

## **HARMONIZATION OF PUBLIC PROCUREMENT LEGISLATION IN THE REPUBLIC OF NORTH MACEDONIA WITH THE EU LAW, A NEVER-ENDING PROCESS**

**Ph.D. Tatjana Spaseska,**

*Associate Professor at the St. Kliment Ohridski University in Bitola, Faculty of  
economics-Prilep, e-mail: tatjana.spaseska@uklo.edu.mk*

**Ph.D. Dragica Odzaklieska,**

*Associate Professor at the St. Kliment Ohridski University in Bitola, Faculty of  
economics-Prilep, e-mail: dragica.odzaklieska@uklo.edu.mk*

**Ph.D. Emilija Gjorgjioska,**

*Assistant Professor at the St. Kliment Ohridski University in Bitola, Faculty of  
economics-Prilep, e-mail: emilija.mateska@uklo.edu.mk*

### **Abstract**

The process of using public funds by the contracting bodies for the supply of goods, providing services or performing construction works should be based on basic principles of economy, efficiency, competitiveness among economic operators, transparency, equal treatment of economic operators and proportionality. The public procurement regulation is a subject of constant upgrading, modifying and amending, in order to more consistently implement and respect the basic principles while using public funds, i.e. providing effective public procurement with effective utilization of state budget funds when delivering quality public services to citizens, with a high level of transparency and accountability. The criticism by the Macedonian and world public for insufficient transparency, corruptive activities, and other drawbacks have resulted in adopting a new Law on Public Procurement (Official Gazette no. 24/2019), which is completely adjusted with the European public procurement directives. The paper will analyze the practice so far when implementing the public procurement procedures, as well as the impact of the new Law on Public Procurement on the total public procurement system, the advantages it offers, in order for higher transparency, modernization and harmonization with the European legislation.

**Keywords:** public procurement, efficiency, transparency, harmonization, rule of law, EU.

## INTRODUCTION

Taking into consideration the aspiration of the Republic of North Macedonia for accession to the European family, in 2001, the Stabilization and Association Agreement between the Republic of Macedonia and the European community and its member countries was concluded<sup>4</sup>. According to art. 68 of the Agreement, the Republic of Macedonia has an obligation to adjust the existing and future legislation with the legislation of the Community. One of the laws was the Law on Public Procurement.

The regulation of the public procurements started in 1998 when the The Assembly of the Republic of Macedonia adopted the Law on Public Procurement (“Official Gazette of the Republic of Macedonia” no. 26/98) which start to apply as of 20.06.1998, then the Law on Public Procurement (“Official Gazette of the Republic of Macedonia” no. 19/2004) which was start to apply as of 07.04.2004, after the Law on Public Procurement (“Official Gazette of the Republic of Macedonia” no. 136/2007) which was adopted on 12.11.2017, and start to apply as of 01.01.2008 and in the end the Law on Public Procurement (“Official Gazette of the Republic of Macedonia” no. 24/2019) which was adopted on 01.02.2019, and will start to apply as of 01.04.2019<sup>5</sup>.

The Law on Public Procurement from 2007 had undergone a series of modifications and amendments, based on the Directives for public procurement of the European Union of 2004. In the meantime, numerous changes and amendments of the law were adopted, which, according to the assessment of the European Union, distanced it from the European legislation in this area. Also, in 2014 new Directives for public procurement were adopted in the classic public sector 2014/24/EU and in the sector activities 2014/25/EU which were not implemented in the existing law. Also, the implementation of this Law identified a number of shortcomings and drawbacks which were noted in the reports of the European Commission for the progress of the country<sup>6</sup>, the detailed analysis of SIGMA, the observations of the Final Report for

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<sup>4</sup> Official Gazette of the Republic of Macedonia no. 28/2001.

<sup>5</sup> Before adopting the first Law on Public Procurement, a separate articles of the Law on rights, obligations, and responsibilities of the republic bodies in terms of assets in social ownership which they are using, were applied (“Official Gazette of SRM” no 41/85 and 51/88).

