Public Procurement

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Skopje, 2011

The content of this book is part of the master's work defended at Iustinianus Primus Faculty of Law, Ss Cyril and Methodius University in Skopje.

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Financially supported by MCIC

МАКЕДОНСКИ ЦЕНТАР ЗА МЕЃУНАРОДНА СОРАБОТКА

Number of copies: 100

English translation: Slavica Taseva

Technical solution, graphic design and print: *JOFI SKEN DOO Skopje*

To Mihaela, Petar and Ilija

All lawyers, economists, legislators, contracting authority officers, and tenderers need to know and understand EU public procurement regulations, if they want to be successful in the public procurement field, which is an EU perspective.

(Trybus)

Foreword

Public procurement is an area which has been attracting attention of the public as a whole since the beginning of the new millennium, regarding that a large proportion of national budgets goes exactly to procedures through which governments purchase goods, works, and services. This topic gains exceptional significance considering that it is one of the important areas of harmonization with the EU Law, since the perspective is oriented toward creating a common market.

In the Republic of Macedonia, public procurement was introduced at the outset of the country's transition to a market economy, in the nineties of the last century, and the set-up of a national public procurement institution, in 2005, confirmed the ambition for a coordinated introduction and establishment of good business practices in the system, which constituted the foundation for further development and improvements.

Despite the fact that this matter includes administrative elements, it is an undoubtedly creative and developing area, which includes a number of disciplines, and is both complex and creative. Anyway, anyone who is involved in the public procurement process is a potential architect of good business practices, especially because there are no universal and identic situations in the implementation, for applicative legislation cannot ideally stipulate all possible things, but on the long run there is a need for public awareness raising, and focusing in the area of implementation of the fundamental public procurement principles, with a purpose that both sides involved in the procedure, as well as the public as a whole, have a positive view on the procurement process.

This book elaborates on public procurement aspects, and the purpose of its publication is to make an introduction into this relatively new area of knowledge, as well as to earn a recognition for it, in order to raise public awareness about the public procurement system, establish business practices, and, finally, increase the interest of those who are involved in the process of researching this matter, both from the practical

and theoretical viewpoint. The perspective in the RM is to introduce public procurement as a special field of education at the universities.

I wish to thank the reviewers Mr. Borce Davitkovski, Ph.D., Full-time Professor at Iustinianus Primus Faculty of Law in Skopje, and Mr. Igor Soltes, Ph.D., President of the Court of Audit of the Republic of Slovenia and former director of the Slovenian Public Procurement Office, who inspired and helped the work on this book, with their longstanding experience. I also thank the publisher, Macedonian Center for International Cooperation (MCIC) Skopje, for the financial support to the Macedonian, Albanian, and English editions of this book. At the same time, I wish to thank the universities, for taking an initiative in including the public procurement theme into their curricula.

1. Introduction

In today's world of constant change, globalization, and opening up of capital and labor markets, public procurement is becoming increasingly visible, causing a great deal of interest for research and pursue of this matter. The system of public procurement is a necessary tool for regulating the process of using public funds by public (government) bodies, for satisfying their necessities from external, commercial sources. The focus and goal of such regulated a system of using public funds requires fair process, fair participation of the business sector in it, and maximization of value for money.

This is a relatively new topic, but it gains exceptional significance because of the fact that the public sector, i.e. governments, spend large proportions of national budgets for public procurement, and therefore the need for introducing mechanisms that demonstrate transparency, competition, efficiency, and non-discrimination, and allow for maximization of value for money in procurement of goods, works, and services.

This topic gains even more significance because of the globalization process, and the internal European Union market, which also enables free movement of goods, capital, and services. Indeed, such established machanisms/procedures, as stipulated in the European Union legislation and adopted by national legislations, refer to the notion that administrative procedures for carrying out this process are governed by national regulations, but the public procurement system is everywhere based on the same principles and goals.

In the Republic of Macedonia public procurement practices started with the enactment of the first Regulation on Public Procurement in 1996, and than the first Law on Public Procurement (LPP) in 1998 (particularly close to UNCITRAL's Public Procurement Rules), followed by the Law on Public Procurement in 2004 (consistent in part with EU Directives, and also with the World Bank's Procurement Guidelines), amended in 2005, which provided for transparent advertising and one-stop-shop for procurement notices, as well as for information availability. These regulations provided the legal framework for, and enabled, the practical start-up and operation of the new and for the first time established national institution in charge of public procurement – the Public Procurement Bureau, as well as the embarking on the electronic public procurement process, for the first time in the Republic of Macedonia. The recent Law on Public Procurement was enacted in November 2007, and amended in 2008.

The beginnings in public procurement system set-up in the Republic of Macedonia, by applying international practices, were ambitious, while the support of EU and USAID projects assisted institution's capacity development, and implementation of good practices, and led to high grades for the work done. It is unquestionable that the Republic of Macedonia has done a step forward in developing legal framework on this matter. However, it is also unquestionable that this matter needs further and higher attention, presence and action, as well as uniting of intellectual potential, in order to improve procedure implementation, raise awareness and assure that parties have a say in public procurement procedures, in each of their stages, as well as afterwards. Namely, the legal framework in this area cannot ideally stipulate and define each possible situation. Therefore, in such cases emerges the need of business practices, whereas their development and establishment are under the authority of the national public procurement institution, which by monitoring public procurement in the country, implementing good practices, and international collaboration, should facilitate and simplify procedure execution.

The aim of this book is not only to focus in, and discuss, stipulated administrative procedures, but also to pay attention to values and principles, implementation process, consequent effects, monitoring activities, and decision-making on the lawfullness of

actions taken, as well as to the parties' role in the overall system, and their ability to have a say in order to fulfill their both legal and commercial interests.

Certainly, considering that this is a matter that needs higher attention in our society, it is important to work continuously on raising public awareness of the need for implementation, or, we should say, proper implementation of public procurement procedures. It is not accidentally that implementation and proper implementation are defined separately. They are certainly both equally important, regarding that current relevant reports still point to cases were public procurement procedures are not implemented (procurement out of procedure, pursuant to LPP), as well as cases were their implementation is not regular.

Precisely because of the undoubted need for achieving high levels of awareness of the necessity of public procurement rules application, the Law also provides for the possibility, and the practice shows it is needed, that national bodies/institutions are in place, charged with the authority to develop public procurement policies, be publicly present with a view to the results of executed procedures, and identify all theoretical possibilities of, and needs for, the implementation of such procedures. Furthermore, such a separate, *independent*, *i.e. autonomous* institution has the role of deciding on public procurement appeals, and if any violation of party's rights is identified, the Law provides for further authority of the Administrative Court. The latter situations are, indeed, the ones that are interesting for analysis, regarding that our court practices are still marginal considering the number of court cases filed.

Professionalisation of public procurement staff is a tool which has been implemented in some countries and results with success. This experience is particularly positive in England.

Along with government institutions, the commercial sector that possesses necessary qualifications to provide such type of education is also entrusted with the task of expanding the knowledge in this area. Through certification of officers who work in the field of public procurement (usually up to three cathegories/degrees of certification),

autonomy and sustainability of the professional procedure execution process is enabled. Education also concerns tenderers/parties in procedures. Informed and educated parties have influence on the proper execution of public procurement. Therefore, there is an undoubted need for developing commercial/business sector's interest, as well, toward its involvement into raising public awareness of public procurement. This certainly is a perspective.

Within these processes, the need for efficient collaboration in the public procurement process between countries, especially on regional basis, becomes inevitable. As a government tool, public procurement is a topic that is constantly developing and taking ever new shapes, further instigating an increasing interest of both theorists and practitioners in its peruse.

Despite the attention paid by the Republic of Macedonia to the system of public procurement, it is still necessary that this process is monitored, improved, and harmonized with the EU legislation, on an on-going basis.

Beside the wish of making by this book a modest contribution to the development of the public procurement idea, the author also believes that it will add to further public procurement system improvements in the Republic of Macedonia, advancement of the national inter-institutional collaboration, public procurement awareness raising in the business sector and among all parties involved in the process, and furthermore to the cooperation with other countries, and to practical procedure implementation the by contracting authorities, i.e. tenderers and economic operators, as well as by judges and public prosecutors.

Regarding the foregoing, this book on the topic of public procurement will make a contribution to public procurement development in the Republic of Macedonia, as well as to further advancement of the cooperation with other countries in implementing fundamental principles of transparency, competition, and non-discrimination.

This book focuses in research and analysis of the public procurement system, as provided by national legislation and the legislation of the European Community, procedure implementation, as well as errors and inconsistencies thereof, deficiencies of applicable laws and regulations, current developments in the EU member states, court practices in the Republic of Macedonia, and the judicial system of the European Union.

The content of this book includes themes that focus in understanding various procedures, explaining why they are needed and how they are implemented, as well as what their effect on, and role in, the country's progress is. Namely, it is about procedures and mechanisms through which governments provide necessary goods, services, and works, and spend in that process large proportions of national budgets. Furthermore, it is about whether public procurement is a consequence, or an integral part of society's political and social modernization, which requires a wide spectrum of supervision of respective partakers, who make decisions on awarding public procurement contracts. (1)

The supervision of public procurement procedures is exceptionally significant and necessary for establishing good business practices, which, on the other hand, is important for further development of the national public procurement system.

Education, upbuilding, unselective and ongoing professionalisation of the staff involved in public procurement procedures, as well as of the economic operators' representatives, who respond to public notices for awarding public procurement contracts, or, for that matter, of all actors who are included in the procurement process as a whole, is vital. Professionalisation is undoubtedly both a perspective and a requirement for system improvement, but for ensuring its sustainability, continuity and a well defined education concept are a must.

This approach allows for efficient procedure performance, higher proficiency levels (specialisation), and limitation of critical corruption areas, on the long run.

The system of public procurement organization and of carrying out necessary procedures, all the way down to concluding contracts for provision of goods, works, and

services, differ from country to country, and the European legislation does not stipulate the ways of public procurement offices' organization. Macedonian legislation provides for setting up public procurement commissions, and the difference between the first and the recent Law is in that initial statutory solution required that commission members have a defined term of office, with a possibility of re-election, whereas the recent one requires establishing separate commissions for each procurement, without any restriction regarding professional expertise, or possibility of multiple election.

Experiences show that legal entities are heterogenous regarding staff capacity, both in terms of quantity and skills, as a result of the differences in the activities they perform. Consequently, there are entities with a few employees, who suffice only for performing the activities of the main business, with public procurement being an additional assignment, whereas there are entities that are "capacious", with a large number of employees, and they both have the same treatment regarding public procurement. Decisions on public procurement procedures are made by an officer in charge, who appoints a commission, and the further administration of the procedure is done by the commission, which in turn makes proposals to the officer in charge for decision-making.

The inevitable question here is: What happens in cases where an officer in charge who, among other assignments (related to the main business), also performs public procurement activities, and who has decided to remain in the system and adjust to the situation?

With a view to the attitudes regarding administration management issues, an individual who has decided to stay in the organization and adjust her/his aspirations to the possibilities of that organization, assumes the following methods, i.e. mechanisms: division of labor, according to clearly defined task performance procedures that provide guidance to each member, and authority system organization with communication canals control, both formal and informal, in all directions throughout organization. (2)

From public procurement system's perspective, in cases where officers allow the development of internal processes, as part of the overall administrative process, such organization is reflected in all procedure activities, which include: setting the budget required for the procurement in question, adopting a resolution on the need for making procurement (including procedure type and commission members), publication of the public procurement adverticement, developing tender documentation, receiving tenders, i.e. requests to participate, preparing a procedure outcome report, selecting the winning tender, reviewing possible appeals and their proceeding to the body in charge of public procurement appeals, acting upon possible findings of the government appeals commission, signing contracts, sending notice to the national public procurement institution for publishing purposes, executing the concluded contract and making payments thereof, keeping a dossier. These encompass all administrative components of the public procurement procedure. Certainly, the administration of this procedure requires hard work, considering procurement diversity (goods, works, and services), as well as diverse professional skills, on one hand, and inclusion of specialized staff in particular procedure stages, on the other.

Identification and start of public administration reform activities in the Republic of Macedonia, as provided by May 1999 Strategy, point to the main principles of the new public administration system, such as:

- rule of law,
- transparency,
- equal treatment of beneficiaries,
- efficiency,
- ethics. (3)

Further to that, and considering that the administration itself is the one that carries out public procurement procedures, public procurement principles may be defined.

The fundamental public procurement principles, further to which implementation goals are developed, are universal and identical. Everywhere and always, since public procurement's presence on the scene, the principles and values on which it is based are identical and unique.

The basic public procurement principles are:

- competition;
- integrity of the procedure and of its participants;
- procedure efficiency;
- providing best price;
- buyer satisfaction;
- fair treatment of tenderers;
- risk mitigation;
- equality of procedure participants, i.e. equal treatment of both participants and stakeholders;
- transparency.

In the administrative procedure, the principle of legality is fundamental. The formal legal aspect of the legality principle in the administrative procedure refers to regularity in procedure execution. (4)

What about the aspect of formality, in the context of public procurement, and its relation to legality, on one hand, and cost-effectiveness and competition on the other? We put this question in order to make distinction between complying with formality requirements, and on the other hand providing cost-effectiveness and competition, and maximizing the value for money, relative to the need for carrying out public procurement administrative procedures.

If activities required by the administration are defined further to their formal or external features, the formal concept of the government would be determined, in functional context. (5)

In that regard, starting from formal features [enforcement bodies, ways of acting and operating (procedures, operation methods)], documentation forms, and manners of monitoring and performing individual activities, the formal side of fundamental government functions concept could be defined. Activities that do not include all such formal characteristics would not belong to a same government function (according to the initial, strictly formal standpoint). (6)

The view of the administration from formal aspect is typical for the representatives of the Vienna law school. According to the beliefs of this teaching, of which eminent representatives are Kelsen, Carrè de Malberg, Marcel, Eisenmann, and others, the process of creating and executing rights and legal norms, as a higher level, is impossible to be separated from the fulfillment of rights.

Public procurement procedures, as one of government administration's functions, certainly belong to the functions and activities that, according to this concept, have elements and characteristics of formal procedures. However, as stated above, the question is whether the formality principle is that critically important even at the price of ignoring other procedure principles, particularly cost-effectiveness and competition. At this point, it is inevitable to mention very frequently present cases, where because of a formal tender failure (starting from the cover, and all the way through the submitted documentation), other principles are threatened. In such situations, the tender is usually rejected because of its formal irregularity, and consequently the number of tenders is reduced – which endangers competition, as well as the possibility of presence of a better tender (the one that is formally incorrect) – which actually undermines the cost-effectiveness principle.

2. Public procurement emerging and development

Public procurement first emerged in the mid nineteenth century. In France in 1833 public procurement was regulated by a law that governed central authorities'

procurement. Thereafter, in Belgium in 1963, procurement of goods and services for government needs was regulated by special legislation, including defined and stipulated procedures. In Italy, the public procurement area was first regulated by a law enacted on October 18th 1923. In terms of providing procedure review, both in Italy and in France (*capitolati generali*), omissions in contract pre-conclusion stage are subject to legal remedies, initiated by those whose interests have been threatened, whereas after the contract has been concluded, court authority is in place. (7)

In Germany there is no unique legislation governing this area, but public authorities are required to carry out procedures that provide competition (by collecting tenders). Occasionaly, also emerge theories (*actes detachables*) regarding the authority in the area of identifying irregularities in procedure execution, i.e. authority of administrative courts (in issuing declaratory judgments), and civil courts (in deciding on concrete contracts). In Germany in 1922, the law on the national budget provided for a rule of carrying out procedures by collecting competitive tenders, but it also allowed for departing from this rule as appropriate. Without enacting any special regulation thereof, a national contract commity was established, which developed the procedures (*Verdingungsordnung für Leistungen – VOL*), and later the construction department defined additional procedures (*Verdingungsordnung für Bauleistungen – VOB*), all published in 1926. (8)

These regulations did not have statutory, but rather administrative treatment. Further practices showed that these regulations were not realy implemented as required, but they were included as an integral part of advertised tender conditions for concrete procurement cases. Practices also showed that incompliance with these regulations did not allow for the possibility of, and right to, a remedy further to VOL and VOB (which were defined by ministerial protocol), but their provisions would become binding if they were included and incorporated in the contract.

In the countries of this region (and wider) that experienced a period of socialist system and planned economy, public procurement emerged in about mid twentieth century, and particularly in its nineties. Thus, for example, in Poland the first regulation –

a public procurement law, was enacted in 1933, and was effective until 1939. In Estonia, a public procurement law was enacted in 1934. (9)

In the United States one can note a comprehensive legislation on this matter, comprising of laws, by-laws, principles, regulations, rules, and procedures that have to be followed in procurement, all of which constitute a one of a kind procurement system.

During later periods, procurement regulations have mainly been affected by the novel trend of establishing supranational and international procurement regulations, which are primarily focused in removing restrictions and barriers to participating in public procurement procedures, irrespective of tenderers' country of origin.

Of great importance for government procurement was the agreement concluded on April 12th 1979 – the General Agreement on Tariffs and Trade (GATT), focused in reducing and eliminating discriminatory measures, and in stimulating competition, which affirmed the intention of enabling and promoting free trade, also relevant for stimulating competition in the procurement area, by way of planning and advertising the (needs for) procurement, announcing procurement procedure participation rules, and providing equitable treatment of all interested potential tenderers, i.e. participants.

