementing public procurements at participating enterprises and municipalities.
- ✓ In addition, 30 persons were trained for development of public procurement integrity plans, and some enterprises benefited from mentorship support in development of their integrity plans.
- ✓ Processing data from total of 5,018 public procurement contracts of participating enterprises in 2020 and 2021 allowed changes, i.e. progress made in the last two years to be measured.

It should be noted that, in 2020, state-owned enterprise founded by the Government, the City of Skopje and the Municipalities of Gostivar, Kavadarci and Struga have awarded a total of 3,466 public procurement contracts in cumulative value of around 15 billion MKD, i.e. around 242 million EUR. Likely is that this amount will be surpassed in 2021, given that 1,552 contracts in total value of 9 billion MKD, i.e. 145 million EUR were signed only in the first six months of the year. Such high value is one of key arguments that underlines the importance of the issue concerning the manner in which public procurements are implemented by these enterprises.

All research conducted in the past period indicate to existence of corruption in public procurements and that portion of tender procedures are implemented with disrespect for the basic principles stipulated in the Law on Public Procurements.

Energy to narrow space for corruption and to reduce possibility for abuse of public resources is evident with majority of persons responsible for public procurements at state-owned enterprises founded by the Government, the City of Skopje and the Municipalities of Gostivar, Kavadarci and Struga. However, the fight against corruption in public procurements requires involvement not only on the part of organizational units tasked with public procurements, but of the entire enterprise, as well as other competent institutions, and even the broader public.

Efforts should continue in respect to enhanced pressure on management structures at state-owned enterprises to manage resources they are entrusted with in lawful and cost-effective manner, not abusing them for personal and political party goals. Such pressure must come from the inside, i.e. from employees at these enterprises, but also from the outside – from independent regulatory authorities and prosecution bodies, as well as from civil society representatives and the media.

The Government accepted the proposal whereby institutions are required to adopt anticorruption programs or integrity plans. Although it cannot be expected for these plans and programs to address the problems overnight, they can serve as baseline for enhanced pressure demanding response and accountability from management structures about the measures planned in respect to reducing corruption risks and what was actually implemented.

Center for Civil Communication implements the project “Towards Accountable State-Owned Enterprises” with financial support from the Embassy of the Kingdom of the Netherlands in Skopje.

KEY CHALLENGES

Corruption generators in all stages of public procurements at public enterprises and joint stock companies founded by the Government and LSGUs are accurately presented in the research paper “Mapping Corruption Risks in Public Procurements of Enterprises Founded by the Government and Municipalities”.[1] In response to weaknesses and risks identified by the project “Towards Accountable State-Owned Enterprises”, the project team developed the document titled “Proposals to Reduce Corruption in Public Procurements and Promote the Method of Their Implementation”, [2] which were subject of broad consultations with stakeholders and were distributed to state-owned enterprises involved in the project, and to other relevant institutions in the country.

Hence, this policy paper aims to underline key challenges in the process of implementing public procurements for each of the three process stages – planning public procurements, implementing public procurement procedures, and performance of public procurement contracts.

They include:

1. Low implementation rate of plans for public procurements;
2. Low competition in public procurement procedures;
3. Poor accountability for contracts signed and performance thereof;

1. Low implementation rate of plans for public procurements

In 2019, the average implementation rate of plans for public procurements among targeted public enterprises and joint stock companies accounted for 54%. In 2020, this rate was even lower and accounted for 47%. The negative trend continues in the first six months of 2021, standing at only 44%. It could be rightfully assumed that the COVID-19 pandemic and accompanying crisis has a particular impact on these negative trends, but precise measurement of this effect is difficult.

Low implementation rate of plans for public procurements is accompanied by frequent changes to these plans. In spite of this situation, most public enterprises and joint stock companies claim they have an established system for monitoring implementation of their annual plans for public procurements. Some of them have a separate operational service for that purpose, while others keep detailed analyses in MS Excel spreadsheets for ongoing monitoring and recording of plan implementation, while a third group reported their management boards are responsible for decision-making on implementation of public procurement plans.