<sup>6</sup> So, in the COMMISSION STAFF WORKING DOCUMENT The former Yugoslav Republic of Macedonia 2018 Report, European Commission, April 2018 pg.57, „The country is moderately prepared in this area, which is particularly vulnerable to corruption. Some progress was made with the launch of the reform of the public procurement legal framework. Some of the recommendations of the 2016 report were implemented. However, substantial efforts are still needed to ensure a stable, transparent, efficient and effective public procurement system. Further efforts are needed to prevent irregularities and corruption during the procurement cycle. Investigations into allegations of serious conflicts of interest and abuse of public office need to be followed up. In the coming year the country should in particular: → step up efforts to finalize the reform of the public procurement system by approximating to the 2014 EU Directives on public procurement especially by reconsidering the mandatory use of e-auctions; → ensure that reports of irregularities related to public procurement, in general, are properly investigated and offenders are sanctioned; → strengthen the administrative capacity of the Public Procurement Bureau regarding oversight and monitoring of public procurement and of the Ministry of Economy regarding management of concessions and public-private partnerships“.

conducted performance audit by the State Audit Office<sup>7</sup> and the reports of the non-governmental organizations included in tracking the public procurement system.<sup>8</sup>

## **ANALYSIS OF CERTAIN DECISIONS OF THE LAW ON PUBLIC PROCUREMENT OF 2019**

Prompted by the indicated drawbacks of the previous Law, as well as the need for adjustment with the EU legislation, the new Law on Public Procurement is in accordance with the Directive 2014/24/EU of the European Parliament and of the Council from 26<sup>th</sup> of February 2014 for public procurement, the Directive 2014/25/EU of the European Parliament and the Council from 26<sup>th</sup> of February 2014 for procurement of entities who work in water management, energetics, transport and postal services, the Directive 2007/66/EC of the European Parliament and of the Council of 11<sup>th</sup> December 2007 for amendment of Directive no. 89/665/EEC of the Council and the Directive no. 92/13/EEC of the Council for improving the effectiveness of the audit procedures when awarding public contracts. The new Law is expected to provide higher transparency and the best value for the spent public funds, an efficient supervision system based on recognizable experiences of some European countries, but also is expected to simplify the procedures, which will normally result in decreasing the administrative burden of the contracting bodies in the implementation of the Law.

Furthermore, the paper will present part of the legal decisions, their advantages, and drawbacks which could appear during their implementation.

### ***Increased valued threshold of procedures which do not include conducting public procurement and introducing an electronic market for small value procurement***

One of the mitigating circumstances is the increasing of the value threshold of the procedures which will not be subjected to public procurement procedures. So, if according to the Law on Public Procurement of 2007 it applied to procurements with a total monthly amount not higher than 500 euro in denars without value-added tax, the new Law increases this threshold in such a way that it stipulates that the total value of the procurements under the value threshold of the public procurement procedures annually cannot be above 12.000 euro in denars at the contracting bodies in the classic public sector, i.e. 24.000 euro in denars in the current year at the contracting bodies of the sector activities. This would practically mean that the contracting parties in the classic sector, can on average per month purchase goods, services or works in the amount up to 1.000 euro VAT excluded even though the right of the contracting body to use this limit in one month is not excluded. Of course, the contracting body has no right to violate this mitigating circumstance, so for that purpose and for higher transparency of these procedures which were not reported to the Electronic System for Public Procurement (hereinafter referred to as: ESPP) website so far, the contracting body now has an

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<sup>7</sup> More in the Final report of performance audit "Efficiency of policies and instruments in the public procurement system and the procedure for giving consent for publication of public procurement announcement", State Audit Report, no. 15-194/9 from 26.04.2017.

<sup>8</sup> Report on impact assessment of the regulative, Ministry of Finance, Draft Law on Public Procurement, page 3.

obligation to publish these agreements in the quartal records which is publicly available on ESPP. The positive side of this legal decision is that a high number of contracting bodies so far had an obligation to conduct a public procurement procedure and when the value of the procurement amounted was too little over 500 euro VAT excluded. It meant additional costs for the contracting bodies for publishing and conducting the procedure, and in situations when an urgent need for such procurement had appeared, it could not be realized due to a procedural burden. Normally, there is always a room for violations, so the legislator had stipulated a fine in the amount of 500 to 1.000 euro in denars for the responsible person i.e. the authorized person of the legal entity who is a contracting body if: wrongly estimates the value of the procurement or unduly divides the procurement into separate procedures in a manner that will result in circumventing the application of the Law on Public Procurement or in selecting an inappropriate public procurement procedure.