Furthermore, in international realms, public procurement also became part of UNCITRAL's (United Nations Commision on International Trade Law) area of interest. In 1994 The United Nation's General Assembly adopted the UNCITRAL Model Law on Procurement of Goods, Works and Services with a Guide to Enactment. UNCITRAL have defined public procurement guidelines, which are not mandatory, but it is recommended that governments incorporate them into their national regulations. The aim is to develop competition among tenderers, provide equality of tenderers, and allow for insight in, or publicity of, executed procedures. (10)

The work on developing new UNCITRAL rules is still in progress, and their adoption is planned for 2012.

Public Procurement

In the European Union public procurement is regulated by two directives (for the traditional procurement sector and for so called “utilities contracts”). These directives require that member states align their national regulations with the public procurement rules. Their specificity is mainly reflected in value thresholds, and in the principles of competition and non-discrimination. With a view to the foregoing, the Advisory Committee has monitoring authorities in rules implementation, uniformity, and non-discrimination, as well as in promoting practices that may be of general use.

As a result of the need for contract enforcement, Procurement Committee has been established [an Advisory Committee that develops public procurement rules (EU directives), reviews the situation and the respective experiences, and gives proposals for improvement (the Republic of Macedonia participated for the first time in Advisory Committee’s work immediately after receiving the candidate status, in March 2006)].

By its nature, public procurement today makes a relation and contact of the public sector with the private sector, by way of purchasing goods, works, and services that it needs for accomplishing its functional goals. Through such a communication between the private and the public sector, public procurement promotes entrepreneurship. Therefore, the public procurement area belongs in the domain of public and private law, including complex aspects that are related to different juristic areas:

- administrative law (including anti-corruption law), as well as
- private law, trade law, and law of obligations (including entrepreneurship aspects). (11)

Within the applicable law, the starting point of public procurement is administrative law. This particularly considering the fact that the procedure starts and goes through the following stages:

- Planning, providing funds, carrying out procedures for awarding public procurement contracts (by making preparations and publishing notes), selecting the winning tender, providing review procedures for protecting the rights pertaining to public

procurement, and supervising the process. Administrative aspects of the foregoing procedure stages are also specific, in that procedure managers and implementers (those who carry it out), are subject to substantive law regulations of the administrative law, as well as to the proceedings defined in the administrative procedure regulations. Also indisputable are the public law aspects of accounting and finance (in the fund planning stage), all the way down to the supervision and monitoring of contract execution, which contain administrative elements and are part of the administrative law, i.e. administrative procedure. The presence of administrative aspects is also clear from the perspective of the status of entities that are in charge of enforcing the Law on Public Procurement, concerning that they fall under the regulations in the administrative law area.

On the other hand, with the view to public procurement contracts, contract law aspects are also unquestionable, which includes the law of obligations.

From the perspective of tenderers' status, public procurement contract award procedures are subject of the company law.

In today's legislation technicality is increasingly present, and tendencies are oriented toward its larger presence in the public procurement system. It practically means that each stage of the public procurement procedure is elaborated in a special act (by-laws, procedures, vocabularies, forms and templates etc.), largely with a purpose of unifying the cases, the stages, and the like. Very often, during the Law on Public Procurement implementation, emerge situations that are absolutely impossible of being matched to defined statutory solutions. The more common view of those who are included in carrying out public procurement, particularly entities in charge of review procedures for protecting the rights pertaining to public procurement, all of whom are familiar with the system, is that interdisciplinary method and good business practices are exactly what is necessary for successful execution of public procurement procedures. Considering the growing trend of public procurement, jurisprudence is being developed worldwide, as a practice that tends toward unification by introducing various model laws, whereas in the European Union this is accomplished with the help of the directives.

Public procurement is characterized by subjectivity, personnel aspects, and legal actions in the process of spending public funds, and the tendency in this process is to rationalize public funds spending.

By its nature, and in line with the purpose of regulations that govern it (public procurement laws), public procurement belongs to anti-corruption legislation, which, again, promotes legality and appropriate acting in spending public funds, and also provides for competition, non-discrimination and transparency of the procedure, as well as for prohibition of negotiating. (12)

The legal nature of public procurement may be defined as multidisciplinary. It naturally requires various education skills (in the first place in economics, egineering, medicine etc.). On the other hand, the purpose of going through certain procedures in public procurement is to conclude a procurement contract, by performing defined operations and actions, in a specified form, and also to provide review procedures and instructions for correcting possible mistakes in the process.

Anyhow, taking into account the development stages of this area, there is no argue that public procurement is increasingly shaping into a field of its own, and not as one of the areas of law. (13)

Today, public procurement legislation includes:

1. Substantive legislation (public procurement law);
2. Status-determining regulations (law on administrative disputes, law on obligations, company law);
3. Regulations that set out the procedure (law on administrative procedure).

In practice, for carrying out public procurement procedures are applied by-laws, with the purpose of regulating frequently changing elements, and, therefore, there is a need to regulate such matters by a special regulation (for practical reasons). Furthermore, business practices, although from formal legal aspect not considered as source of law,

anyway affect its implementation, and the same applies to comparative legislation, EU guidelines, UNCITRAL's model law, WTO rules, etc. Legal doctrine, on the other hand, is a source of law, and has a decisive role in interpreting, developing, and analyzing respective institutes, practices, regulations, and comparative systems.

3. Public procurement principles, purposes, and object

3.1. Principles (values)

Analyzing the developments in this area, it may be stated that, in general, public procurement principles are identical and unique.

Public procurement, as a relatively new field, has been developed under the influence of administrative procedure development, and particularly because of the fact that administrative procedure values have been also established in each of the individual administrative procedures.

If administrative procedure's fundamental principles are taken as the starting point: principle of legality, principle of citizens' rights and public interest protection, principle of efficiency, principle of cost-effectiveness of procedures, and principle of double instance, they do not exhaust all procedure principles, since every provision of the Law on General Administrative Procedure is an emanation of a previously established chief premise of the legislator, out of which theorists can sublimate an idea that may acquire the meaning of an administrative procedure principle. (14)

The substantive aspect of the principle of legality is reflected in the duty of appropriate implementation of substantive law regulations (laws, other government bodies' regulations, and other acts), as well as the duty of adherence to formal-legal provisions, which refers to regularity in carrying out procedures from formal aspect, by implementation of specified rules related to the form and manner of acting, in all stages, all the way down to the enforcement stage. (15)

Fundamental public procurement principles are set out in the Directive 2004/18/EC, in Article 2:

- principle of equality,
- principle of non-discrimination,
- principle of transparency. (16)

Fundamental public procurement principles in the Republic of Macedonia, as defined in the 2004 and 2007 laws on public procurement, are:

1. competition among economic operators,
2. equal treatment and non-discrimination,
3. transparency and integrity,
4. rational and efficient use of funds in public procurement procedures.

3.1.1. Transparency

This is a principle which ensures that activities by government institutions are carried out by procedures that ensure impartiality and publicity toward all participants, and the public as a whole. It is a fact that this term has recently been gaining more importance, and is very often mentioned not only in terms of public procurement, but in wider context as well. Namely, transparency understands disclosure to both procedure participants, and the public as a whole (all who are interested), on the way of carrying out activities, and on the decisions taken by government (public) bodies. This is a principle of key importance, which ensures procedure integrity (wholeness), as well as impartiality, i.e. objectivity.

3.1.2. Competition

This principle allows for selection of a better option, and such choice is possible only if there are at least two tenders in place. It is very important that in the development stage of each individual public procurement, care is taken for the implementation of this principle, by setting realistic criteria and conditions, which would ensure participation of multiple competitive tenderers with their tenders. (The issue of medium-and-small-sized entrerprises' participation in public procurement is increasingly coming into focus, since very often they are not in a position to meet the conditions set out in public notices. This is definitely one of the current topics of the Advisory Committee on Public Procurement as well, which has been pondered about in terms of increasing participation possibilities by alleviating the criteria and dividing the procurement in lots, by which medium-and-small-sized entrerprises would have equal treatment since the beginning, in the act of applying.)

However, competition is certainly no guarantee for acquiring better quality, and is not to be taken as an absolute determinant. But, it anyway constitutes a protection against monopoly, although not always successful, which makes regulatory regimes necessary. Market mechanisms and competition, of which public contracts are part, lead to increased quality and efficiency. (17)

3.1.3. Equal treatment

This principle refers to the necessity of equal treatment of all procedure participants on the part of tenderers (economic operators). This principle ensures equality and non-discrimination regarding products' or tenderers' (economic operators') origin, which assures the absence of preferential methods. This is one of the key values on which EU directives rest. Namely, this ensures opening up of capital and labor markets. The Republic of Macedonia made a giant step in this area, by incorporating this principle into its 2004 Law on Public Procurement, which made it the first country in the region to introduce this principle in its national legislation. (18)

3.1.4. Non-discrimination

The non-discrimination principle establishes equality and restricts the possibility of granting any privileges or making any exclusions based on the country of origin, either of the procurement object or of the tenderer.

Last countries in the region to implement the preferential approach were Bosnia and Herzegovina, Serbia, and Montenegro, the legislations of which were providing for prefered status of national products and tenderers, which was one of the key discussion topics before signing the Free Trade Agreement (CEFTA) in 2006. At the negotiations in Brussels, in July 2006, possibilities were discussed for accepting the preferentialism of the laws of Serbia and Bosnia and Herzegovina for a certain (few year) interim period, to which other Agreement signees (Macedonia and Croatia) objected, and asked for equal treatment by legislation harmonization. However, near the end of 2006 the Agreement was signed with the existing national preferences, allowing for an interim harmonization period.

In situations where two or more tenders differ for less than three points, the 2007 Law, in its section dedicated to utilities contracts, provides for the possibility of tender selection by implementing contract award criteria according to which 50% of the goods offered in tenders are to be of national origin, from the European Union member states, and from countries with which the Republic of Macedonia has signed an equal status agreement, which allows equal treatment of Macedonian economic operators on the markets of respective countries. (19)

3.1.5. Rationality and efficiency

This principle allows for justification of public procurement procedures, and ensures accomplishment of public procurement goals – maximization of value for money. The purpose of public procurement procedures is efficient and rational use of the funds planned for procurement. Considering that the proportion of funds used for public

procurement is large (in general terms, approximately 30% to 40% of national budgets), the need for following this principle in the procurement process is unquestionable, with the purpose of efficient and controlled fund spending.

All foregoing principles are interconnected and conditioned of each other.

In the context of public procurement principles compliance, the author considers it useful to present one practical example of a case that took place in 2008. Through a negotiated public procurement procedure without a public notice, three economic operators were invited to submit tenders in a set out deadline. Before expiry of the deadline for submitting tenders, appeared other interested economic operators, who made formal requests to the contracting authority/purchaser, to allow them to submit their tenders. Their requests were rejected, i.e. purchaser's answer was negative. The question here was which of the principles was violated: transparency, competition, or non-discrimination? By inviting three tenderers (statutory condition), competition, transparency [(despite the opacity imminent to this kind of procedures (negotiated)], and non-discrimination were provided. But, that was until the moment of emergence of another tenderer, i.e. economic operator, who indicated her/his wish and demand to take part in the procedure. By precluding her/his participation, all three principles were violated, for if more tenders were submitted, competition would increase, moreover, precluding the participation of an interested tenderer was discriminating, and finally transparency was also undermined, since information on the procurement procedure was not possible from any point of view.

The foregoing clearly shows that public procurement principles are interconnected, and if one of them is violated, that entails violation of others as well.

Other principles, which are universal, and are not stipulated but are still defined in the procedures, are: integrity of the procedure (consideration for the participants and for the procedure as a whole) and fair treatment of tenderers, procedure efficiency, its fast and rational execution, providing the best price for demanded goods, works, or services, mitigating risks (good planning and execution of public procurement procedures) etc.

3.2. Public procurement purposes

Public procurement purposes are directly linked to its principles. For achieving public procurement purposes, the legislator provides for procedure rules according to which public procurement contracts are awarded.

Public procurement purposes are:

- promoting competition among tenderers,
- preventing corruption,
- introducing and improving financial discipline in managing public funds,
- improving the possibility for public insight into public funds spending,
- rational spending of public funds.

The European Economic Community (hereinafter: EEC) establishment treaty sets up the basic framework for public procurement legal regulation. The main purpose of this act is establishment of a relevant internal market of the member states, including prohibition of any kind of national discrimination, or any limitations in selecting goods and services, free movement of goods and capital – free from any tariffs and charges, as well as prohibition of quantity restrictions (quotas), and of measures with effects equivalent to tariffs and quotas between member states. Treaty purposes also include execution of key European Community policies, first of all in the juridical area of competition.

The EEC Treaty does not concretely mention public procurement, except in terms of financing Community's agreements in overseas countries and in relation to industrial policy, but in the EEC Treaty may be found a few provisions which constitute the foundation of public procurement system set-up, and which are talking about free movement of goods, free establishments, and free movement of services. There are also other important provisions, which refer to discrimination prohibition.

The EEC Treaty incorporates the main purpose of the European legal system regarding public procurement, with an aim of opening up the public procurement market to member states, and enabling tenderers co-operation in public procurement procedures, out of individual member states borders. Since member states could not uniform detailed public procurement rules based only on the EEC Treaty, public procurement directives have been adopted, as a secondary source of law. Directives should certainly be taken only as a fundament on which to build national laws. Member states that prior to directives enactment haven't adopted any public procurement laws, like for example the United Kingdom, transposed in their legislation almost the complete text of directives.

Member states that historically have the tradition of public procurement legislation, such as France for example, with its "Code de Marchés pubblics", and Germany, with the "Verdingungsordnungen", had to amend their legislation in order to harmonize it with the directives, which was causing difficulties and problems, since countries were not implementing the directives timely and in proper way. Namely, the importance of understanding law's basic principles is critical, especially considering that directives implementation is not successful everywhere, and therefore principles constitute the main core for explaining and accomplishing the purposes, which are included in the public procurement system by the establishment treaties and relevant directives. (20)

The fundamental public procurement principles derive from relevant European Community Treaty provisions, directives that govern public procurement, and EC court decisions. The Establishment Treaty includes two basic principles that apply to all system areas at Community level, and are key to the establishment of a common market. These are the principle of proportionality and the principle of mutual recognition. In the opinion of the Commission (included in the Green Paper), the Establishment Treaty should also be regarded as basis of the principle of transparency, and the principle of non-discrimination.

It is necessary to stress that the real meaning of the principles on which individual laws rest, play an important role in providing guidelines to legislators in the process of developing legal norms, as well as in understanding statutory provisions, especially in cases of insufficient stipulation.

Principles integrate the legal norms in one whole, and provide them with necessary contents, particularly in cases where the diversity of real situations cannot be covered by legal norms.

From purchasers' perspective, proper understanding of public procurement is also important, since disposing of public funds entails certain rights limitations regarding public procurement purposes, which are not to be focused in receiving public benefits or group benefits, but in serving public interest in "largo sensu".

During execution of public procurement procedures there often comes to violations, i.e. incompliance with statutory provisions, which is also a result of insufficient understanding of the principles on which public procurement system is based.

Understanding of fundamental principles is also important for tenderers, since this helps them to better understand their own rights and shape their expectations of purchasers to provide them, which ensures equitable, non-discriminating and proper terms and measures, and other respective tender documentation requirements.

Questions that appear in the context of fundamental principles is whether these principles are equal in importance, or stand in certain subordinate-superordinate relations, whether they exclude one another, or are complementary, and whether they support public procurement purposes in the same direction and proportion.

So far practices indicate a problematic and questionable relationship between the principle of formality and the principle of cost-effectiveness, which often contradict each other. Purchasers understand this conflict very well in situations where formal reasons require retirement of a tender that is irregular because some document required in the

tender documentation by the purchaser is missing, which is in fact not substantial for the good realization of the work, whereas the tender itself, pursuant to the respective documentation's criteria, is the best one. Due to abiding to the principle of formality, such tender, in the perspective of auditing institutions' practices, has to be rejected, notwithstanding that such decision would be inherently contradicting to the principle of cost-effectiveness. (21)

The balance between principles can be reinvestigated whenever there is a try to protect one principle at the expense of another, which is possible, for example, when the principle of cost-effectiveness is protected.

The foregoing suggests that minimum three conditions are necessary for making exceptions, and these are: purposefulness, efficiency, and balance in narrow sense.

In the context of balancing between the principles of formality and cost-effectiveness, particular attention is needed to not possibly breach either of them, because of the possible negative consequences of principle incompliance.

Thus, certain deficiencies, for exmple, must not imply tenderer's elimination, if such deficiencies are not causing negative or adverse cosequences in relation to other public procurement principles (principle of tenderers' equality, non-discrimination etc.). Such approach can enable selection of a tender that would be fulfilling of the principle of cost-effectiveness, as an economically best offer. Non-compliance with the principle of formality for the benefit of the principle of cost-effectiveness could in such case also be necessary, appropriate, and balancing.

One of the harder tasks of the legal system and legal practices in the public procurement area is to find the real balance between fundamental public procurement principles.

It may be stated that not any of the principles can be excluded, and at the same time neither of them can be followed in full.

Considering that it is not possible to cover by legal norms all situations that can emerge during Law implementation, principles and purposes are established as mechanisms for responding to concrete situations.

3.2.1. Publicity

One of the public procurement purposes is public communication of the ways and objectives of public spending by government bodies. The principle of publicity enables achieving and accomplishing one important public finance purpose – providing financial discipline, which legally binds operators to act in accord with the public procurement regulations, pursuant to applicative legislation, particularly in the planning stage, and to provide and use the needed funds in an efficient, targeted, effective, and successful way. Purchasers, as well as legislators are expected to target financial and economic effects toward providing fair competition in all procedure stages.