Low implementation rate of plans for public procurements and frequent changes thereto, coupled with lack of established system for monitoring implementation, are indicative of poor planning of public procurements and inefficient management of public funds. In small number of cases, changes can be justified with objective circumstances related to business activity performed by public enterprises and joint stock companies. However, in vast majority of cases the plans are not implemented in their entirety and are changed because their initial development did not pay sufficient attention to determining actual need and possibility for specific procurement and to precise setting of its estimated value, and more frequently the problem is reduced to failure to take into consideration mid-term needs, meaning that certain activities or events would give rise to particular procurement needs.

[1] <https://www.opendata.mk/Home/TekstualniDetails/103?Category=2>

[2] https://www.ccc.org.mk/index.php?option=com_content&view=article&id=440%3A2021-05-31-13-35-36&lang=mk

The stage of planning public procurements as one of three main stages, in addition to implementing tender procedures and contract performance, is especially important for successful implementation of public procurement procedures and award of procurement contracts.

In that, successful planning of public procurements synthesizes a series of important aspects, such as adequate identification of procurement needs, i.e. goods, services and works that should be procured, followed by precise setting of the procurement's estimated value and, finally, proper definition of procurement timeframes. The importance of planning public procurements arises from the fact that this stage sets the base that later determines the overall course of procurement procedures and success in meeting procurement needs. Another important aspect is that only small portion of planning is covered under public procurement regulations which primarily focus on the middle stage, i.e. organization and implementation of procedures for awarding public procurement contracts. Therefore, planning is the stage that greatly contributes to integrity, commitment and professionalism of persons at contracting authorities, not only those involved in public procurements.

2. Low competition in public procurement procedures

The average number of bids per tender procedure is one of key indicators used to assess the manner in which contracting authorities implement public procurements. Low competition is indicative of discrimination in public procurements related to application of inadequate eligibility criteria for participation of bidding companies in tender procedures, favouring tender specifications and tender documents, and inadequate criteria for selection of the most favourable bid.

Analysis of data obtained from state-owned enterprises and taken from the Electronic Public Procurement System shows improved competition in public procurement procedures among targeted enterprises. In particular, the average number of bids per tender procedure in 2019 accounted for 2.4, while in 2020 this number was increased to 2.8 and dropped to 2.7 in the first half of 2021. This shows a generally positive trend whose maintenance and improvement necessitates further efforts, even more knowing that, for several years in a row, the average number at national level stands is 3 bids per tender procedure.

As regards competition, tender procedures presented with one bid imply a particular risk of corruption. Notably, such situation could be a result of market developments, but also of discrimination and disrespect for legal obligations related to ensuring level playing field for bidders.

Analysis of data shows that, in 2019, as many as 40% of tender procedures organized by targeted enterprises were presented with only one bid. In 2020, this share was reduced to 35% of tender procedures, while in the first half of 2021 every third tender was presented with one bid each (33%). This demonstrates an improvement and a trend that should continue in the future.

In order to increase competition, it is important for state-owned enterprises to significantly reduce use of negotiation procedures without previous announcement of call for bids, i.e. direct negotiations. Based on analysis of data from public procurements implemented by targeted enterprises over the period of two and a half years, some progress is noted in this respect, but having in mind the importance of this matter, improvements should continue. In particular, data show that, in 2019, 35% of analysed enterprises have organized negotiation procedures without previous announcement of call for bids, while their share in 2020 was increased to 45%, but accounts for only 20% of them in the first half of 2021.

Particularly problematic in terms of corruption risks are procedures based on two grounds: 1) negotiations without previous announcement of call for bids due to urgent need; and 2) negotiations because the procurement in question can be performed only by one economic operator. Although implementation of public procurement procedures on these two grounds necessitates an opinion from the Bureau of Public Procurements and they can be used only in exceptional situations without previously obtained opinion from the Bureau, these by default non-transparent procedures imply an opportunity for corruption.