The new law for the first time implements an electronic procurement market of small value which is an electronic platform in the form of electronic catalog managed by the Public Procurement Bureau and which is used for small value procurements. According to the Law, small value procurement of goods and services are considered the procurements in the amount up to 10.000 euro in denars and an execution of works up to 20.000 euro in denars. The procurement through the electronic market is conducted in such a way that the contracting body publishes a notification on the electronic market of small value procurements for the intention to make a procurement within at least 48 hours before realizing the procurement while giving a brief description of the subject of the procurement. The manner of conducting of this type of procurement will be regulated in more details by an act adopted by the Minister of finance. Anyway, such a manner of procurement would mean realization of the procurement within a much shorter period of time and by using a more simplified and transparent procedure. According to the data of the Report on the activities of the Public Procurement Bureau in the functioning of the public procurement system 2017<sup>9</sup>, out of 27.031 procedures, 7.957 procedures were conducted by using a simplified competitive procedure of small value (up to 5.000 euro), 7.823 were conducted by using simplified competitive procedure and 9.128 by an open procedure.

Also, the new law increases the value threshold for implementation of public procurement procedures for both procurements of small value and for an open procedure, as the most commonly used procedures which indicate to relaxation and simplification of the procurements procedures, which is of significant importance for a large part of the contracting bodies which are not staffed and prepared for conducting very complex and complicated procedures.

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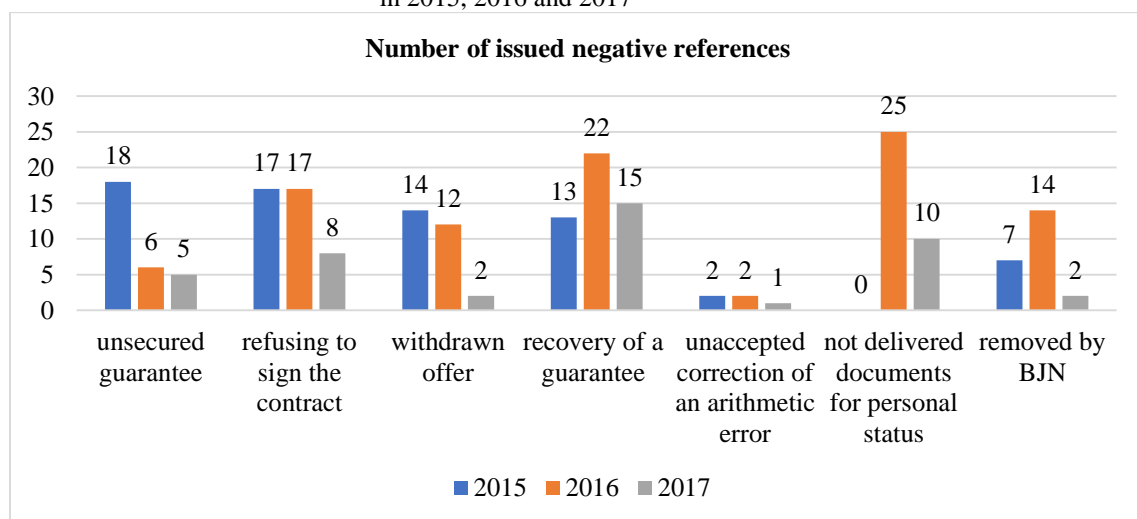
<sup>9</sup> The Report on the activities of the Public Procurement Bureau in the functioning of the public procurement system 2017, June 2018, Public Procurement Bureau, page 60.

### ***Redefining the negative reference***

Another weakness of the Law on Public Procurement noted also in the Reports for the progress of the country from the European Union, was the publication of the negative reference for the economic operators in a situation when the guarantee of the offer was collected, the donated funds were retained or the statement on steadiness of the tenderer was broken. The negative reference was issued also for withdrawal of the offer before the expiration of its validity; not accepting the correction of the arithmetic mistakes; not signing the public procurement contract according to the conditions of the tender documentation and the delivered offer, and not providing performance guarantee if the contracting body had stipulated it. The negative reference meant excluding the respective tenderer from all future procedures for awarding public procurement contracts within a year from the date of publication in case of first negative reference. The exclusion period increased for an additional year during every future negative reference but it could not last for more than five years.

During 2015, a total of 64 negative references were issued by the contracting bodies to the economic operators<sup>10</sup>. During 2016 a total of 84 negative references to the economic operators<sup>11</sup> were issued by the contracting bodies while during 2017 a total of 41 negative references to the economic operators were issued by the contracting parties<sup>12</sup>.

**Chart 1:** Display of issued negative references on different grounds in 2015, 2016 and 2017



The legislator imposed a draconian prison sentence from one to five years for the president of the public procurement committee, his deputy, members and

<sup>10</sup> Report on the activities of the Public Procurement Bureau in the functioning of the public procurement system 2015, May 2016, Public Procurement Bureau, page 10-11.