Provision of competition has positive effects, which ensure savings, competing among tenderers, and therewith quality of the offered goods, services, and constructions, possibility of international co-operation among tenderers, prevention of monopolistic positioning (status) and cartel agreements, which altogether, can have positive effects on public finances.

One of the purposes is also to exercise certain government policies through the public procurement system and by implementing internationally accepted rules when new directives are advanced, first of all in the social and environmental area.

3.2.2. Preventing corruption

Since one of the public procurement purposes is avoiding fraudulent and inefficient behavior in public spending, the public procurement law enables preventing and precluding corruptive actions. This is one of the key purposes.

If the national law does not provide for clear provisions which set anti-corruption mechanisms, such law has no purpose, i.e. the justification of its very existence is under question. This is also the context of UNCITRAL's new public procurement law (UNCITRAL Model Law on Procurement of Goods, Construction and Services), which is likely to be adopted by 2012, and will constitute an important tool for dealing with complexity and consolidating investment toward public procurement system advancement, along with the United Nations initiative and strategy for fighting corruption, by the adopted "UN Convention Against Corruption".

Public procurement and fighting corruption have so far been areas of isolated activities, but the United Nations with their activities of supporting public procurement law adoption are trying to bring together the so far separate areas, in order to show the power of synergies, which will help the achievement of successful coordination between public procurement reforms and efforts of fighting corruption.

3.2.3. Financial discipline

Fundamental public procurement system principles and purposes constitute the roadmap in public procurement procedure planning, execution, contract conclusion and contract execution monitoring.

Proper principle implementation by supervising authorities, who oversee procedure execution and fund spending, is particularly important.

Public procurement audit is a very important segment of the entire process of establishing financial discipline. Public procurement audit and control may be external as well as internal.

In the Republic of Macedonia, internal audit is being implemented in all government and local self-government institutions. Internal audit is included in public procurement control (*ex ante*).

The State Audit Office is an independent and autonomous government body, which performs public procurement procedure audit (*ex post*).

3.2.4. Distribution

Distribution is one of the public procurement purposes that relates to the fact that execution of public procurement procedures enables provision of required goods, works, or services for an appropriate counter-value, which further allows for distribution of the procurement object. Namely, by public procurement, and by following its fundamental principles, distribution of goods, works, and services is realized and served. This purpose is particularly related to the principles of non-discrimination and equality. Pursuant to these principles each tenderer, irrespective of the country of origin, or the country of origin of the goods and services she/he offers, has equitable treatment with any public procurement procedure participant. Further to that, it may be stated that goods, works, and services distribution is one of the fundamental purposes, especially in the context of globalization processes and the common European internal market.

3.3. Public procurement object

Object of the public procurement process is procurement of goods, works, and services. During procurement planning stage, purchasers should pay special attention to that, that procurement object includes appropriate works, goods, or services, whereby appropriate understands proper classification, naming, records, purpose, and properties. Namely, any purchaser has to include in the public procurement notice, as well as in the tender documentation, everything as provided for in the Public Procurement Plan, while taking care that all tenderers are allowed to offer comparable goods, works, and services, by kind, quality, price, and any other necessary properties and requirements.

Purchasers may divide the procurement object in groups or portions (lots), according to the following:

- administration department,
- commodity areas,
- kind,
- quantity,
- location,
- time of delivery.

A procurement object group or portion is characterized by mainly identical, related, or similar properties or purposes, which enables cooperation of multiple small-and-medium-sized tenderers. Purchasers may not limit the right of offering a group or a portion of procurement object in a submitted tender, as set out in the submitted tender. In public procurement notices, purchasers must also state that groups of tenderers are also allowed to apply, and in the tender form there should be space for entering numbers and respective data, which are important to purchasers for evaluation purposes.

4. Public procurement role in the government modernization, development, and EU Directives approximation, legal aspects, and administrative procedures in international realms

In 2004, the European Union enacted two new public procurement directives – directive on public works contracts, public supplies contracts, and public services contracts, and directive on utilities, including power (electricity, heat, and gas), water supply, transport (including airports and harbors), and postal services.

The purpose of these directives is to ensure internal market development and non-discrimination of contracting parties from other than European Union countries, and should be implemented and applied in national or regional laws, depending on individual countries' legislation systems. The legal framework of public procurement varies from country to country. EU member sates with a developed tradition in public procurement have developed their own legal framework, with a tendency of making improvements, which ensures coexistence with the EU legislation. The rest of the countries simply transpose EU rules.

In theory, EU rules apply only to contracts of certain value levels, whereas in practice they affect considerably national legislations. If a tenderer considers that EU rules have not been implemented, while at the same time they have particular impact on national legislation, or that their improper incorporation into the national legislation could result in her/his elimination from a tender, the tenderer may request decision review. The Eropean Commission, further to the submitted appeal, presents the case before the European Court of Justice, or initiates infringement proceedings against the respective member state, requiring that member state to reconsider the decision and implement the law.

Revised public procurement directives allow contractors the possibility to take into account social and accessibility issues, which is of much importance to contractors at all levels. Member states were left alltogether 21 months, beginning from the publishing date of the directives in the Official Journal of the EU, to adopt and implement the directives in their national legislations.

The purpose of 2004 directives is to incorporate the structural and technological advance of public procurement practices, to provide a framework for modernization, to improve purposefulness, and to enlarge inclusion. The new concept, which directly affects country development, includes the introduction of:

- electronic means,
- electronic auctions,

- dynamic procurement systems,
- framework agreements,
- competitive dialogs,
- integration of environmental and social aspects. (22)

EU member states have an autonomy in regulating administrative issues, since the development of their administrative systems has been autochtonous and autonomous, based on national tradition, national culture, and the level of democracy development in individual countries. Nevertheless, the EU has an impact on the ways in which its members organize their administrative systems. Member states do not insist on administrative system uniformity, but rather on standards and principles, as established in different conventions, declarations, recommendations, directives etc., adopted by EU bodies and authorities, further to which should be founded and built administrative systems of individual member states, as well as of the ones that aspire to EU membership. Standards and principles refer to: confidentiality, predictability (legal certainty), openness and transparency, responsibility, efficiency, economy, and effectiveness (the renown three “E-principles”), but also technical and managerial capability, organizational capacity, and citizen participation in the decision-making process. (23)

4.1. Comparative experiences of some European countries

The legal framework that governs public procurement inside EU is based on the following three pillars:

- relevant establishment treaties,
- respective directives, and
- extensive case practices of the European Court of Justice.

Since rules have been set out in a relatively general way, and do not include precise provisions for practical use, the purpose of EU directives is to provide guidelines

on the avenues in which EU legislation is to move, with a view to accomplishing public procurement purposes and principles. The basic principles, which are part of the treaties, require that every member state binds itself directly to obey set forms and value thresholds, by regulating respective national legislation.

At the public procurement regional conference, held in April 2006 in Sarajevo, with the support of the OECD's SIGMA Initiative, special attention was paid to the importance of public procurement in the EU, with a particular accent on Western Balkans. One of the European Union representatives at the conference discussed the importance of creating a unified public procurement system, and the help that was offered in that respect by the European Commission. The overall purpose is to open up the internal market, by coordinating national public procurement regulations and practices.

For making a short comparative overview of the respective systems of the European Union member states, below is given a brief description of the public procurement systems of the European Union member states (old and newly accessed), as well as of the Republic of Macedonia.

4.1.1. Great Britain

Great Britain does not have any national government system of public procurement, and all relevant directives in this area are transposed into secondary legislation that governs procurement of small value, which on the other hand, emphasizes competition and the principle of maximizing value for money. At national and sub-national level, the trend is toward a centralized key procurement program, and decentralized execution by sub-regional sections. Regulations present an authentic translation of the EU directives, though contents are divided into multiple sections, by applying simplifications, which makes them formally non-resembling to the directives. The two applicative laws provide for a few novelties: competitive dialog, reverse auction, and dynamic purchasing systems. Framework agreement is used as a more frequent method both for thresholds defined by EU directives, and for values below thresholds.

Each ministry has procurement responsibilities, and the same aplies to the local self-government, as well as to any other entity which pursuant to the Law is obliged to take account of the basic principles in procedure execution. Ministries are thereby responsible in the segment of issuing procurement consents, which is also the case with the local self-government, whereas it is a fact that in procurement of smaller value may be observed certain discretion rights of purchasers in selecting tenderers, even though the implementation of the principles of transparency and competition is clear. Experience shows that public procurement advertisements are published whenever the value exceeds £20,000. (24)

In the eighties of the last century, the need for higher flexibility in public procurement became evident, especially in projects led under the Private Finance Initiative, where distribution of goods (for public use), as well as financial charging, were entrusted to the private sector, partly accompanied by utilization of assets, mainly for a period of over twenty years. Among others, this approach was used in infrastructure and transportation, schools, hospitals, lodging. This tendency is already observable everywhere in the EU as well. Some of these projects are realized by concessions, which are excluded from directives, or have limited regulation, but the gross part is completely covered by the Directive 2004/18/EC. (25)

In 2006, the use of framework agreements was particularly increased. The same experience was present in the use of reverse electronic auctions, electronic procurement, standard documentation, and terms and conditions.

Great Britain is an example of successful implementation of the EU directives in the public procurement legislation, and may serve as a success model. (26)

4.1.2. Germany

In Germany, in September 2005, public procurement regulations were enacted, by incorporation of the new directives. Thus, in the national law proposal attention was paid

to small-and-medium-sized enterprise development, since it was considered particularly important to provide them with access to public notices for awarding public procurement contracts. It was also provided for the possibility of establishing tenderers association. Special (outstandingly favorable) terms and conditions for innovative enterprises were provided for, as well. For procurement that is below European thresholds, it is insisted on the principles of transparency and documenting (procedural administration), with advertising in a national or local newspaper, or on the internet, without an obligation of publishing in an European Union's newspaper. For this procurement (below thresholds), as defined in the directives, general procedures are implemented, with a prior suitability examination, or negotiated procedures.

The new german law, also provides for a pre-qualification stage in procedures that include construction, while the tenderers must demonstrate their ability or inability to participate in, or to win this procedure.

Germany still has in place a manual for standard procedures, templates, and a methodology for calculating values by points. This method was introduced in no later than the nineteenth century, and has still been used since than (VOL, VOB).

In the "Construction Contract Procedures" or VOB (Vergabe-und Vertragsordnung für Bauleistungen – Teil A: Allgemeine Bestimmungen für die Vergabe von Bauleistungen) are defined standard procedures and forms that are provided for in German public procurement regulations.

In the 2006 version of VOB, Directives 04/18/EC and 04/17/EC were incorporated.

VOL govern services and goods procured by contracting authorities, and are aligned with the German legislation. Thereby, the procurement process is facilitated and specified, with a purpose of administering simplification, while at the same time, the principle of formality is being preserved.

4.1.3. Denmark

A legislation framework was first presented in June 1992. The basic principle for procurement values that are below thresholds, on which statutory provisions insist, is a business cooperation competition notice (since 1989). Public procurement via electronic means is carried out through an electronic purchasing system, i.e. through a public procurement portal. The function of this portal is to provide a place that can be accessed by both purchasers and tenderers. The system was developed by the public sector, which did not make the initial investment, but was, and still is financing its operation. The portal focuses in promoting purchasing opportunities, and is able to provide insight into procurement, i.e. into the invoicing process. This system/portal constitutes a central procurement body, and is owned by the government. Denmark has implemented new directives completely. Procurement in the construction area is regulated by a special law.

4.1.4. Latvia

Latvia, as a relatively new member state of the European Union, has made great progress in public procurement system development. Directives were introduced in 2005, by enacting two laws (one governing the utility, and one the traditional procurement sector). On the other hand, it is exceptionally successful in introducing electronic public procurement, and maybe even more successful in establishing the electronic trading system, which combined with electronic procurement operates in a specific and efficient way. Regarding institutional set-up, it has a national public procurement institution, charged with authorities that also extend in supervision of procedures executed by the contracting parties.

4.1.5. Slovenia

The first Slovenian Public Procurement Law was developed in 1908, which for the first time introduced the possibility of competition in selecting tenderers, but only in the area of construction works. The purpose of enacting this Law was the construction of

Vienna – Trieste railway, which attracted local people's attention. In the communist period, with the introduction of the planned economy, this area was not further developed.

In general, since 1992 till now, public procurement system development era can be divided into three periods:

- 1992 to 1997,
- 1997 to 2000, and
- 2000 till now.

In the first period this topic was introduced by the Law on Finance. Public notices on procurement of things financed by the Budget were introduced. This caused reactions, with an argument of the need for administering.

In 1997, under large influence of the UNCITRAL rules, was enacted the first Public Procurement Law, which was not in line with the requirements set out in the EU directives. This Law showed deficencies in the area of implementation, and therefore in 1999 was enacted the Law on Auditing Public Procurement Procedures.

In 2000 a new Public Procurement Law was developed, by which public procurement procedures were simplified. However, its implementation proved itself to be unrelistic and irracional, mainly because of the fact that it was developed in great deal by pure transmission of Directives' provisions, which was why in 2004 the Public Procurement Law was amended. 2004 was also the year of adopting the two new EC directives (2004/17/EC and 2004/18/EC), while the harmonization period lasted until January 31st 2006. Therefore, in 2006 were enacted two new laws, i.e. the Law on Public Procurement and the Law on Public Procurement in the Water Supply, Energy, Transport, and Postal Services Sectors, effective as of January 7th 2007.

The Law on Public Procurement provides for anti-corruption measures. Recent solutions of the Law restrict administrative aspects, and set up a reduced administrative

framework, limiting mainly excessive requirements for demonstrating formal aspects, which in practice showed to be needless with the view to rational, economical, and efficient execution of public procurement. (27)

Implementation of the Law on Public Procurement in Slovenia showed that tenderers major difficulty was lying in the area of providing necessary documentation for demonstrating and proving suitability, since that required extensive documentation. The practice also showed that expenses for preparing such documentation (including notary charges) were some times reaching the assessed amount of the contract that was to be awarded by the procedure. For that reason, recent public procurement laws (both in the traditional and utilities sector) were developed toward reducing the number of documents required for proving suitability.

4.1.6. Sweden

The Public Procurement Law of Sweden has incorporated all public procurement directives. The first public procurement law in Sweden was enacted in 1996, providing full compliance with directives (being directly implemented). From our perspective, this is arguable, but it is a fact that untill nowadays, practices have shown that Sweden has an exceptionally developed public procurement system, inclusive of the commercial and business sector, which participate directly in setting, implementing, and enforcing legislation and procedures. There is a great influence by economic operators associations that work on an ongoing basis toward improving public procurement terms and conditions, and are an important factor in the overall policy development in this area. Each tenderer must comply with the Swedish Law, which on the other hand complies with the directives.

Procedures for contract values that are below thresholds are slightly regulated, compared to procedures that exceed thresholds. The former according to the Swedish Law are termed as simple and informal procedures, whereas the latter are formal. Regarding informal ones, important of noting is the insisting on sufficiently reasonable

deadlines, in order to allow tenderers enough time to submit their tenders. The notice is published electronically, including the deadlines, which must be no less than ten days.

Sweden was the first country to intensively use framework agreements. They are concluded for a period of up to three years. Framework agreements, which are concluded following a previosly completed procedure (normally by electronic auction), include quantities by minimal prices and other respective elements, as well as purchaser's identity, and by simple delivery of a call (invitation) to everyone, in a matter of hours the contract with the winning tenderer (who is a framework agreement's party) is concluded.

Sweden is the first country to constitute an institutional agency for legal, financial, and administrative affairs, which has the coordinating function between the central government and other subsidiary agencies, and covers 75 kinds of public procurement, with the powers to coordinate framework agreements contractors. In 2002 Sweden underwent reforms, by which electronic public procurement was introduced. (28)

4.2. Public procurement legal aspects, and administrative procedures in international realms

In the European Union the public procurement area is regulated by directives, the purpose of which is creation of a uniform market and promotion of cooperation opportunities among all member states, as well as implementation of the principle of non-discrimination. In the European Union Law, directives constitute legal acts that are not applied directly, but impose to the member states an indirect obligation to include the set purposes and principles into their legal systems. In implementing the directives, member states do not establish unique procedures (from the perspective of administrative procedures), however, they comply with directives' requirements. On the other hand, from the perspective of rights protection, it is specific that compliance with directives for member states has a direct effect, i.e. if a particular provision that is set out in a directive, but not in the national legislation, is not followed, than the directive's provision is the one that has direct effect, i.e. it is a ground for filing a lawsuit. Moreover,

in cases where directive provisions violation is indicated, the European Commission files lawsuits before the European Court of Justice. The object and scope of European public procurement directives are applied to the contracts awarded by contracting authorities, which are defined by the directives as “government, regional, or local authorities, bodies that work according to the public law, and associations created by one or more of these authorities, or by one or more of these bodies, which act pursuant to the public law”. The Court of Justice has issued a number of judgments in which it has decided about matters concerning these directives. (29)

In 1997 the European Union stipulated the basic rules, methods, and procedures for making agreements, by introducing conceptual and legally equatable processes.

There are numerous cases dealing with the definition of “a body that administers public law”, as provided in directives. Rules in the public procurement area mainly concern the public entities of non-commercial character. The expression used in the directives and regulations for such entities is “contracting authority”. The directives define four groups of entities/contracting authorities. From the perspective of their scope of activity, public bodies (contracting authorities) are divided into several groups:

- entities that satisfy public interest needs (provide services of common interest);
- entities that have no industrial or commercial character (an individual feature of many of the cases in this group is that the entire scope of work of these entities, or a significant part of it, is performed by public contracts);
- entities with combined activities (both commercial and noncommercial activities). (30)

The 2004 directives refer to flexibility and individual approach, allowing commercial public entities to make more procurement in a commercial manner. The two new directives reduce the administrative framework, and great emphasis is placed on public procurement values, i.e. principles, as elaborated in this book.