3. Poor accountability for contracts signed and performance thereof

Transparency and accountability in public procurements are assessed in respect to publication of notifications on public procurement contracts signed within the law-stipulated deadline, publication of notifications on contract performance, submission of all relevant information requested under the instrument from the Law on Free Access to Public Information, and publication of all relevant public procurement information on official websites of public enterprises, i.e. joint stock companies.

The obligation for publication of notifications on contracts signed and notifications on contract performance is regulated by law and is rather straightforward for implementation, i.e. does not require significant time and resources. Therefore, reasons why certain public enterprises or joint stock companies publish some notifications on implemented public procurements late or do not publish such notifications at all, remain unclear.

On one side, by complying with these legal obligations, contracting authorities will demonstrate that they want to and operate in compliance with the law, and on the other hand, they will contribute to increased transparency and accountability in the process of public procurements, and will also increase trust among citizens and users of services provided by state-owned public enterprises and joint stock companies.

Analysis of data shows that the deadline of 10 days for submission of notifications on contracts signed and submission of the contract to the Electronic Public Procurement System (Article 70 of the Law on Public Procurements) was not respected in 49% of tender procedures. In 2020, the situation remained unchanged, while in the first half of 2021 this share accounts for 38%. This is indicative of improvements made in respect to transparency of state-owned enterprises.

The situation is especially unfavourable in respect to the legal obligation for submission of notifications on contract performance to EPPS. Joint stock companies and public enterprises founded by the Government, the City of Skopje and the Municipalities of Kavadarci, Gostivar and Struga do not fully comply with this obligation, but certain positive trends in this respect were noted in the course of 2021.

The Law on Public Procurements (Article 81, paragraph 1, item 7) stipulates misdemeanour fines in the amount of 500 to 1,000 EUR in MKD counter-value that are issued for the responsible person, i.e. authorised person at legal entities acting as contracting authorities in the case where they fail to submit notifications on contracts signed and notifications on contract performance. However, practice related to enforcement of the new law (April 2019) does not provide any information whether a particular contracting authority has been issued fine for non-compliance with this legal obligation.

The group of notifications that must be published also include notifications on tender annulments. The practice shows that, in some cases, this obligation is not enforced.

Unlike mandatory publication in EPPS (which is not adherently regulated in respect to law-stipulated deadlines), the research show that institutions continue to publish even less information and documents on their official websites.

1. Improve public procurements in the planning stage

Plans for public procurements should reflect the needs, but also the actual financial ability of state-owned enterprises at national and local level.

All enterprises should introduce a system for monitoring implementation of these plans. That would allow better implementation of plans for public procurements, and will also result in reducing frequent changes to these plans. At the same time, the system for monitoring implementation of plans will allow persons responsible for public procurements to take into consideration experiences from implementation of plans in the previous year when developing new plans.

In developing plans for public procurements, contracting authorities should not be bound only by previously signed contracts for same or similar procurement subjects. They should use the Electronic Public Procurement System as valuable database on public procurements performed on the territory of the entire country and information available online.

Led by the rules laid down in the Law on Public Procurements, especially in respect to procurement subjects and situations that are subject of public procurement procedure and in respect to time periods necessary for development and completion of the adequate type of public procurement procedure, contracting authorities should adopt a methodology or guidance on assessment of specific procurement needs and their estimated values. Such document should provide detailed guidelines in respect to ensuring timely implementation of public procurement procedures and the need to consult the market in order to establish estimated value of procurements that corresponds to market prices. In that, institutions will be forced to assume a more serious approach to setting start of procedure implementation and to more realistic setting of estimated value. The fact that enterprises will have developed their own, more detailed guides on setting estimated value of procurements would allow them to take into consideration the specificities and nature of procurements they organize and implement.

Frequent changes to plans should be one of indicators for performance of administrative control by the Bureau of Public Procurements, as anticipated under the new Law on Public Procurements.