<sup>11</sup> Report on the activities of the Public Procurement Bureau in the functioning of the public procurement system 2016, September 2017, Public Procurement Bureau, page 14.

<sup>12</sup> Report on the activities of the Public Procurement Bureau in the functioning of the public procurement system 2017, June 2018, Public Procurement Bureau, page 14-15.

their deputies who had failed to issue a negative reference i.e. to the person or person in charge of the organizational form who will fail to publish a negative reference on the website of ESPP.<sup>13</sup>

Since the previous legal decision was not in accordance with the judicial practice of the Court of Justice of the EU, but also with the EU Directives, the Law on Public Procurement of 2019 has limited the term for issuing a negative reference to six months after publication, by increasing the time period for additional three months for every future negative reference but not more than a year. But besides the decision of the EU directives for excluding the economic operators from participation in public procurement procedures due to not meeting the criteria for personal status of the candidate or the tenderer, stated in article 45 par. 1 and par. 2 of the Directive 2004/18<sup>14</sup>, without publishing and forming of a blacklist of excluded economic operators, the Macedonian legislator has decided on the same reasons for issuing a negative reference just as in the previous legal decision, with the exclusion of collection of performance guarantee for quality execution of the contract.<sup>15</sup>

### ***Termination of obligatory use of the lowest price criteria***

According to the legal decision from the previous law, normally the criterium for awarding public procurement contract was the lowest price. As an exception, the criterium for awarding a public procurement contract could have been the most economically advantageous tender for the procurement of consultant or other services of intellectual character, for procedures for awarding contract for public-private partnership, as well as in cases where due to the specificity of the subject of the contract the quality or other elements such as minimum conditions of the technical specifications cannot be precisely determined. The criterium for the most economically advantageous tender was obligatorily used in the procedure with competitive dialog and in case of an alternative offer. A certain period of time the legislator had limited the application of the criterium for the most economically advantageous tender by getting consent from the Council for public procurements.<sup>16</sup> The data that the Council for public procurements in 2014 had accepted 12 and rejected 74 requests is striking, and in 2015 it had accepted 14 and rejected 61 requests for using the criteria for the most economically advantageous tender. In practice, it meant that the lowest price criterium was obligatorily used in almost all procedures.

The data from the Report on the activities of the Public Procurement Bureau in the functioning of the public procurement system 2017 show that in 17

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<sup>13</sup> Art. 232-m from the Law on Public Procurements ("Official Gazette of the Republic of Macedonia" No. 136/2007, 130/2008, 97/2010, 53/2011, 185/2011, 15/2013, 148/2013, 160/2013, 28/2014, 43/2014, 130/2014, 180/2014, 78/2015, 192/2015, 27/2016, 120/2016, 165/2017 and 83/2018).

<sup>14</sup> Report for the review of the public procurement system, Sigma, April 2016, page 46.

<sup>15</sup> Besides obtained observations for drawbacks of the First draft law, stated in page 11 of the Preview of proposals obtained in the process of the first draft, for not terminating the negative reference, the legislator believes that: "Using negative references is significantly limited compared to the existing law. It is, also related to using a statement on steadiness of the tenderer, which is in the economic operators' interest."

<sup>16</sup> Stipulated by art. 22 of the Law on amendment of the Law on Public Procurements (Official Gazette of RM 148/2013).

210 procedures the lowest price criterium was used, and only in 10 procedures the most economically advantageous tendercriterium was used (these data do not include some of the published contract notices for restricted procedure and negotiated procedure with a prior publication of a contract notice).<sup>17</sup> Since before 01<sup>st</sup> of May 2014, before the start of implementation of art. 22 of the Law on amendments of the Law on Public Procurement published in the Official Gazette of RM no. 148/2013, the contracting bodies could freely choose the criterium for conducting public procurement procedures, the practice shows that in 15926 procedures the lowest price criterium was used while in 2665 procedures the most economically advantageous tender criterium was used.<sup>18</sup>

The past legal decision was largely criticized in the EU Reports and in the Sigma Report.<sup>19</sup> The observations referred to the fact that the cheapest offer is not always the most affordable, i.e. it can mean ineffective use of budget funds for delivery of quality public service to the citizens. Also, according to art. 53 of the Directive 2004/18/EU the contracting bodies are free to choose which criterium they will implement in conducting the procedure, so it would provide the most efficient use of the public funds.