4.3. European Union Directives

Below is made a brief overview of the following European Union Directives: 92/13/EEC, 89/665/EEC, 2004/17/EC, 2004/18/EC, 2007/66/EC, and 2009/81/EC. Also effective are the Regulation No. 2195/2002 as of November 5th 2002, amended by the Regulation No. 2151/2003 as of December 18th 2003, on CPV (Common Procurement Vocabulary), the purpose of which is to make unification of procurement notices regarding public contract objects, by setting codes for each individual contract object, that further ensures access of all interested in submitting tenders/requests to participate, by simple location of public contract objects, set in the so called list of codes. The same goes for the Regulation 1564/2005 on establishing standard forms for the publication of notices in the framework of public procurement procedures.

The directives which were in force until 2004 introduced anti-corruption provisions, with a view to securing this area against corruption, in the context of European Union's anti-corruption regulations. (31)

One of directives purposes is also implementation of certain government policies through the public procurement system and by internationally accepted rules, which results in an ongoing improvement of the directives, including thereby the social and environmental aspects.

4.3.1. Directive 92/13/EEC

This directive, adopted on February 25th 1992 with an aim of harmonizing laws, regulations, and administrative provisions relating to implementation of the European Community's Law, governs the protection of rights in public procurement procedures for awarding the so called utilities contracts. This directive does not include procedural provisions, but it rather sets the foundations of the rights protection system. It provides for the principles of legality, publicity, transparency, and efficiency. It also provides for the status of the government public procurement appeals institution, setting its

autonomy, independence, and professionalism, as well as the terms of electing its members and its president, which have to be identical with the terms of electing judges.

4.3.2. Directive 89/665/EEC

This directive, adopted on December 22nd 1989, provides for harmonization of laws, regulations, and administrative provisions in the area of auditing procedures of awarding contracts for public procurement and public works (appeal measures and procedures in the traditional procurement sector).

Member states have a duty of providing legal rights in the public procurement system and their effective protection. This is ensured by extending authority for appeals proceedings to bodies that have court character. Another solution is to award that authority in the first instance to bodies that do not have such character. In that case, these bodies' decisions must be subject to a control by another body, which must meet the requirements set out in the directive. These requirements are as follows:

- Members of that independent body should be appointed and dismissed under the same terms as members of judicial bodies, regarding bodies in charge of their appointment, terms of service, and dismissal.
- At liest the president of that independent body should have legal and professional qualifications equal to those of the members of judicial bodies.
- That independent body has to issue decisions after carrying out proceedings, in which both sides have been heard, and such decisions are legally binding, which is enforced by means that should be defined by each member state.

If the body in charge of appeals proceedings has a court character, these guarantee provisions do not apply. (32)

4.3.3. Directive 2004/17/EC

This directive governs procurement in the area of the so called utilities contracts (transport, energy, postal services, water supply). Its purpose is to provide for higher thresholds for carrying out procedures, due to large procurement performed in these sectors. To any procurement that exceeds the amount of EUR 412,000 for goods and services, and EUR 5,150,000 for works, apply directive provisions, whereas under these thresholds, national legislations stipulate procedures, manners, and thresholds for making procurement. Procurement in these sectors is flexible and relating to the public interest provided by these entities, irrespective of their capital ownership structure. In that regard, it is worth of mentioning that EU member states have regulated this issue in different ways, and that has been done either by individual laws that regulate procurement in these sectors, or by a single law (both for traditional procurement and utilities contracts), which provides for special thresholds provisions that are more liberal regarding traditional procurement contracts. Thus, for example, Slovenia has enacted an individual law that regulates this issue. In the Republic of Macedonia, on the other hand, there is a single public procurement law, which includes a separate utilities contracts chapter that sets higher thresholds than those in traditional procurement contracts.

4.3.4. Directive 2004/18/EC

This directive governs traditional procurement contracts. It sets the thresholds above which it must be applied: EUR 206,000 for goods and services and EUR 5,150,000 for works. Below these thresholds apply national regulations, and pursuant to that, advertising in an official journal of the EU is required.

One of the major novelties in this directive is the new procedure, the so called competitive dialog, the purpose of which is to introduce higher flexibility in complex public procurement contracts. This directive also introduces, for the first time, precise provisions on the so called “green procurement”, which as such constitutes only one aspect of the wider issue of “trade and environment” – how to provide economic benefits from liberalizing economic benefits, when at the same time governments are provided with the possibility of taking environment protection measures. (33)

European recognition of the green procurement reflects the wider international awareness, and indeed is fully consistent with the implementation of integration principles, which are defined in Article 6 of the EC Treaty. This kind of procurement is particularly important considering that, on the one hand, 14% to 16% of GDP account for public procurement, and on the other hand it can help tender differenciation, support environment as well as product, service, and process development that is sustainable in that context, and provide the possibility of influencing buyers consumption practices, which affirms that this kind of procurement is indeed a positive phenomenon. (34)

4.3.5. Directive 2007/66/EC

This directive makes amendments and addenda to the previous two directives (regarding rights protection), and it introduces a period that must be respected (between issuing the decision on the winning tender and signing the contract), in which the contract may not be signed, considering that there is a deadline for appeals, regarding that parties are provided with the possibility to have their rights protected. This period is termed as stand-still period, that should last 10 to 15 days, depending on the communication manner (which is set out), as well as on the date of the notice on selecting the winning tender. This period may also be shorter. Furthermore, this directive provides for contract award notices (30 days following contract award date).

4.3.6. Directive 2009/81/EC

The European Parliament and the Council, on July 13th 2009, in coordination with contract award procedures for public procurement of works, goods, and services in the defense and security area, adopted the directive by which were amended the Directives 2004/17/EC and 2004/18/EC. The adoption of this directive was a realization of the several years discussions and deliberations on subjecting procurement procedures in the defence area to proceedings and procedures that are transparent and competitive,

because budgets planned and spent for this purpose are particularly high, and have a large proportion in the overall procurement.

(In 2006, the EC's Advisory Committee on Public Procurement, initiated this topic and discussed the needs identified by EU member states representatives for regulating this matter by a directive, which would provide for transparency and competition.)

4.4. European countries

Public procurement is a topic that has been attracting much attention in the recent period of about ten years, considering that large proportions of national budgets are used for procurement of goods, works, and services. This is also obvious in the data below, which show a clear trend toward increase of these amounts, but this growing trend is also affected by the established practice of publicizing advertisements for, and data of, contracts award, which makes statistics possible. In the majority of EU member states, public procurement amounts are assessed to somewhere between 10% and 15% of GDP, and about 25% to 30% of the total consumption. (35)

One of the fundamental purposes of European integration is creation of an internal market which "shall comprise an area without internal frontiers in which the free movement of goods, persons, services, and capital is ensured in accordance with the provisions of this (EC) Treaty" (Article 14).

The following table shows data on the share of public procurement in the GDP of European Union member states.

Table 1: PP share in EU member states' GDP

PP share in GDP (in %)								
	1995	**1996**	**1997**	**1998**	**1999**	**2000**	**2001**	**2002**
Belgium	14.38	14.61	14.35	14.37	14.69	14.75	14.91	15.22
Denmark	16.27	16.26	16.51	16.94	17.26	17.39	18.40	18.76
Germany	17.98	17.99	17.45	17.19	17.15	16.99	17.01	17.03
Greece	13.62	12.81	12.69	13.00	12.71	13.55	12.98	12.62
Spain	13.84	12.81	12.76	12.97	12.94	12.73	12.75	13.02
France	17.26	17.32	17.26	16.49	16.35	16.52	16.34	16.62
Ireland	13.54	12.87	12.11	11.95	12.05	12.23	13.25	13.30
Italy	12.58	12.17	12.00	12.12	12.25	12.37	12.69	11.88
Luxemburg	15.49	16.01	18.89	14.43	14.38	13.11	14.25	15.48
Netherlands	20.84	20.51	20.27	20.12	20.21	20.12	20.68	21.46
Austria	18.36	18.15	17.70	17.69	17.77	17.05	16.22	16.46
Portugal	14.14	14.56	14.57	13.85	14.29	13.98	13.91	13.26
Finland	16.25	16.70	16.57	15.96	16.06	15.37	15.72	16.45
Sweden	22.14	20.97	19.99	20.48	20.27	19.40	20.01	20.49
GB	21.68	20.58	18.24	17.79	17.84	17.46	17.89	18.42
15	**17.26**	**16.89**	**16.33**	**16.10**	**16.13**	**16.02**	**16.18**	**16.30**

Source: *European Commission (2004): A report on the function of public procurement markets in the EU: Benefits from the application of EU directives and challenges for the future (10/1/2007)*.

There is a growing trend of these shares.

That is obvious from the data: in 2006 EUR 1,900.00 billion were spent for public procurement (Source: Press release IP/08/1971 as of December 15th 2008).

4.5. United States of America

The US government is world's largest purchaser, with about 25% of GDP going to public procurement. Regulations that are followed in executing public procurement procedures are particularly extensive and concrete.

Public procurement regulations include about 1,900 pages, with additional arround 2,600 pages of descriptions and procedures, which elaborate closer institutional procurement procedures of individual agencies.

A few years ago, analyses in the US showed that the system was in a need of simplification. Namely, it was necessary to make the elements of large administration more plain. In that context, it was noted that the Australian model was taken as an example, because of its simplicity and efficiency, and pursue of simple documentation. (36)

One of the most popular movements and ambitions for reforms in the public procurement system that took place in the USA in the nineties of the last century, considered reforms regarding efficiency. Analysts of the American system state that historically efficiency has not been primary objective of the public procurement process. To talk about efficiency is to consider administrative and business efficiency (although this concept can be applied in a much broader sense). In other words, the public procurement system is efficient if it spends less funds, whereas the system that employs minimum public procurement staff, spends minimum funds. (37)

However, if purchasers (tenderers) suffer from fatigue because of heavy workloads, such system becomes too expensive, and it can lead to the overpayment of purchases. (http://dodig.osd.mol)

There are also reports of continuous extention of administration's authorities, which are burdening the administration itself, and the whole US public procurement system for that matter. (The Small Businesses Program includes the preference of small meager businesses, and businesses owned by women.) That also includes programs promoting public procurement of goods, works, and services that are safe for the

environment and for the human health, as well as promoting the environment by comparing competing goods and services of equal use, therewith eliminating or decreasing human health and environmental impacts, such as e.g. approving the use of paper with a set out minimum of recycled contents, etc. (38)

Electronic public procurement has a growing trend, and the statistics shows that in 2006 it accounted for 44.7% to 68.1% in all states. Since 2006 that proportion has been increasing, and recent data indicate to the amount of 80% in 2008, and already in 2009 up to 90% in overall procurement.

E-procurement has been increasingly introduced also as a result of current management innovations, centralized procurement with high authorization levels, as well as owing to the size of the country.

The United State Agency for International Development (USAID) supported electronic public procurement system implementation in many European countries (the new EU member states, as well as the ones that started harmonization with the EU legislation). Thus, in Romania for example, the procedures of this kind were established by the USAID project. The Republic of Macedonia embarked on such project in 2005, and in 2006 the first electronic procedure was carried out.

5. Public procurement in the Republic of Macedonia

The Republic of Macedonia regulated for the first time the public procurement area in 1996, by the enactment of the Regulation on Public Procurement, and the first statutory establishment of the system in this area occurred in 1998, when the first Law on Public Procurement was adopted. This Law was effective untill 2004, when a new Law on Public Procurement entered into force which provided for the main types of procedures, as stipulated in the directives of that time. At the same time, this Law was largely incorporating of the World Bank's suggestions and recommendations. Of these, as more specific could be mentioned the planning segment, which required adoption of decision,

further to a prior consent, including provision of funds by the Ministry of Finance (i.e. its Treasury Department). All this was aiming at introducing financial discipline in the budgetary institutions, also promoted by the World Bank and the International Monetary Fund. However, it is a fact that administering took its part, and very often, due to enormous administrative slowdowns, execution of certain procurement was not possible. 2004, the year of enactment of the new Law, was also the year of adoption of the new directives (17 and 18). In 2005 the Law was amended, by including provisions on electronic public procurement, as well as on advertising public contract awards both in the Official Gazette, and on the Bureau's website, which added to transparency and to providing of one-stop-shop for all public procurement information. Training of trainers was also provided, as well as training of purchasers' and tenderer' public procurement staff. It all occurred under the 2003 CARDS Project, financed by the European Commission. Under the E-government Project, financed by the USAID, on the other hand, was established an electronic public procurement system in the Republic of Macedonia, for the first time. Furthermore, the terms of reference of the CARDS Project also included development of amendments/new public procurement law.

In 2007 a new law on public procurement was enacted, effective as of 2008, and amended in 2009, which conceptually, from the perspective of institutional set-up and manner of procedure execution, could be considered as being based in the same structure, in terms of public procurement system organization.

The following section describes public procurement system's development, through a chronological review of the regulations governing this issue, particularly from the administrative point of view.

5.1. Legal framework

5.1.1. 1998 Law and by-laws

The law, along with its amendments, as well as the by-laws, constituted a good foundation for further development of the system, the establishment of which was in progress. This law did not clearly precise provisions on technical documentation, i.e. tender documentation, and it also did not provide for clear tender evaluation methodology. There was also no established coordination for interpreting the relatively general statutory provisions. Procedure execution control was impossible, due to, on one hand, lack of an institution in charge of this matter, and on the other, the structure of the public procurement appeals commission, the members of which were appointees.

General developments, however, constituted a solid beginning and foundation for system advancements, while in the meantime many of the countries with an ambition of accessing the EU (Poland, the Check Republic, Slovakia, Hungary, Slovenia) established national institutions (autonomous) aimed at system development, which was important for preventing corruption and promoting competition.

Considering that about 20% to 30% of the Macedonian budget at that time was designated to public procurement, the country had a reason plus to establish transparent procedures, and to introduce financial discipline, while the International Monetary Fund and World Bank suggestions were pointing to the same thing.

This law provided for both open and restricted public call, while there was no procedure in place for e.g. providing consultant services, which was identified as deficiency.

During the period of 2002, 2003, and 2004 further development of the Law on Public Procurement took place, ending with its enactment in 2004.

5.1.2. 2004 Law and by-laws

The 2004 Law on Public Procurement, provided for procedures that were also recognized and implemented in the EU member states. In the period of enactment of this

Law, in the EU were adopted the two new directives, which resulted in an additional task for the Republic of Macedonia to go on with further amendments and harmonization of the legislation in this area.

The 2004 Law, provided for the following procedures:

- open procedure,
- restricted procedure,
- negotiated procedure without prior publication of a notice,
- restricted call for consultancy services,
- competition for project development.

This Law did not allow for deadline cut downs, especially for negotiated procedures, and the only set out deadline was 52 days following the date of submitting advertisements in the Official Gazette. This was the reason of many postponed procedures; and considering that in case of receiving only one tender, public opening could not even start, selection of winning tender was an impossible task. This was pure administering, since formal aspects were preventing public procurement procedures from completing. Therefore, the number of dismissed procedures was indeed high compared to the overall number of carried out procedures, which was calling for law amendments. In the meantime, was also completed the EU project for developing a draft-law on public procurement, which provided alignment with EU directives.

The by-laws that derived from the Law on Public Procurement, with the purpose of closer regulation and stipulation of public procurement procedures, were highly helpful (in terms of the ways of execution), but on the other hand, they added a great deal of administering and formalization. This was mainly observed from the perspective of compliance with the formality principle, but it was a fact that in certain procedure stages, which insisted on particular procedure form (properly addressed envelope, at least two received tenders etc.), it definitely had an impact on the cost-effectiveness principle, considering the many cases of dismissed and repeated procedures, and so on.

Applicative by-laws, enacted further to the 2004 Law on Public Procurement, were as follows:

- Indicative list of contracting authorities to which the Law on Public Procurement applied;
- Rulebook on detailed rules on procurement evaluation;
- Rulebook on the contents of the document on financial standing;
- Rulebook on the form and contents of the annual plan for public procurement;
- Rulebook on the procedure of opening open procedure and restricted procedure tenders;
- Rulebook on the form of the tender opening minutes;
- Rulebook on the required elements of tender documentation;
- Rulebook on the form and contents of the template and the manner of keeping a Register of Executed Procurement by purchasers;
- Rulebook on the manner, terms, and procedure of selecting public procurement experts;
- Rulebook on the form and contents of the template and the manner of keeping a Unique Public Procurement Register;
- Methodology for expressing criteria into points;
- Decision on defining equipment, goods, and services of defense and security character;
- Rulebook on the manner of utilizing the electronic public procurement system.

The foregoing by-laws provided for administering in many of the procedure stages. Thus, for example, the Register of Executed Procurement required a template filled by tenderers who had signed contracts with purchasers, and originals of that documents had to be sent by the Register to the Public Procurement Bureau, which had to place that information on its website (including contracting parties' identity, contract awarding procedure type, and contract value), providing thereby transparency. Insofar, the introduction of a one-stop-shop for public procurement notices actually provided an overall public insight into processes and procedures, from their beginning to their end. Not abiding to this duty meant administrative offence, which entailed penalties.

This statutory solution, regarding thresholds, set the value of EUR 3,000 in Denar denommination, below which procurement was carried out by a simplified procedure, and anything above this value required a regular procedure, with defined deadlines.

Deadlines set out for the procedures were close to the deadlines set in the EU directives and were aligned with them. The possibility of cutting them down was provided by a prior indicative notice.