Plans for public procurements should be published on institutions' official websites. In order to allow the public to follow implementation of plans for public procurements, institutions need to provide precise description of their procurements, instead of enlisting general activities/categories such as, for example, construction and reconstruction of streets, procurement of software and the like.

As the first step in any process, planning is very important and should be based on the last step from the previous process. This means that an analysis of previously implemented public procurement and performed contract for same or similar procurement subject should allow better estimate of the new procurement (whether and when it is needed, in what scope and for what period, how much funds are needed, etc.).

2. Implement measures to increase competition

Persons involved in public procurements at enterprises where they work should use the potential offered by the Law on Public Procurements and strive towards attainment of underlying principles in public procurements: cost-effectiveness, efficiency and effectiveness in use of public funds, competition among economic operators, transparency, equal treatment and non-discrimination of economic operators, and proportionality.

In its own right, each enterprise founded by the Government or LSGUs should strive to implement tender procedures in a manner that attracts as many as possible interested companies and that increases competition. Publicity, accountability and integrity of public procurements account for some form of guarantees for greater competition and, consequently, higher quality of goods, services and works procured.

In order to stimulate greater competition, public enterprises and joint stock companies should more frequently engage in technical dialogue (competitive dialogue) as additional option for consultations with economic operators provided in the new Law on Public Procurements. This form of communication between contracting authorities and potential bidders should be applied in preparation for public procurements of large scope, but primarily in respect to planned procurements, irrespective of their value, for which contracting authorities lack knowledge about actual market situation and market participants or whose subject is complex, i.e. when contracting authorities lack expertise to properly describe the procurement subject.

In order to stimulate competition through adequately developed tender documents and technical specifications, efforts are needed to enhance capacity of contracting authority employees, but also to enhance administrative controls performed by the Bureau of Public Procurements, by expanding the scope of public procurements covered by such controls based on risk assessment for violation of provisions under the Law on Public Procurements, and randomly selected procedures. That will result in loss of opportunities for contracting authorities to anticipate which of their procurement procedures might be subject of administrative control by the Bureau of Public Procurements. Moreover, this will objectively strengthen responsibility at the level of individual institutions.

Reasons behind low competition also include previous arrangements among companies in respect to participation in public procurement procedures, prices and market division. Therefore, it is important to establish a regular practice on publication of minutes from public opening of bids or names of bidding companies to be enlisted in the notification on contract signed. This would allow stakeholders and the broader public to be acquainted with economic operators that participate in specific public procurement procedures, putting them under greater public scrutiny and preventing possible arrangements among companies.

3. Encourage transparency for contracts signed and performance thereof

Publication of notifications on contracts signed and notifications on contract performance is regulated with adequate deadlines under the law, and therefore founders of state-owned public enterprises and joint stock companies should indicate to responsible persons the need for compliance with this legal obligation and should enforce sanctions anticipated under the Law on Public Procurements in cases of violations related to publication of notifications on contracts signed and notifications on contract performance.

If non-compliance with such obligations continue in spite of indications and sanctions, then EPPS's readily configured function whereby a contracting authority is not allowed to publish new procurement notice when it has not published a notification on contract signed for the previous public procurement organized within certain period of time after completion of the procurement procedure should also be applied in the case of failure to publish notification on contract performance.

As regards transparency, major step forward will be adherent implementation of the recommendation for publication of a series of documents on official websites of all institutions implementing tender procedures. Hence, it is important for state-owned public enterprises and joint stock companies to designate a separate section on their websites titled "public procurements", which will be regularly updated with relevant documents and data, such as plans for public procurements and amendments thereto, procurement notices, and notifications on contracts signed and contract performance.

Furthermore, all data submitted to EPPS should be published in open format allowing streamlined use and understanding of such information. This would allow a multitude of analyses to be developed that are currently missing and could serve as baseline for further improvements to the system of public procurements. Also, data contained in EPPS should be linked to those kept by the Central Register in order to allow easier detection of possible abuses of tender procedures for corruptive purposes.