The new legal decision is diametrically opposite. The legislator is now introducing the the most economically advantageous tender as the only criterium for awarding the contracts. Excluded are the procurements of small value of goods and services with an estimated value up to 10.000 euros in denars and execution of works up to 20.000 euros in denars when the procurement is done by the electronic market of procurements of small value of ESPP, for procurement of standard goods and services, when the lowest price criterium is implemented.

### ***Optional use of electronic auctions***

Another modification of the Law on Public Procurement is the optional electronic auctions. According to the previous law, the electronic auctions were mandatory for all published contract notices from 01<sup>st</sup> of January 2012, with certain exceptions stipulated by the Law when the contracting body was obliged to give an explanation about the reasons for the inability to use an electronic auction in ESPP.

The new legal decision is in accordance with art. 53 of the Directive 2004/18/EC and is in accordance with the recommendation in the Sigma Report.<sup>20</sup> In the reports of the international and domestic public, it is stated that the obligatory nature of the electronic auctions resulted in delivering offers with unusually high prices in the stage preceding the auctions so that tenderer can have a room for decreasing to a “real” market prices during the stage of the e-auction itself, so based on that the

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<sup>17</sup> Report on the activities of the Public Procurement Bureau in the functioning of the public procurements system 2017, June 2018, Public Procurement Bureau, page 57.

<sup>18</sup> Report on the activities of the Public Procurement Bureau in the functioning of the public procurement system 2013, May 2014, Public Procurement Bureau, page 56.

<sup>19</sup> Report review of the public procurement system, Sigma, April 2016, page 84-86.

<sup>20</sup> Report review of the public procurement system, Sigma, April 2016, page 11.

savings realized by using e-auctions, according to the calculations of Public Procurement Bureau, do not reflect the actual savings.

### ***Partnership for innovations***

As a separate type of procedure, the law for the first time implements the partnership for innovations and the objective for this type of procedure is meeting the needs of the contracting bodies for innovative goods, services, and works, which can not be met by procurement of goods, services or works which are no longer available on the market. With this type of procedure will encourage, higher growth of the companies, right to intellectual property, economic growth, and development etc.

### ***Greater application of electronic means***

The Law stipulates electronic records of the public procurement procedures in a separate records book of ESPP. This means that the contracting bodies will no longer print and archive the documents of public procurement procedures, which means saving time and resources, and the archiving and keeping of the complete file of the procedures at a state level will be stored in an electronic form of ESPP. It would mean a higher safety, saving data and providing audit trace of the manner of spending public funds.

In accordance with the trend for replacing the conventional manner of communication with an electronic, a new manner of filing an appeal is stipulated. The economic operators will file an appeal only through ESPP to the State Appeals Commission and at the same time to the contracting body. The complete manner of communication in the appeal procedure will be done electronically. Also, the new law decreases the compensation for conducting the appeal procedures.

In order to increase the transparency, besides the previous publication of contract notices and tender documentation, the notifications for concluded contracts, an obligation is stipulated for the contracting bodies to publicly publish the Public procurement plans, the notification for realized contracts, the notification for modification of contract etc.. These measures aim at increasing the transparency and the rationality when using public funds.

On the other hand, besides simplifying the public procurement procedures for the contracting bodies, the stipulated modifications related to proving the capability and the criteria for participation in public procurement simplify the terms for participation in public procurement procedures for the economic operators. For the first time, a single document for proving the capability is introduced which will automatically provide the economic operators, through a tender file, issuing of all necessary documents for proving the capability from the Central Register.

## **CONCLUSION**

The new Law on Public Procurement includes a series of modifications and qualitative improvements against the previous legal decision. The modifications provide simplifying and relaxing the public procurement procedures from the unnecessary formalities so far, for both contracting bodies and economic operators, increasing the transparency in using public funds, increasing the application of the



criterion for the the most economically advantageous tender, relaxation of the terms and manner of using negative references, increasing the application of electronic means for running an electronic procurement market, and also in terms of running electronic records of procedures, electronic filing an appeal, response to an appeal and decision on appeal etc.. The stated legal act represents a big step forward in adjusting and harmonization of the Macedonian legislation with the EU legislation, following the good practices of the EU member states which is of crucial importance for the further progress of the country in the EU membership negotiations. The drawbacks and issues from the implementation of the law remain to be seen from the practical application of the new law after 1<sup>st</sup> of April 2019.

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