Prior indicative notice is an institute born in the EU states that works well, and allows for shortening procurement procedure deadlines, while providing in turn higher transparency, as well as efficiency and effectiveness of the procedure.

Process administering required by the Law on Public Procurement needed certain reductions, which would have allowed for greater creativity and for developing methods and approaches toward transparent and anti-corruptive actions. Creativity and developing methods and approaches is directly linked with developing good business practices, raising public awareness, as well as establishing practices of complying with public procurement principles and values, considering that, as already observed, it is not possible to cover each potential situation by a regulation, and in that case what is important is to follow the principles.

5.1.3. 2007 Law and by-laws

The 2007 Law, that became effective in the beginning of 2008, made a terminology harmonization with the EU legislation, regarding economic operator and contracting authority terms.

Furthermore, the Law also introduced new public procurement procedures, as well as thresholds different from the ones defined by the previous statutory solution. Thresholds can be divided into the following groups:

- EUR 5,000;
- EUR 5,000 – 20,000 (for goods and services);
- EUR 5,000 – 50,000 (for works);
- EUR 20,000 – 130,000 (for goods and services);
- EUR 20,000 – 4,000,000 (for works).

These thresholds constitute a base, defining the range for contracting authorities orientation in choosing procedure types and deadlines. Deadlines mainly range within limits that are lower than the ones set out in the directives (e.g. 26 days, with a possibility for shortening, provided that electronic means or prior indicative notice is used). However, it is a fact that e.g. prior indicative notice, which is one part of the administrative procedure, by which the intention of making a public procurement within a defined period is announced, and is advertised on the Bureau's website, with the purpose of informing the public on the period in which the purchaser would advertise the notice, had not lived into practice.

This statutory solution was part of the previous law as well, and considering the provision of a prior notice, transparency is not only retained, but is also emphasized (due to informing on the period of publication), and that is followed by the procurement notice itself, whereby statutory deadlines are shortened for an exact number of days, which eventually improves efficiency (the period for preparing tenders), and increases competition possibilities.

5.2. Institutional framework

In the area of monitoring, supervision, training, and active role in particular stages in the public procurement process, most interesting are experiences of some European countries (Poland, Latvia, Estonia, Hungary, the Check Republic, as well as the countries in the region), which by following the example of developed countries have established institutions of this kind, and built their capacity regarding professionalism and number of

staff, that undoubtedly matches government needs for a systemic solution in the public procurement area.

The Public Procurement Bureau in the Republic of Macedonia is an institution charged with the authorities as provided in the Law on Public Procurement. The 2004 Law on Public Procurement for the first time provided for introduction of an institution in this area, with the authorities focused in system development, raising public awareness, making public procurement procedures easier by issuing opinions on procedure execution, etc.

In the context of good practices by EU member states, in Poland e.g. the public procurement law has provided for a Public Procurement Office. The establishment of this Office was preceded by much polemics in terms of the need for existence of any new institution in charge of public procurement, which could have enlarged the administration, doubled the functions of already existing government institutions, slowed down investment processes, restricted the contracting authorities' independence level, and all in all resulted in excessive concentration of authority in the field of spending public funds in a single institution, increasing thereby the risk of corruption. It was proposed that public procurement function, instead by such institution, be carried out by one of existing institutions, such as anti-monopoly office, or that it be shared among multiple ministries, including the Ministry of Economics, Ministry of Finance, Council of Ministers etc. Or, for that matter, that each ministry be individually responsible for its own procurement.

However, despite the variety of proposals, it was not questioned that the proposal of following Hungary's example in this area (where the Public Procurement Council reports only to the Parliament, and not to the Government) was not even taken into consideration. Finally, it all led to the understanding that the new public procurement law extended to the Government new and additional duties, that required establishing of completely new mechanisms: one-stop-shop for publishing public procurement notices, keeping records on public procurement, reviewing tenderers appeals, and implementing all these, which required new skills and thereby extensive training of relevant officers.

That was why it was decided to establish a Public Procurement Office (PPO). The new minor institution, without any local structure, was to deal exclusively with public procurement issues. The main reason for this solution was public fund spending, and the fear of the respective implementation of the new law.

The PPO's primary role is one of planning and organizing things in the public procurement field. Furthermore, its function is also to centralize skills and experience. However, as a result of the scepticism, the authorities that has been deciding on the PPO, has focused the powers toward auditing (review of the proper implementation of public procurement procedures), and separated them as to be shared by various government institutions. The PPO's President reports directly to the Prime Minister of the Government, and due to the need for a clear and effective responsibility, the idea for establishing a collective body has been rejected.

Regarding competences, the PPO does not deal with the following: does not purchase goods, works, and services, and does not implement a centralized system of the government sector. In Poland the system is decentralized, and bodies that have the duty of implementing public procurement law provisions are completely independent, and carry out procurement procedures on their own behalf. Moreover, the PPO does not award funds for financing public contracts, neither it issues consents for individual procurement procedures, nor it approves procedures carried out by other contracting authorities (such powers has been awarded e.g. to the Slovakian Public Procurement Authority). The PPO does not participate in the candidate qualification process, and tender evaluation. It does not have any authority in the appeals procedures and complaints, which is the case in Lithuania, Estonia, and Slovakia. Furthermore, it may not impose sanctions for public procurement procedure violation. Instead of that, it has to notify the disciplinary commission, which is under the authority of the Minister of Finance.

The PPO does not have a list of licensed companies that may apply for contract award (such list has in place e.g. the Slovakian PPA), neither an official black list of bodies that are excluded from procurement procedures. Regarding staff qualifications and

training, the PPA does not issue certificates to natural persons, and for that matter it is not authorized to conduct certification procedures for such persons. The processes of procurement staff training and selection are left to individual institutions' heads. For example, in Slovakia public procurement procedures may be carried out only by certified staff, who have completed relevant training and have been examined and registered in the official list, whereas training, i.e. training centers or lecturers certified for seminar organization, are placed in each institution. Furthermore, the PPO does not have any authorization for contract realization.

The Prime Minister directly appoints PPO's President, as well as her/his deputy, but on President's proposal. More precisely, the President have competencies in the public procurement area issues, whereas the institution itself is supporting President's functions. The President and her/his deputy are not part of the government administration, and are usually dismissed when a new government is established. The Polish Law does not provide for special provisions regarding the procedure and manner of director's i.e. president's election, whereas the Slovakian Law regulates the election of the president and his deputies for a five year term of service, and the manner of their replacement is following a precisely established procedure and clearly set terms.

The system includes a Council which is an advisory body to the President. Council's members are appointed and dismissed by the Prime Minister, on the President's request. The Council includes members from the Parliament (representatives of all political parties, both in the government and the opposition), contracting authorities (both on the central an local level), purchasers and contractors association, government audit commissions, and experts in the public procurement area. Meetings are held each two to three months.

Main functions of the PPO are: preparing drafts of public procurement legal acts, publishing a public procurement bulletin, issuing decisions regarding Public Procurement Law's implementation, organizing and providing administrative services in arbitration hearings relating to appeals submitted during the procedures.

Regarding procedures characterised by less competition and transparency, according to the Polish Public Procurement Law as of 1994, the President of the PPO had the authority of issuing consents on the implementation of individual procedures, as well as on reducing appeals deadlines. Since 2001, the Law amendments have modified and revoked these provisions, due to their being considered as very bureaucratic, while introducing procedures that include different deadlines for submitting tenders (deadlines that may be shorter than six weeks, but not shorter than three weeks). (39)

The PPO is still operative, discharging the same authorities, with a large number of employees, and a well established practice in the area.

In the Republic of Macedonia, the Public Procurement Bureau, as a body of the Ministry of Finance, was established on June 16th 2005. Its authorities are in the area of system monitoring, public awareness raising, publishing relevant materials, carrying out trainings etc.

In 2007, the Law on Public Procurement adopted the previous solution regarding the Bureau's authorities and positioning in the system, despite the unquestionable need of its becoming autonomous and independent. This also applies regarding the election of its director and setting out more concrete competences in law implementation.

Experiences show that institutions of this kind are established as autonomous bodies (offices or agencies). The director is usually elected in a competition process, which is a precondition for providing necessary professional qualifications and skills.

However, a national public procurement institution should be an autonomous body (independent), with the capacity of a legal person, established either by the government (director elected by the government, by following strictly set competition terms), or by the Parliament (and reporting to the Parliament).

In both cases, such positioned a national institution will meet the conditions set in the law on the organization and the manner of operation of government authorities. The Law on Public Procurement does not include penalty provisions. The Bureau should have competences in infringement proceedings (to carry them out) against procedure offenders, as well as in inspections supervision. In democratic countries, government bodies dealing with public procurement must have maximum protection against influences of the authorities in power, particularly in the manners of electing these government bodies, which should report for their operations only to those that have elected them, i.e. to the parliament, that in fact adopts the national budget, in which vast proportion is designated for spending via public procurement. (40)

5.3. Institutional framework of public procurement monitoring

In performing day-to-day operative government functions, three kinds of monitoring can be distinguished, i.e. monitoring carried out by the:

- administration,
- judiciary, and
- parliament.

The monitoring performed by the administration, or administrative monitoring, can be analyzed from several perspectives. It is performed by the financial administration, which monitors from without the first instance superiors from the perspective of public accounting, furthermore accountants inspect the operations before making payments for the expenditures, and than the financial inspection has to verify that all provisions have been followed.

Financial monitoring is performed by specialized jurisprudence – court of auditors. Before the court of auditors accounts reports are presented.

Monitoring by the parliament (issues and commissions) can be effectuated in the budget realization stage, according to the provisions of the law governing budget realization. (41)

The purpose of bringing here the issue of monitoring public procurement system is to distinguish and point to the institutions included into the monitoring process.

A national institution for performing audits of the use and spending of public procurement funds in the Republic of Macedonia is the State Audit Office (SAO), which pursuant to the 2007 Law on Public Procurement has competences in controlling the legality of spending public funds. Further to SAO's reports, available on the internet, and included in this book through part of the data, it can be stated that there have been identified mistakes and inconsistencies in the implementation of the Law on Public Procurement.

5.4. Public procurement procedures

When fundamental public procurement principles and administrative procedure principles are taken as a starting point, it is noticable that public procurement procedures are included in administrative matters.

5.4.1. Procedure types

Public procurement procedures, as provided for in the directives, are the following:

- open procedure (so called general procedure),
- restricted procedure (so called procedure with a prior suitability identification),
- competitive dialog,
- negotiated procedure without prior publication of a notice,
- negotiated procedure with prior publication of a notice,

- simplified competitive procedure with publication of a notice,
- simplified competitive procedure without publication of a notice.

Public procurement procedures are applied for procurement values that exceed set thresholds, and purchasers choose which of the available procedures is to be implemented. Public procurement directives define which procedures should be provided for in national legislations, and in what way. The usual threshold set by national legislations is EUR 10,000, meaning that for any procurement of a higher value stipulated procedures apply, whereas for everything else, public procurement procedure is not needed. This threshold results from the knowledge level and the public awareness development regarding public procurement. Thus, e.g. in the Republic of Macedonia, in the beginning, public procurement procedures applied to procurement exceeding EUR 100 (according to the 2004 Law on Public Procurement), whereby within the range between EUR 100 and EUR 3,000 was applied a simplified procedure, or a so called small value procurement procedure, whereas procurement of values lower than EUR 100 was not subject to any procedure. The 2007 Law provided for higher thresholds. Any procurement of a value above EUR 500 is subject to the Law implementation. Procurment of values ranging from EUR 500 to EUR 5,000 is carried out by a simplified competitive procedure without publication of a notice (eight days). In the range from EUR 5,000 to EUR 20,000 (for goods and services) and from EUR 5,000 to EUR 50,000 (for works), by a simplified competitive procedure with publication of a notice (14 days). Above these upper thresholds are implemented procedures as: open procedure, restricted procedure, negotiated procedure (with and without prior publication of a notice), and competitive dialog.

An open procedure is a regular procedure, which allows for highest tenderer participation. From the perspective of administrative elements which distinguish it, and in the context of formality aspects, each stage of this procedure requires following of the principle of formality. Namely, from the beginning, at the stage of tender opening, and also before that in the tenderers' communication with the purchaser, it is important to comply with the formality aspect (written communication, formal, defined way of submitting tenders, by public opening, attended by authorized representatives, with valid

power of attorney etc.). On the other hand, this procedure is carried out in one stage, in which tenderers submit their tenders together with their offers.

In that context, issues of the formal and of the substantive (essential) aspects come into light. With a view to compliance with the formal aspects, untill 2007 there was a requirement of having in place at least two tenders, as a precondition for public tender opening. Often, that requirement was a reason for failed notices, that had to be repeated. However, there is no way of getting any guarantee for having more than one tender in the moment of expiry of the deadline for submitting tenders (which for that matter coincides with the time of tender opening), and it is undisputable that in such situations the principle of formality is complied with, but the principles of effectiveness and efficiency are undermined.

A solution in a form of carrying on with the procedure even in a case of receiving only one tender, allows for adherence to both formality on the one hand and efficiency and effectiveness on the other.

A restricted procedure is executed in two stages. It is a regular procedure and is usually implemented for procurement of goods, works, and services where contract object is complex or specific, and where it would be beneficial if all who are interested submit their requests to participate, but only selected candidates, i.e. qualified tenderers may submit tenders. The difference between the two procedures is that although the activity of submitting requests, i.e. of identifying technical and individual suitability is performed in the same way, it is formally separated in different stages, which on the other hand constitutes the basis for further financial evaluation of tenders. This type of procedure is beneficial for tenderers (economic operators), since they don't have to submit their financial offer immediately (as in the case of the open procedure), which allows for price invulnerability, thus developing competition and protecting privacy i.e. business aspects. This procedure includes also elements that are of mainly formal and administrative character, and provide the condition for its success. However, it is a fact that the practice shows that ambiguities in statutory solutions are a good reason for

promoting business practice development and implementation. In that context, further in this section a practical example is presented.

Considering that the 2007 Law does not provide for a special procedure for consultancy services procurement (which was the case in the 2004 Law), but to these services applies the restricted procedure, which from goods, works and services procurement differs only in the way of opening tenders, i.e. requests to participate. Namely, opening of the requests to participate in consultancy services procurement, as opposed to the restricted procedure for other procurement, is carried out by opening the requests to participate (which is not public), thereafter by their review and evaluation, and setup of a list of candidates (qualified), and at the end by public opening of financial tenders. The emphasis of this aspect is made (except adhering to formality) considering that it justifies opening and analysis of the question whether this has an impact on the material (substantive) aspect, and whether thereby all public procurement principles are complied with. The considerations mainly refer to a positive answer, i.e. that by adhering to the formal aspect (opening the requests to participate out of the public) other principles and aspects are also adhered to. In the stage of evaluating individual and technical suitability selection is made, and those that have not passed this stage are not in the position to have their financial tenders open. However, it is worth of mentioning that in consultancy services procurement, submitting of unacceptable tenders is a very often event, due to their exceeding of thresholds of provided funds (which is by the way set in the procurement decision). In many countries worldwide, consultancy services budgets are made known in the notices, with a view to ensuring procedure efficiency and effectiveness, considering that evaluation of this kind of contracts is some times not precise at all, and the value of consultancy hour is a disputable category. The practice that is emerging in Macedonia is toward changing the procurement decision, which requires adoption of a formal decision on amendments and addenda to the procurement decision, whreby the amount of the funds designated for the concrete procurement is modified, but this is possible only in situations when the defined budget allows it, i.e. when there are enough funds for this purpose, even though contract's estimates have been lower. The Law does not provide for situations like this (and indeed by their nature they are not a matter of statutory provision). However, they are very real not only in consultancy

services, but in any other types of procurement as well. Generally speaking, if the need for surpassing the budget should and can lead to amendments in the procurement decision, than it has to be ensured that the new trhreshold does not require application of another procedure.

In international realms, procedures correspond in type and the stages involved, whereas varieties in national legislations are in the segment of threshold definition. Thus, for example in Slovenia, the obligation for aligning with the 2004 directives has led to a provision according to which purchasers (contracting authorities) may apply procedures as stipulated by the national law, provided that the procurement value of goods or services ranges between EUR 10,000 and EUR 40,000 and the procurement value of works is below EUR 400,000.

Simplified competitive procedure is applied for contract values of no less than EUR 20,000 and less than EUR 80,000, whereas regarding services these values are set to more than EUR 40,000 and less than EUR 137,000. Regarding construction works these values are no less than EUR 80,000 and less than EUR 274,000 and the publication of a notice is required.

According to the Slovenian public procurement law, for example, the same as according to Article 28 of the Directive 04/18/EC, a public procurement procedure is not required for procurement under the threshold of EUR 10,000 for goods and services, and EUR 20,000 for works.

This Directive points to setting out national procedures, which are to be aligned with the Directive.

A generally applied provision is that choice of the procedure is made by the purchaser. The so called regular procedures that are usually used for procurement of goods, works, and services are the open and the restricted procedure. For the rest of the cases are implemented other procedures as provided for in the national legislation.

The procedure choice further ensures transparency in the relationship between the tenderer and the purchaser. However, the foregoing is in the context of open and restricted procedures, whereas in the rest of the procedures purchaser's ability to make choice is limited, and is guided by the procurement object, as well as by the thresholds which need to match the procurement. In Slovenia, for simplification purposes, procedures are grouped in the law in three sections, according to thresholds. Article 6 of the Directive 2004/18/EC allows to national legislations the possibility of grouping and setting out the procedures according to thresholds.

The number three as a minimum for invited economic operators, or for ensuring the principle of competition has mainly been chosen for two reasons: the European Union's market of capital, goods, and services is unified, and a minimum of three tenderers is certainly sufficient for providing competition, as well as for compliance with all other principles. Furthermore, the possibility for negotiations (informal) between two tenderers/economic operators is higher and available, since an agreement between two parties is more easily achieved, whereas involvement of three parties limits the possibility of negotiating and reaching an agreement, and in that respect increase of parties' number decreases the possibility of reaching an agreement. This procedure (simplified competitive procedure) is an informal procedure, but it requires compliance with fundamental public procurement principles.

Competitive dialog is a new procedure introduced in the new directive governing traditional procurement sector. Competitive dialog is a procedure which is carried out in three stages. According to the stipulated manner of implementation, this procedure has relatively minor features, or less features of an administrative procedure. In the first stage, following a public notice, requests to participate are submitted, according to which candidate' individual, financial, and technical suitability is defined. Thereafter, in the second stage, which is a negotiation stage, negotiations are carried out, whereby ideas are exchanged, procurement object is clarified and technical specifications are precisely defined, further to which tender documentation is developed for the third stage [considering that at the beginning the purchaser has a defined goal (contract object)], but there is no clear and precise idea of how and in what manner all that is to be carried

through. The purpose of the negotiations is clarification, concretisation, and solution exchange, with a view to achieving procurement's aim.

This procedure, regarding the time necessary for implementation is the most complex one. Actually, if an approximation is made on the length of the implementation period, it would be no less than four months. This procedure is complex and its use is intended for complex procurement (where creative solutions need to be introduced). It is appropriate for realization of public-private partnership ventures.

Negotiated procedure may be carried out both with and without prior publication of a notice. The varying part is the one of notice publication, whereby specific for both procedures is that administrative elements are reduced to the minimum. Particularly interesting for analysis in this context is also the issue of adhering to the principles of formality and efficiency. Namely, the negotiated procedure with publication of a notice provides for manners of placing advertisements, short deadlines, and a negotiation stage. In the negotiation stage, aspects set in tenders are negotiated, and tender improvements achieved by such negotiations are to be submitted at the end in writing, and formal selection process is to be carried out.

The negotiated procedure without publication of a notice is carried out without an advertisement, whereas tenderers are invited by the contracting authorities (on their own choice).

The foregoing two procedures (negotiated) are implemented by the EU member states. Practices show that for these procedures contracting authorities have developed internal procedures, which are followed in the negotiations segment. These procedures are also implemented in the so called utilities contract awards. The Macedonian Law on Public Procurement until 2007 did not provide for negotiated procedure with publication of a notice. Negotiated procedure without publication of a notice, on the other hand, was included in the Law, and was often implemented by purchasers, since possibilities provided for in the Law regarding procedure choice were limited (only several types of procedures were included), practices of procurement planning were in their outset, and

the statutory provision for providing at least two tenders had to be met, which was all preventing public procurement procedures (restricted or open) from success.

This procedure also required prior consent of the national public procurement institution, which was a formal consent, for meeting formal procedure implementation terms, that on the other hand was burdening the procedure with formalities and administering, insofar that national institution's staff could not evaluate each kind of procurement (purpose and manner) in terms of expertise, since in question was procurement in all areas included in the Law, meaning that administering was irrational, and contrary to the tendencies of its reduction. The reason for such administering was budget discipline and control.

Furthermore, in the context of administrative and formality procedure aspects, it should be noted that the Treasury Department with the Ministry of Finance was issuing permits for provided funds, without which the procedure start was not possible, and consequently public procurement contract was not possible as well. This measure was adding to further procedure administering, but the reason for its introduction was more relevant in terms of fund spending analysis and control, which was a matter of analysis and reports issued by the Ministry of Finance for international institutions.

5.4.2. Public procurement notices

The requirement for adverticement in public procurement procedure execution, includes publication of information in several procedure stages, and the main purpose is procedure transparency, from its beginning through its completion, which consequently ensures compliance with the remaining principles, such as competition, non-discrimination, and equal treatment.

Procurement notices are also required by the EU directives, and actually by putting great emphasis to this matter, they insist on following such rules in national legislations, considering that under the thresholds set out in the directives, the obligation

for adverticement is regulated by national legislations. However, the national governments' tendencies are toward regulating one-stop-shop for procurement notices, with a purpose of providing information to the public, and a possibility to potential tenderers to keep track in procurement advertisements and notices on a one-stop-shop basis.

In the Republic of Macedonia in 2005, pursuant to the amendments to the Law on Public Procurement was introduced a requirement for simultaneous publishing on the website of the Public Procurement Bureau, that was established in the meantime. Before these statutory amendments it was required that notices be published only in the Official Gazette of the RM, whereas signed contracts, along with the so called Registers for executed public procurement procedures were submitted to the Public Procurement Department with the Ministry of Finance, and afterwards to the Public Procurement Bureau (after its establishment). The constitution of the unique register for publishing data on signed public procurement contracts, provided publicity in concluding public procurement contracts (purchaser's and tenderer's identity, procurement object and value), all disclosed on the Public Procurement Bureau's website (for which was carried out a CARDS project of the European Commission).

The obligation for advertisement includes publishing of an indicative notice (prior indicative notice), the purpose of which is to make a previous announcement of the intention of carrying out a public procurement procedure, before publication of the notice itself, thereafter publishing contract award notice (according to the chosen procedure type), as well as publishing notice on the signed contract or on procedure dismissal. The obligation for advertisement includes publishing notices both on the Public Procurement Bureau's website, and in the Official Gazette of the RM.

5.4.3. Procedure stages

Public procurement procedures as part of administrative procedures are generally carried out in the following stages:

- advertisement (invitation),
- tender documentation and tender (request to participate) submission,
- tender opening and evaluation,
- tender selection and contract signing,
- contract realization and enforcement.

The ways in which procedure stages are regulated differs depending on the approach to this matter. Namely, according to one point of view, public procurement is completed in the moment when the contract is signed, whereas its realization is a matter of the contract law, considering that it constitutes a basis for further contract obligations of the parties. According to another standpoint, this is a matter that includes contract realization as well, i.e. contract realization is an integral part of public procurement.

Experiences in the Republic of Macedonia show that the 2004 Law on Public Procurement provided for a regular court authority regarding public procurement (in that period the Administrative Court was not established yet), whereas the 2007 Law referes to the Law on Administrative Procedure provisions for anything that has not been stipulated in the Law on Public Procurement, and Administrative Court authority, both with regular courts authority, notwithstanding that it is not clearly stated which is the way of fulfilling party's legal interest in case of initiating certain court proceedings, for which previously no court decision has been issued (by an Administrative Court), for revoking the administrative act of the public procurement appeals commission, and whether in such situations arguing on party's legal interest is possible. This is a question to which at this moment it is not possible to respond regarding the practical implementation aspect, considering that in the Republic of Macedonia practices in this area has not yet been developed, and currently several proceedings are in progress, which are not yet finalized.

The list of foregoing procedure stages is general and these are definitely not the only stages that are adopted in public procurement. All sub-stages are not a matter of interest of this book, since generally speaking they could all be observed from formal/administrative perspective of regulation by numerous by-laws, the main purpose

of which is procedure unification, which on the other hand is time consuming and requires a lot of attention to detail that is out of the scope of this book.

5.4.4. Tender documentation

Tender documentation is a key part of public procurement procedures, and therefore it is presented as a separate section. Namely, experienced officers involved in public procurement very often state that tender documentation is the backbone of a public procurement procedure. Well developed tender documentation also means a good procedure with quality tenders, that will reflect purchaser's clearly defined expectations, allowing as such for an overall procedure administering simplification, as well as for preventing situations of procedure failure and repetition.

In EU member states, further to the public procurement directives, the matter of tender documentation elements and contents is regulated by a by-law – a regulation that has been enacted further to statutory provisions in the public procurement area. The purpose of this kind of regulation is to keep the Law compact and free of too many provisions. The by-laws usually include elements that are inherent particularly to tender documentation, whereas statutory provisions are more brief in description, without going deeper into detail, about what is not to be included in tender documentation.

The European legislation includes provisions governing technical specifications and access to them. Regarding accessability, or for that matter the set of all criteria that are important for particular groups or individuals, certain novelties have been introduced in specific areas (e.g. disabled persons, possibility for participation of a group of tenderers etc.), and these can be included in the technical specification, which is a necessary term of the tender, and consequently of the contract.

Further to that, all possible criteria or the set of all criteria needs to be taken into account, always and wherever possible. This is promotive of the principles of non-

discrimination and equal treatment, and affirmative of compliance with other regulations regarding this matter, as well.

The set of all necessary terms and conditions is being defined in the daily implementation of technical specifications.

Technical specifications can also be implemented as contract award criteria in the final selection. (*Recital 46)

Further explanations regarding inclusion of accessability, or of all criteria into technical specifications (Recital 29), point to the fact that these provisions must be clearly defined. Technical and/or professional abilities of a certain company in the construction or services field, as well as measures taken by that company toward quality assurance, can be included as well.

In tender documentation development it is important to consider statutory solutions dealing with equal treatment ensurance, as well as possible requirements for obtaining certain permits and licenses etc., but special attention has to be paid to compliance with fundamental public procurement principles. That will prevent law violations in certain concrete situations. This is a particularly extensive area, since it includes a wide range of issues which can actually appear during the procedure. All in all, public procurement object is directly related to the way in which tender documentation will be developed. Thus, for example, if the matter in question is procurement in the pharmacy area, it will surely require consulting and aligning with applicative regulations governing this matter. This can be done by including experts in respective areas in the tender documentation development process, which can also provide an introduction of creative solutions, and novelties that will be in line with fundamental procurement principles, the importance of which is hardly enough of stressing.

A concrete case which took place in 2008 seems to be an appropriate example in this regard. A contracting authority published a public procurement contract award notice, and the tender documentation indicated time limits for the age of used assets that

would be designated to procurement realization. Applicative regulations (lex specialis) on assets safety provided for a clearly defined procedure, involving certified monitoring institutions, for making used assets age irrelevant, i.e. assets were receiving equal treatment by a document issued by a certified institution, which was done on a yearly basis. However, the response to the complaint against tender documentation terms, and afterwards also to the appeal against the selection decision, was negative, for which administrative proceedings had been initiated.

Another case is also indicative of the exceptional importance of this stage or element of the public procurement procedure regarding its overall success. A tender documentation for service contract award did not include terms regarding the age of used assets that could be possibly engaged in service provision. All arrived tenders were opened in public, including the offered prices, i.e. financial tenders, and the commission withdrew to make the evaluation. The commission, i.e. the officer in charge, made a decision to revoke the procedure, with an explanation that the contracting authority had made an omission regarding one of the criteria (used assets age), and tenderers submitted appeals against making such decision in the evaluation stage. The State Appeals Commission rejected these appeals for being ungrounded, and the Administrative Court confirmed such State Appeals Commission's decision, while in the moment of writing of this book the case reached the Supreme Court, further to the complaint against such judgment of the Administrative Court (pursuant to the Law on Administrative Disputes amendments, enacted in the meantime). This case is definitely an example of violation of the principles of confidentiality and business information safety. The contracting authority could have made the respective decision, provided that it had not been done in the tender opening stage, i.e. that prices included in financial tenders had not been publicly disclosed. But, in this case prices had already been disclosed, which was directly compromising the competition principle, since in the repeated procedure it would be possible to adjust the prices to the ones disclosed in the previous procedure.

Situations when terms and conditions are being altered, lead to suspicions regarding the possibility of presence of corruptious actions, which is a matter of other kind of analyses. Care should also be taken regarding the procedure of participant's

suitability identification in public contract awards, with a purpose of smooth reaching to stages of contract signing and realization.

As already mentioned in this book, the trend of so called “green procurement” is calling for developing such tender documentation aspects, by their inclusion into the public procurement system, which is practically possible through the tender documentation itself. With a view to “green procurement” introduction, tender documentation can define the ways in which contractual parties will protect the environment. In such situations it should be emphasized that contracting authorities may not make exact specification of the procurement object, since that is inconsistent with public procurement principles, particularly the principle of transparency.

Further to the foregoing, it is worth of mentioning that the exceptional importance of this procedure element requires involvement of experts, who would help in tender rules development, which once again leads to the conclusion that public procurement is a matter that is interdisciplinary in itself, and needs a wide range of expertise and staff.

5.4.5. Procedure completion

A public procurement contract award procedure, or simply public procurement procedure, is carried out with the purpose of concluding a public procurement contract. The new terminology further to the 2004 directives refers to “public contract award procedure”, whereas previously the term “public procurement procedure” was used.

Public contracts are defined as contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of Directive 18/04.

It is important to note that neither the definition of contracting authority, nor the definition of public contract refer to the source of financing. Therefore, in deciding if a contract is public and subject to the public procurement system, it is irrelevant whether it is financed by public funds or not. (C-126/03, Commission vs. Germany, p. 20)

All public contracts that include large values are concluded according to European Community rules, the main purpose of which is to open up wider possibilities for cross-border competition. (42)

Certainly, not all contracting authorities' activities are subject to the public procurement system, and they are not always required to be in a form of contractual legal relationship. Contracting authorities have at all times the possibility to perform the tasks conferred on them by using their own administrative, technical, and other resources (in-house contracts) without being obliged to call on outside entities. In such cases, they are not required to apply public procurement laws (C-26/03 Stadt Halle, p. 48).

The European Court of Justice has established two criteria for distinguishing in-house from public procurement contracts:

1. A public procurement contract may be concluded only between two legally distinct entities: such as a contracting authority and any other entity (company) that is legally distinct from it.

2. Contracts concluded between various contracting authority's departments are in-house contracts. This also includes contracts concluded with entities that carry out their activities under contracting authority's control. In these cases public procurement procedure is not required (C-26/03 Stadt Halle, p. 49).

5.5. Electronic public procurement

Technology development and the dynamics of social relations in general, especially in the area of public finances, impose the need for purchasers staffing and providing them with access to technology and electronic performances, with the

perspective of carrying out electronic public procurement, as well as establishing electronic communication with the Bureau.

Public procurement is increasingly adapted to electronic execution of relevant procedures. Reverse auction is a procurement executed by electronic means, which provide tenderers with the possibility to revise presented prices (i.e. values) downwards, after an initial evaluation of tenders (within an open or restricted procedure). During these procedures, particular care has to be taken of keeping to the principle of competition, with an extra attention not to stop or prevent the execution itself.

Procurement carried out by electronic auction can rest on:

- lowest price, and
- best tender elements, within criteria set out in the tender documentation.

Electronic public procurement in the Republic of Macedonia was first introduced in 2005, under an USAID project, and the first electronic auction was carried out in 2006. Electronic auctions were statutory introduced in the 2007 Law on Public Procurement.

Current statutory provisions in the Republic of Macedonia provide for implementation only of the lowest price criterion in electronic auctions. The electronic procurement system is designed in such a way that electronic auctions can be performed only according to price, on the principle of reverse auction.

The European Commission, since the introduction of electronic public procurement in 2000, has set out optimistic goals, considering the newly introduced possibilities for procurement that is further simplified (without paper and additional expenses – verification, signatures etc.), as well as considering the possibility of implementation of framework agreements. Statistics revealed that untill the end of 2003, 25% of public procurement transactions in the EU countries had been performed by electronic means.

Electronic trading, that was introduced first in the public administration, and later expanded also to other entities, appeared in the nineties of the last century in Australia, where thereafter were also introduced important standards and principles, which were widely accepted by other countries. Electronic trading of the public administration, or E-Government, and generally of the business community, or E-Commerce, and for that matter the increasingly widely accepted term E-Business, also includes electronic operations in the public procurement area, for which the term E-Procurement (Electronic Procurement or Electronic Public Procurement) is in use much more often.

Electronic public procurement is certainly a perspective, but it should be approached in a systemic way, in terms of providing consistency in knowledge and skills of the administration in this area on one hand, and on the other hand in economic operators' knowledge and skills, and finally care should be taken of the electronic equipping and IT-infrastructure of the society. This is also European Commission's recommendation to countries where tradition in this regard is not very advanced (in terms of both quality and quantity), although much more important is to ensure quality in public procurement procedure implementation, while electronic procurement will inevitably follow. Considering that situation varies, particularly regarding contracting authorities, and with the view to maintaining non-discrimination and competition, care should be taken in electronic procurement implementation, in that anyone is allowed the possibility to submit a tender for published notices, which requires long-term education and provision of necessary conditions.

Summary of benefits from electronic public procurement

	Government	Supplier	Public
Transparency	• Anti-corruption • Increased number of suppliers • Better integration and interaction between governments • Professional procurement monitoring • Higher quality of procurement decisions and statistics	• Increased fairness and competition • Improved access to the government market • Open the government market to new suppliers • Stimulation of SME participation • Improved access to public procurement information	• Access to public procurement information • Monitor public expenditure information • "Have a say" • Government accountability
Efficiency *Costs*	• Lower prices • Lower transaction costs • Staff reduction	• Lower transaction costs • Staff reduction • Improved cash flow	• Redistribution of fiscal expenditure
Time	• Simplification/elimination of repetitive tasks • Shorter procurement cycle • Communication anywhere/anytime	• Simplification/elimination of repetitive tasks • Shorter procurement cycle • Communication anywhere/anytime	• Communication anywhere/anytime

Source: World Bank, 2003: *Electronic government procurement. World bank draft strategy*.

5.6. Framework agreements

Framework agreements represent a way of awarding public procurement contracts. They were introduced in the Directive 2004/18, which enabled their implementation in the traditional procurement sector as well. Earlier, the Directive 93/38 introduced framework agreements in the utilities procurement, i.e. in the utilities sector.

Framework agreement is an agreement between one or more contracting authorities and one or more economic operators, with the purpose of establishing the essential terms that are to govern public contracts awarded for a certain period of time. This period is usually not longer than four years. (43)

Framework agreements are concluded in a public procurement procedure, as provided by Law, and therefore framework agreement is not a procedure type, but rather a way of awarding public procurement contracts. In the Republic of Macedonia, framework agreements were first introduced by the 2004 Law on Public Procurement, whereas in the 2007 Law they were elaborated and made available to all procedure types (provided that fundamental public procurement principles are preserved), and the contract period was set out to no longer than three years. The essence of implementing this way of awarding public contracts is that these agreements provide contracting authorities with the possibility to procure what is currently needed at any time, as appropriate, without any major prior procedures, which prevents from making excessive reserves, reduces formalities, and ensures efficiency of the whole process.

It is best when a framework agreement is concluded with at least three tenderers (because of the principle of competition), followed by a so called mini-tender, within short deadlines, and by a communication as set out in the tender documentation and the framework agreement, although it can also be concluded with one tenderer, and in such situations Article 32-3 of the Directive stipulates that the contract has to be concluded within the frames of the framework agreement.

The following table lists framework agreements' strengths and weaknesses.

STRENGTHS	WEAKNESSES
a) Establishment of an indicative price and a price mechanism.	a) Lack of competition for certain contract types, except in restricted procedures.
b) Possibility for providing contract directions, where clients (or users or many others along the line) are provided with small-and-medium enterprise products, which increases competition.	b) Lack of transparency in the second stage of all framework agreement procedure types.
c) Dynamic and flexible way that meets urgency and simplicity needs, and as such saves time.	c) For large purchases in framework agreements, providers are often used, and thereby small and newly established enterprises are often not provided with equal opportunities.
d) Arranging things in urgent situations.	d) In some areas competition cuts framework agreement duration.
e) Supply continuity and stability.	e) In some framework agreement types (stricto sensu), terms and conditions, and particularly amounts, are not registered in the time of concluding the framework agreement. That fact can lead providers not to submit their tenders later, when invitation for tender participation is issued. Concluding framework agreements with less specific initial terms and conditions can be restrictive of the number of consequent transactions.
f) Increasing the strenght of connections and ensuring better supply ensurance.	f) In types where management has enough reserves to satisfy clients' most immediate needs.

g) Lower risk and instability.	g) If framework agreement's purpose is achieving economy of scale, that can cause problems for small-and-medium enterprices (tenderers).
h) Economy of scale.	
i) Quick contracts and contract efficiency (rationalization of actions).	
j) Maintaining contracting authorities' actions at lowest possible level.	
k) Achieving lower prices or getting discounts, by using an e-catalogue.	
l) Lowering transaction costs and reducing transaction prices.	
m) Rationalization and more efficient administration of public procurement procedures.	
n) Mitigating the risk of multiple repeats of procedures during the framework agreement (the everlasting risk of multiple supply during the framework agreement).	
o) Avoiding duplication.	
p) Possibility for collective procurement.	
q) Open competition in low amount procedures.	

Source: *Framework agreements in public procurement. (44)*

The table below presents the experiences of some EU member states regarding framework agreements implementation.

Member state	**Procurement object**	**Number of tenderers participating in the framework agreement**	**Purpose of the number of tenderers participating in the framework agreement**	**Framework agreement's duration**
France	Automobile fuel.	3	Framework agreement's purpose is higher supply from the network of numerous gas stations close to the users.	18 months, with a possibility of double recurrence during one year.
Ireland	Copying machines.	5	The purchaser wanted to conclude with the tenderer a framework agreement, which could enclude six black and white monochrome models, starting from small-sized, and up to large machines.	Two years, with a possibility of one year reduction.
Sweden	Employment, translation services, cargo transportation, flying tickets.	2 - 3	Capacity required by the clients, capacity ensurance, market structure, position, goods/services variety.	Usually one to two years, with an option of one additional year.

Source: *Framework agreements in public procurement. (45)*

6. Parties in public procurement procedures

Tenderers have access to documents and professional knowledge regarding public procurement issues, which allows them to prove possible presence of discrimination in certain procedure segments, particularly in tender documentation and specification. They are the ones that have interest in procedure results.

In that regard, many public procurement procedures provide tenderers with the possibility to initiate appeals proceedings. An efficient rights protection system entitles tenderers and strengthens their rights, which contributes to their confidence in public procurement procedures, and encourages them to participate in these procedures. On the other hand, appeals proceedings in public procurement should not put barriers to the contract award process. It is believed that appeals mechanism should ensure efficient and quick error corrections (corrections that stand on the way of contract conclusion), and that legal remedies should be available to any tenderer, to any firm which has or used to have legal interest in the contract conclusion. (46)

In terms of administration, many statutory solutions (once harmonization with the Council's Directive 89/665/EEC has been made) provide that complaints can be submitted against any contracting authority's action, in all procedure stages. In cases when contracting authorities accept complaint's argumentation, the procedure segment to which the complaint has referred is repeated. If a contracting authority rejects the complaint or does not respond to it, the interested person is entitled to place an appeal before the president of the public procurement office.

The best information source regarding violations of particular contract provisions in individual procedures are tenderers themselves, considering their role of procedure participants.

6.1. Party's right to participate in procedure stages

With public procurement fundamental principles as a starting point, law provisions governing this matter must ensure that parties are entitled to participate in procedure stages. Moreover, taking into account the term party, as defined in the Law on Administrative Procedure, i.e. a person at the request of whom proceedings have been initiated, or a person against whom proceedings are conducted, or a person who due to ensuring protection of her/his rights or legal interests is entitled to participate in the proceedings. Therefore, from formal legal perspective in the Administrative Procedures there are three kinds of parties: active party, passive party, and party having an interest. (47)

The Law on Public Procurement in the Republic of Macedonia defines the participants in public procurement procedures: on one hand contracting authority (purchaser), and on the other hand economic operator, candidate, and tenderer.

The difference is in the following: economic operator is any legal entity registered for performing business activities, and can potentially be participant, i.e. party in a public procurement procedure. Candidate is anyone that has submitted a request to participate (pursuant to stipulated procedures, consisting of more than one stage), whereas tenderer is anyone that has submitted a tender further to a public contract award notice.

All three terms can be joined into the term procedure party, considering the entitlement to participation in a public procurement procedure due to having individual interests. Further to the principles governing the public procurement system, particularly the principle of transparency, it can be concluded that exactly this is the reason for the party's entitlement to participation in any stage of the public procurement procedure, although depending on the acquired treatment or the participation level. The starting point is the information stage, followed by getting tender documentation, putting comments and making questions relating to tender documentation, and thereafter

submitting a request to participate/tender, attending and participating in tender opening, making insight into performed evaluations, and exercising rights protection.

In the Republic of Macedonia, a formal transparent and non-discriminating approach has been taken regarding parties' rights in public procurement procedures, but this is a matter that needs continuous efforts of preventing any discriminating attitudes in rights realization, which is referred to in the conclusions and recommendations sections.

6.2. Fulfilling party's legal interest

Key element of the issue of fulfilling party's legal interest is the way in which parties are entitled to discharge their legal and commercial interests.

The right to lodge an appeal, as provided in the public procurement system, has a suspense effect on contract conclusion. The final decision on the appeal may be subject to administrative dispute before the Administrative Court (that does not decide in full jurisdiction).

The system set-up in the Republic of Macedonia regarding party's legal interest realization, along with contract award adverticement, and all other actions within the procedure, ending with the decision on the winning tender selection, are in subsidiary relation to the Law on Obligations. The prohibition for concluding a contract limits party's free disposition, and procurement specificities give to these contracts the character of a sui generis civil contract.

In EU member states the trend is toward establishing national public procurement institutions, and the same has been realized in the Republic of Macedonia, as well. Parties have the right to have insight into, and get information on, the procedure, which ensures transparency. These rights are realized before the body that carries out the public procurement procedure. However, if a party does not succeed in that, these rights should

be fulfilled through a specialized institution, which is in charge of developing policies and establishing good practices in the public procurement area.

Considering the presence of real possibilities for individual rights violation in public procurement procedures, the forms of protection (from the perspective of institutions that provide such protection) are: administrative and judicial.

Administrative protection of the rights relating to public procurement is about: administrative control and administrative supervision. Judicial protection, on the other hand, can be: administrative judicial, regular judicial, punitive (infringement), as well as potentially constitutional judicial. (49) Under regular judicial authority are issues such as fulfillment of the right to compensate for damage, and contract termination.

6.3. Ways of protecting party's legal interest

In the public procurement area, legal interest protection is a subject which attracts particular attention. Considering that public procurement is a relatively new topic, subject to ongoing changes and additions, situations where no concrete statutory solution is at hand (provided for by law) are very possible in the reality, within individual cases of public procurement. Practices in EU member states are carried out also in correlation with the European Court of Justice decisions. That points to the necessity for establishing rights protection very clearly. European Commission's recommendation to the Republic of Macedonia in that regard was to establish an autonomous and independent institution in charge of public procurement appeals, authorized to make decisions (with the purpose of avoiding the possibility of multiple repetition of decisions on selecting winning tenders, which were returned to first instance commissions for a repeated decision-making). However, the rights protection system includes clearly defined damage compensation mechanisms (regular court proceedings), such as in Germany, where it has had preventive effects, considering that damage compensation amounts adjudged by courts are quite large, which leads to paying more attention to possible mistakes even since the selection procedure stage. On the other hand, contracts

are signed immediately, i.e. rights protection does not have a suspense effect. Anyway, rules on correcting certain inconsistencies are necessary. The best information source regarding violations of particular contract provisions in individual procedures are tenderers themselves, as procedure participants. Nevertheless, all systems provide tenderers with the right to initiate appeals proceedings.

In Poland, problems and disagreements between contracting authorities and tenderers are under the jurisdiction of civil courts with commercial disputes competences. (49)

In Latvia in 1999 was established a mechanism that included arbiters. These professionals are on the public procurement office's list, for which passing of an exam on public procurement is required. Appeal can be lodged following a prior complaint. The administrative duty of the arbitration committee is performed by the public procurement office. The administrative approach to appeals review has also prevailed in Estonia and Slovakia. In these countries, appeals are reviewed by the public procurement institution. (50)

In cases of incompliance with public procurement regulations that has affected procurement procedure results, civil courts may revoke concluded contracts.

Budget realization regularity is audited by auditing institutions, and internal auditors are also one of the elements of the public procurement system.

6.4. Administrative protection of rights

Despite the formal legal regulation of rights protection in the Republic of Macedonia, it can be noted that in reality parties' say in the procedure is still not sufficient, as well as the fulfillment of their rights. Experiences show that contracting authorities, i.e. purchasers, very seldom act upon requests, even in situations where fundamental public procurement principles have evidently been violated in tender rules

development, as well as in providing tender documentation, and in cases where parties make their remarks, i.e. act in accordance with the Law on Public Procurement, and request changes in certain tender rules. Therefore, it can be noted that in such circumstances the system needs to operate better. Here lies the gratest threat for violation of the principles of equality and non-discrimination, which leads to suspicions about presence of weak points in terms of favoring particular tenderers, and providing favored economic operators with the opportunity to submit tenders.

Full jurisdiction proceedings are a solution that would overcome the dilemma regarding the way of meeting party's entitlement to legal interest, since current statutory solution refers to both Administrative Court's and regular courts' jurisdiction.

In Poland e.g., the Public Procurement Office makes decisions (as provided by the 1994 Law) on cutting deadlines for submitting tenders, or on approving implementation of certain procedures. These decisions are subject to appeals before the supreme administrative court. Decisions may not be altered, but they may be revoked, directing the Public Procurement Office to make their review, and to withdraw them and pronounce their incompliance with Law. Final interpretation of the public procurement law provisions is under the court competence. (51)

Full jurisdiction proceedings, performed before the administrative judiciary, by so called contract lawsuits, which constitute lawsuits for resolving disputes arising from administrative contracts, include wide court authorities – to adjudge damage compensation payments by the administration, and more narrow they can also make a sole decision on contract termination, or on revocation of sanctions imposed by the administration upon its counter party. But, it is also possible for the administration to appear before the court in a plaintiff's role. (52)

7. Recommendations

7.1. General status

Public procurement in the Republic of Macedonia, as already mentioned in the beginning, is a topic to which attention is paid. By establishment of the institutional framework, which provides formal legal foundation regarding public procurement transparency, in terms of public contracts award procedures, appeals proceedings, and administrative disputes, the whole process has been completed. What is recognizable in that regard is the permanence of professionals involved in these activities, and the inclusion of the business sector in procedure development and its participation in all procedure stages, as well as in education and procedure implementation supervision, including the availability of appeals proceedings for rights protection.

In the 2004 – 2006 period, under a CARDS project financed by the EU, were carried out trainings of trainers, who got the opportunity to perform further public procurement trainings in the Republic of Macedonia, and thereafter trainings were also carried out for purchasers' and tenderers' representatives, which created a substantial quantum of experts in this area. Participants in such seminars were selected by the Public Procurement Bureau (on grounds of data received by those purchasers and tenderers who appeared most often as parties in concluded contracts, published on the Bureau's website), whereas all applicants to the published advertisements, that were open to the wide public, were included as well.

The purpose of this kind of building professional skills was to create a good basis of officers skilled in this area, with a perspective to be included and remain in the system, whereas some of them would perform the future activities of education and raising public awareness in the public procurement area. However, political changes cause poor utilization of professional capacities. It may be stated that individuals previously included in that process of education are not part of the system. Far from any prejudgment, since the act of education does not necessarily mean that they should permanently be engaged in public procurement activities, it is still evident that these officers are not active in this field any more.

However, new public procurement seminars and trainings took place, again with the same purpose, and the concept of building professional capacities was at the outset again, which as a desire for carrying out such activity, and for increasing the number of individuals educated in this area is worthwhile, but there still remains the question why this process does not also include those who has already passed previous training and have experience thereof, as well as those who wish to join the system. Education is important in terms of understanding public procurement system foundations, whereas statutory provisions are implemented in the very process, meaning that each law amendment should not entail establishment of the system from the beginning. This is a way of demonstrating system inconsistency, both in the eyes of the local and the international public.

The conclusion is that public procurement is a dynamic subject which requires keeping track with novelties on an ongoing basis, and parctices need to follow and further adjust, which is a condition to keeping continuity in the process and raising awareness, both in the government and in the business sector. Approach to this matter must be non-discriminating, and it has to be available and open to any individual who wants to be included into the process, regardless of whether she/he is currently active or wishes to be active in it. Considering experiences of some countries, this can be ensured if education is entrusted to the commercial sector, which would organize and implement education programs, as developed in co-operation with the national public procurement institution, as well as with the research and education institutions. On a longer run, that would ensure creation of professional capacity that will be independent and sufficient, whereas the government, but also economic operators, will always have a choice of professionals specialized in this area, which would enable both competition and high professional standards.

On the other hand, regarding business sector participation, insufficient inclusion and lack of initiative can be both realized. Very often, business sector representatives have remarks on public procurement tender design and implementation. This is a frequent remark of foreign investors as well. If results are to be achieved, it is necessary

to provide for business sector participation in the public procurement bodies, i.e. commissions.

Economic operators' representatives should take part in these commissions, with a purpose of demonstrating government willingness for maximum transparency and wish to co-operate, preventing as such at least some of the criticism and continuous remarks on tender procedures by the business sector. In such case, best solution is to establish a body of economic operators, which would enable permanent representation in tender procedures as proposed by them. This is also practice in a number of European countries, as well as in some of the new EU member states.

In Poland, in the first year of Public Procurement Office's operation, activities were mostly focused in trainings. Manuals were developed, numerous conferences took place, and a group of 60 trainers were trained, who were performing further trainings. Since than, a number of private companies have been set up in Poland, specialized in providing trainings and advisory services in the field of public procurement.

Taking into account that the public administration needs not to focus in what can be done equally well, or even better, by private companies or universities, the Polish PPO has in that way gradually withdrawn from providing direct trainings to various parties' representatives interested in public procurement issues. (56)

The national public procurement institution in the Republic of Macedonia has been established with an aim of awareness raising in the public procurement area. It is a government administration body, and since its establishment, its status has remained unchanged – a body operating within the Ministry of Finance. The change that it has undergone since the previous statutory solution is only in its legal capacity. It was originally established as an attached body, without the capacity of a legal person, whereas currently it has the capacity of a legal person, and the director is elected by a government appointment. If this solution is changed in a way that director election and appointment/dismissal procedures are clearly defined in a precise procedure, by implementing public contest with defined requirements, this institution could achieve

more solid approach to public procurement, without political influence, and fully discharge its competences, including provision of all needed measures in the public procurement system. Otherwise, if the institution turns into a pure record keeper, for preparing reports and publishing data, in longer-term, the justification of its existence will be put under question. In principle, government tendency toward setting up national institutions is actual in the period of establishing public procurement practices and providing assistance in procedure implementation, with a view to entrust these to the commercial/business sector in a long term perspective.

Acceptance and realization of the suggestion regarding Public Procurement Bureau's status, toward its setting as an independent and autonomous body, will allow harmonization with European standards, as well as with other Macedonian regulations. (53)

In terms of public procurement procedure supervision, currently there is no statutory provision governing the institution in charge of public procurement supervision and control. From finance perspective, the State Audit Office has such competences, but only ex post. Authority of a government institution, or an ex ante auditing of each contracting authority, should be clearly defined.

All lawyers, economists, legislators, contracting authority officers, and tenderers, as stated by Trybus, need to know and understand EU public procurement regulations, if they want to be successful in the public procurement field, which is an EU perspective. (54)

Regulations undergo constant changes that are accepted and implemented, but that process needs prior education. In that process, as stated by Shooner, maximizing equality, transparency, competition, and efficiency is important. When the government applies standard legal measures, the process goes smoother, task accomplishment becomes a routine, and all parties understand the rules.

Regarding appeals proceedings, the procedure stipulated in the Law is expensive, and, on the other hand, it provides contracting authorities with great discretion opportunities in decision-making.

For example, in Poland the main system advantages are: promptness (appeals proceedings take less than a month), effectiveness (arbiters decide in favor of tenderers in one third of the cases, and are able to prevent contracting authorities from further breaching the public procurement law), independence of the procedure parties and of the PPO (as well as PPO's freedom from political pressure), relatively low expenses for the actions taken by entrepreneurs, highly qualified arbiters in the field of public procurement. Negative elements are: superficial appeals review, lack of impartiality, and high formality (focusing only in formal procedure aspects).

Very often, regrettingly, tenderers do not take the advantage of all mechanisms that are at their disposal, and to which they are entitled, all from the fear of being discriminated in the future. (55)

Moreover, there is the question of determining the boundaries between the principles of efficiency and formality, and whether it is at all possible to put them in a value system which, in a relatively objective way, would set out pre-defined frameworks and circumstances in which one principle becomes more important than the other or, simply, to position the principle of formality ahead of the principle of efficiency, irrespective of economic consequences. Currently, this question cannot be answered, considering that there has not yet been reached a consensus about this matter among the government institutions in charge.

7.2. Recommendations and perspectives

Considering all previously said, the need for establishing a commercial system in this area is undoubted, additionally supported by the fact that there are situations where public administrators are burdened by performing multiple simultaneous tasks, whereas

public procurement, on one hand, is an area with which they are not familiar, and on the other, it makes an additional duty.

The way in which contracting authorities focus their attention in numerous different activities between the public and the private sector is very important. Private institutions (tenderers) should be involved in decision-making processes that have public impact. Contracting authorities by respecting private sector's views and opinions will constitute a much more relevant factor to producers and entrepreneurs, and thereby will demonstrate their respect for these persons' rights, and will also have more confidence toward these persons, which will help them realize their goals. (58)

The wider public's perception of the whole public procurement process is that it is an administrative, slow, and formal process, which is time consuming and has procedure requirements, and not a process of ensuring appropriate procurement charge and value for money. Therefore, constant work is needed toward raising public awareness regarding public procurement, as a way of cost-efficient spending of public funds. One of the essentials is professional execution of public procurement procedures, by skilled and well educated individuals, who will also be able to join the system on their own initiative, and this is an inevitable condition to objective and professional public procurement procedure execution.

Public procurement allows for proper identification of needs and an appropriate economic justification of the required amounts.

Certain considerations point to the fact that principles of transparency and equal treatment are also to be implemented in areas that are not governed by directives, such as electronic trading and public private partnerships. It is obvious that references toward compliance with these principles, included in the EU legislation, is additional confirmation of the complexity of public procurement as a topic.

Finally, as stated by Shooner, no one system is capable of achieving all these goals. Neither can the government expect that system goals will always remain unchanged. Goal

development is an ever changing and growing challenge, and our goals go beyond economic, transactions, and social cost, toward maximizing goals relating to transparency, integrity, and competition, which on a long run will provide the expected results.

8. References

1. Barry, N. *The French Law of Contract*. Oxford, 1992.
2. Blažević, Z.; Čvrlje, M.; Horvat, G.; Matešić, G.; Mužina, A.; Perdić, A. *Javna nabava*.
3. Давитковски, Б.; Павловска-Данева, А. *Управни договори*. Скопје, 2009.
4. Давитковски, Б. *За*... Скопје, 2007.
5. Димитријевић, П. *Одговорност управе за нечинење*. Источно Сарајево, 2005.
6. Димитријевић, П. *Основи управног права*. Београд, 1989.
7. Dolinšek, F. A. *Okvirni sporazumi v javnem naročanju*. Ljubljana, 2008.
8. *European Commission, The Rules Governing the Procedure in the Award of Public Procurement Contracts*. Office for Official Publications of European Communities. Luxemburg, 1997.
9. Европска комисија. *Public Procurement in the European Union*. Brisel, 1998.
10. Гелевски, С.; Гризо, Н.; Давитковски, Б. *Управно право*. Скопје, 1993.
11. Гелевски, С. *Управно-процесно право*. Скопје, 2003.
12. Graig, P. P. *Administrative Law* (second edition). London: *Sweet &Maxwell*, 1989.
13. Гризо, Н.; Гелевски, С.; Давитковски, Б.; Павловска-Данева, А. *Административно право*. Скопје: *Правен факултет „Јустинијан Први“*, 2008.
14. Гризо, Н.; Гелевски, С.; Давитковски, Б. *Управно право*. Скопје: *Правен факултет*, 1997.
15. Гризо, Н.; Давитковски, Б. *Проблеми на управувањето*. Скопје, 2001.
16. Христов, А. *Управно право*. Скопје: *Самоуправна практика*, 1984.
17. Integrity in Public procurement, Good practice from A to Z, OECD (2007).
18. Ласкомб, М.; Вандердрише, Х. *Јавни финансии*. Скопје, 2006.
19. Lemke, M. *Public Procurement – The Countinuing Revolution, Center Commercial law Studies*. London: *Forum*.
20. Linz, Juan J. *Transitions to Democracy*. *The Washington Quarterly*, 1990.
21. Марковић, Б. *Есеји о управи*. Крагујевац, 2001.
22. Марковић, И. М. *Савремена јавна управа, студије и огледи*. Подгорица, 2007.
23. Matešić, G. *Ogledi, pravni izvori, primjeri*. Zagreb, 2005.

24. Mužina, Aleksij. *Revizija javnih naročil*. Ljubljana, 2005.

25. Петровић, М. *Наука о управљању*. Ниш, 2006.

26. Petrović, M. *Nauka o upravljanju (Opšti deo)*. Niš, 2006.

27. *Pravo i politika javnih nabavki EU*. Sarajevo: *EUPPP*, 2006.

28. Pusić, E. *Država i državna uprava*. Zagreb: *Savremena javna uprava*, 2007.

29. Pusić, E.; Ivanišević, S.; Pavić, Ž.; Ramljak, M. *Upravni sistemi*. Zagreb: *Narodne novine*, 1988.

30. Pusić, E. *Nauka o upravi*. Zagreb, 1968.

31. Pusić, E. *Nauka o upravi*. Zagreb: *Školska knjiga*, 1993.

32. Šoltes, I. *Pomen in vloga sistema javnih naročil pri delovanje države*. Ljubljana, 2008.

33. Šoltes, I. *Sistem javnih naročil kot del horizontalne odgovornosti*. Ljubljana, 2005.

34. *The Law of Public and Utilities Procurement*. London: *Sue Arrowsmith*, 1996.

35. *The National Institute of Governmental Purchasing USA*. Florida: *Journal of Public procurement*, 2006.

36. *The World Bank, Guidelines: procurement of Goods and Services by World Bank Borrowers, The International Bank for reconstruction and Development*. Washington DC: *World Bank*, 2004.

37. Томић, Р. З. *Управно право*. *Јавно предузеће Службени лист СРЈ*, 2002.

38. Treitel, G. *Remedies for breach of contract*, Chapter 16.

39. Turpin, Colin C. „Public Contracts“. *Inst. 17, International Encyclopedia of Comparative Law*. Edited by K. Zweigert † and K. Drobnig. Hamburg, Germany: *Max-Planck Institute*, 1982.

40. Trybus, M. *European Union Law and Defence Integration*. Oxford, 2005.

41. Trybus, M. *Pravo i politika javnih nabavki EU*. Sarajevo: *EUPPP*, 2006.

42. Zuccolotto, Steafania. *Public procurement in Europe*. Public Procurement Network Roma: *Instituto Polografico e Zecca dell Stato*, 2005.

- **Information available on internet:**

1. Allen & Overy | Areas of Expertise | Public Procurement Remedies, www.allenovery.com.

2. EU directive to improve remedies in the area of public procurement, www.eubusiness.com/Finance/eu-**procurement**-remedies/.

3. European Commission (2004): A report on the function of public procurement markets in the EU: benefits from the application of EU directives and challenges for the future, http://ec.europa.eu/internal_market/publicprocurement/docs/public-proc-market-final-report_en.pdf (10.1. 2007).

4. European Commission: Explanatory Note – Competitive Dialogue – Classic Directive, http://simap.eu.int.

5. European Commission, Explanatory Note – Framework Agreements – Classic Directive, http://simap.eu.int.

6. European Commission „Internal Market" Public Procurement, www.ec.europa.eu.

7. European Community Contract Law: The effect of EC legislation, www.books.google.com.

8. European Environmental Bureau/Public Procurement, www.eeb.org/activities/**public_procurement**/.

9. INTERREG IIIC – Public Procurement, www.interreg3c.net/web/.

10. www.curia.eu.int.

11. web.worldbank.org/**PROCUREMENT**/.

9. Legal references

- European legislation:

1. *The Treaty of Amsterdam* (1997/99).
2. Directive 89/665/EEC (O. J. 1989, L 395).
3. Directive 92/13/EEC (O. J. 1992, L 076).
4. Directive 92/50/EEC (O. J. 1992, L 209).

5. Directive 93/36/EEC (O. J. 1993, L 199).
6. Directive 93/37/EEC (O. J. 1993, L 1999).
7. Directive 93/38/EEC (O. J. 1993, L 199).
8. Directive 97/52/EEC (O. J. 1997, L 328), by which Directives 92/50/EEC, 93/36/EEC and 93/37/EEC were amended.
9. Directive 98/4/EC (O. J. 1998, L 101), by which Directive 93/38/EEC was amended.
10. Directive 2001/78/EC (O. J. 2001, L 267).
11. Directive 2001/79 EC, by which 92/50, 93/36, 93/37, 93/38, 97/52 и 98/4 were amended.
12. Directive 2004/17/EC.
13. Directive 2004/18/EC.
14. The Communiquè on public procurement in the EU, COM (98) 143.
15. *The Treaty on the European Union (TEU)* (1992/93).

- Judgments of The Court of Justice of the European Union:

1) Judgment of The Court of Justice of the European Union as of February 10th 1982, Case no. 76/81.
2) Judgment of The Court of Justice of the European Union as of April 14th 1994, Case no. C-389/92.
3) Judgment of The Court of Justice of the European Union as of March 18th 1992, Case no. C-24/91.
4) Judgment of The Court of Justice of the European Union as of October 18th 2001, Case no. C-16/98.
5) Judgment of The Court of Justice of the European Union as of January 24th 1995, C-359/93 UNIX.

- Macedonian legislation.

Endnotes:

1. Šoltes, I. *Pomen in vloga sistema javnih naročil pri delovanje države*. Ljubljana, 2008, p. 3.
2. Гризо, Н.; Давитковски, Б. *Проблеми на управувањето*. Скопје, 2001, p. 63.
3. Гризо, Н.; Давитковски, Б. *Проблеми на управувањето*. Скопје, 2001, p. 180.
4. Гелевски, С.; Гризо, Н.; Давитковски, Б. *Управно право*. Скопје, 1993, p. 381.
5. Димитријевић, П. *Основи управног права*. Београд, 1989, p. 50.
6. Димитријевић, П. *Основи управног права*. Београд, 1989, p. 51.
7. Turpin, Colin C. „Public Contracts“. *Inst. 17, International Encyclopedia of Comparative Law*. Edited by K. Zweigert † and K. Drobnig. Hamburg, Germany: *Max-Planck Institute*, 1982, p. 48.
8. Turpin, Colin C. „Public Contracts“. *Inst. 17, International Encyclopedia of Comparative Law*. Edited by K. Zweigert † and K. Drobnig. Hamburg, Germany: *Max-Planck Institute*, 1982.
9. *Pravo i politika javnih nabavki EU*. Sarajevo: *EUPPP*, 2006, p. 283.
10. UNCITRAL Model Law on procurement, past, present, and the future, p. 5.
11. Matešić, G. *Ogledi, pravni izvori, primjeri*. Zagreb, 2005, p. 7.
12. Matešić, G. *Ogledi, pravni izvori, primjeri*. Zagreb, 2005, p. 12.
13. Matešić, G. *Ogledi, pravni izvori, primjeri*. Zagreb, 2005, p. 7.
14. Гелевски, С.; Гризо, Н.; Давитковски, Б. *Управно право*. Скопје, 1993, p. 379.
15. Гелевски, С.; Гризо, Н.; Давитковски, Б. *Управно право*. Скопје, 1993, p. 381.
16. Directive 2004/18/EC, Article 2.
17. Давитковски, Б.; Павловска-Данева, А. *Управни договори*. Скопје, 2009, p. 162-163.
18. Закон за јавните набавки. Службен весник на РМ, 2004.
19. Закон за јавните набавки. Службен весник на РМ, 2007.
20. Turpin, Colin C. „Public Contracts“. *Inst. 17, International Encyclopedia of Comparative Law*. Edited by K. Zweigert † and K. Drobnig. Hamburg, Germany: *Max-Planck Institute*, 1982.
21. Komentar Zakona za javnem naročanju. Ljubljana, 2006.

22. Šoltes, I. *Pomen in vloga sistema javnih naročil pri delovanje države*. Ljubljana, 2008, p. 62.
23. Komentar Zakona za javnem naročanju. Ljubljana, 2006.
24. Šoltes, I. *Pomen in vloga sistema javnih naročil pri delovanje države*. Ljubljana, 2008, p. 70.
25. *Pravo i politika javnih nabavki EU*. Sarajevo: *EUPPP*, 2006, p. 145.
26. Šoltes, I. *Pomen in vloga sistema javnih naročil pri delovanje države*. Ljubljana, 2008, p. 260.
27. Šoltes, I. *Pomen in vloga sistema javnih naročil pri delovanje države*. Ljubljana, 2008, p. 143-144.
28. Šoltes, I. *Pomen in vloga sistema javnih naročil pri delovanje države*. Ljubljana, 2008, p. 116.
29. *Evropski sud pravde o javnim nabavkama*. Izvod iz prakse. Sarajevo: *EUPPP*, 2006, p. 30.
30. *Direktive Evropske Unije o javnim nabavkama, EU.* Sarajevo: *EUPPP*, 2006, p. 20.
31. *The mandatory exclusions for corruption in the new EC directives*. *Sope Williams, Arrowsmith*, 2000, p. 1.
32. *Evropski sud pravde o javnim nabavkama*. Izvod iz prakse. Sarajevo: *EUPPP*, 2006, p. 57.
33. *Pravo i politika javnih nabavki EU*. Sarajevo: *EUPPP*, 2006, p. 225.
34. *Pravo i politika javnih nabavki EU*. Sarajevo: *EUPPP*, 2006, p. 226-227.
35. *The mandatory exclusions for corruption in the new EC directives*. *Sope Williams, Arrowsmith*, 2000, p. 1.
36. *The World Bank, Guidelines: Procurement of Goods and Services by World Bank Borrowers.* The International Bank for Reconstruction and Development. Washington DC: *World Bank*, 2004, p. 56.
37. *Pravo i politika javnih nabavki EU*. Sarajevo: *EUPPP*, 2006, p. 27.
38. C.F.R., оддел 19, p. 48 и 51.
39. *Pravo i politika javnih nabavki EU*. Sarajevo: *EUPPP*, 2006, p. 285.
40. Давитковски, Б. *За*... Скопје, 2007.
41. Blažević, Z.; Čvrlje, M.; Horvat, G.; Matešić, G.; Mužina, A.; Perdić, A. *Javna nabava*, p. 64.

42. Давитковски, Б.; Павловска-Данева, А. *Управни договори*. Скопје, 2009, p. 167.
43. *Direktive Evropske Unije o javnim nabavkama, EU*. Sarajevo: *EUPPP*, 2006, p. 26.
44. Dolinšek, F. A. *Okvirni sporazumi v javnem naročanju*. Ljubljana, 2008, p. 9.
45. Dolinšek, F. A. *Okvirni sporazumi v javnem naročanju*. Ljubljana, 2008, p. 94-95.
46. *Pravo i politika javnih nabavki EU*. Sarajevo: *EUPPP*, 2006, p. 259.
47. Гелевски, С.; Гризо, Н.; Давитковски, Б. *Управно право*. Скопје, 1993, p. 405.
48. Matešić, G. *Ogledi, pravni izvori, primjeri*. Zagreb, 2005, p. 153.
49. *Evropski sud pravde o javnim nabavkama*. Izvod iz prakse. Sarajevo: *EUPPP*, 2006, p. 102.
50. *The Law of Public and Utilities Procurement*. London: *Sue Arrowsmith*, 1996, p. 65.
51. *Pravo i politika javnih nabavki EU*. Sarajevo: *EUPPP*, 2006, p. 165.
52. Давитковски, Б.; Павловска-Данева, А. *Управни договори*. Скопје, 2009, p. 129.
53. Давитковски, Б. *За*... Скопје, 2007, p. 62.
54. *Pravo i politika javnih nabavki EU*. Sarajevo: *EUPPP*, 2006.
55. *Pravo i politika javnih nabavki EU*. Sarajevo: *EUPPP*, 2006, p. 305.
56. *Pravo i politika javnih nabavki EU*. Sarajevo: *EUPPP*, 2006, p. 300.
57. Давитковски, Б. *За*... Скопје, 2007, p. 63.
58. Zuccolotto, Steafania. *Public procurement in Europe*. Public Procurement Network Roma: *Instituto Pologrаfico e Zecca dell Stato*, 2005, p. 96.