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„CORRUPTION IN PUBLIC PROCUREMENT“

ABSTRACT

The aim of this paper is analysis of corruption in public procurement, the reasons for its occurrence, possible risks, preventive measures and foundation of penalty system for eliminations of this harmful phenomenon. The author will first analyze the meaning and the need for creation and sustainability of a solid public procurement system. In order to maintain a stable, competitive public procurement and socio-economic system in general, it is necessary to eradicate corruption with all of its risk factors throughout the procurement process phases. Corruption in public procurement indicates any unlawful act performed against legally enforced public procurement procedure by presiding or non-fulfillment for personal gain which leads to significant State budget shortfalls. In-depth analysis of the causes and forms of corruption in public procurement leads to the author's conclusion that it is necessary to be enforced preventive corruption measures and establishment of sanctions system that will repressively affect perpetrators of incriminating actions by which will be reached the objectives in the scope of general and special prevention.

Keywords: public procurement, corruption, principle of public procurement, criminal act, regulatory framework

Introduction

Public procurement comprises of government purchasing of goods and services for State activities in providing external resources by commercial vendors, i.e. economic operators. Contracting authorities exercise their statutory powers through purchases of goods, implementation of services or execution of work for which proper procedure is provided with laws and bylaws that constitute the legal framework of public procurement system governance.

Public procurement system is a crucial pillar of strategic governance and services delivery for governments. Due to the sheer volume of spending it represents, well governed public procurement can and must play a major role in fostering public sector efficiency and establishing citizen' trust. Well designed public procurement system contribute as well in achieving pressing policy goals such as environmental protection, innovation, job creation and development of small and medium enterprises.

The impact of the public procurement system on the economy is vital. According to research conducted by the Organization for Economic Co-operation and Development (OECD), the procurement of contracting authorities makes up on average 13% of GDP.¹ The value of public procurement is attractive for economic operators that make tough competition for acquiring contracts. Public procurement process is activity conducted by government due to the size of financial flows which includes economic operators susceptible to fraud and corruption. The integrity in public procurement is crucial for maintaining citizen's trust in the government institution.

Corruption is harmful social phenomenon that violates moral and legal norms, fundamental human rights and values, at the same time devaluating economical, psychological, sociological, political and legal processes. In a broader sense, public finances corruption can be interpreted as use of public power by public officials for private gain. More specifically, corruption can be defined as an act of inadmissible exchange between public officials and others in order to be achieved personal interests. One of the most important consequences of corruption in public finance is lack of trust in the public institutions which results in negative impact of the economic development of the country. Corruption is a systemic weakness that can be controlled and reduced by application of strict and preventive measures through quality education programs on moral conduct, ethical values and civic norms. Success in the elimination of corruption is in direct correlation with the success of law enforcement and the effectiveness of the judicial processes. However, the role of the preventive measures in elimination of the corruption through public tutorials, ethical codes of conduct, education and acknowledgement of corruptive risks in all aspects of society, should not be overlooked.

Having in consideration the aforementioned, subject of analysis in this paper would be corruption in public procurement process, causes of corruption occurrence, phases and forms in which it appears as well as the measures of prevention and repression that are applied in the institutions toward its elimination and marginalization. There is no doubt that corruption is harmful social phenomenon which leads to distortion of the entire socio-economic system. Therefore, eliminating the corruption in public procurement system, as a main tool in creating strategic governance policies should be a fundamental objective of every government towards maintaining the stability of the structural system as well as citizen' trust. However,

¹ www.oecd.org/gov/ethics/public-procurement.htm

corruption in public procurement is deeply rotten in all the stages of the process which makes it almost impossible to be suppressed and completely eliminated. Unquestionably, respecting the core principles laid down in the public procurement process is fundamental postulate for the effective functioning of the system. Core principles are the foundation on which the entire institutional system is build. Nevertheless, principles alone are not sufficient in order to eradicate this social phenomenon, especially having in consideration the importance of public procurement system and the immense interest of the economic operators towards it. Therefore, overall strategy of fighting corruption at all levels in the public procurement system takes a lot more than implying preventive measures, it requires also additional measures such as: establishment of a sanction system for incriminating corruptive actions by creating efficient regulatory and institutional system as well as system of moral values as base for elimination of this harmful phenomenon that has destructive implication on all levels of socio economic life representing an obstacle in the process of integration of the developing countries towards international community. Co-operation between the various national enforcement agencies with jurisdiction over corruption in public procurement is paramount, in order to achieve a coherent overall strategy and ensure its full implementation. The way institutional public procurement system fights against this harmful phenomenon will be the core of this paper sheet.

1. PUBLIC PROCUREMENT SYSTEM

Public Procurement system is a crucial pillar of strategic governance and services delivery for governments. Due to the sheer volume of spending it represents, well governed public procurement can and must play a major role in fostering public sector efficiency and establishing citizens' trust. Well-designed public procurement system additionally contributes in achieving pressing policy goals such as environmental protection, innovation, job creation and development of small and medium enterprises.²

Having in consideration the importance of the public procurement in terms of socio-economic prosperity on a national level, the Organization for Economic Co-operation and Development (OECD) has established the basic principles for improving the public procurement integrity. These principles ensure strategic use of public procurement. They provide reference for modernizing procurement systems and can be applied across all levels of government and state owned enterprises. They address the entire procurement cycle in all of its phases. Basic principles established by OECD are:

- Support the proper allocation of public resources by using public procurement as a strategic tool;
- Yields returns through greater efficiency in public spending, a 1% saving represents 43 billion EUR per year in OECD;
- Mitigates risks such as those of inefficiency and corruption often prevalent in major infrastructure and other complex procurement.³

² Directorate for Public Governance and Territorial Development, OECD Recommendation of the council on public procurement, p.3

³ www.oecd.org/gov/ethics/public-procurement.htm

Despite its economic significance, public procurement is often handled as an administrative, compliance-oriented process rather than a strategic function of government. The network of leading practitioners in public procurement process provides a global view of leading practice through knowledge sharing on effective approaches to strengthen public procurement system and transforming procurement into a strategic function. According to the review of progress made since 2008 shows that OECD countries lag behind in the following areas:

- **LACK OF PROFESSIONALISM** remains the greatest weakness in many countries. Procurement is not recognized as a specific profession in a third of OECD countries;
- **PROCUREMENT IS A CYCLE** from the design of the project throughout the tender until contract management. Only half of OECD countries indicated that their recent procurement reforms have addressed the whole public procurement cycle;
- **MONITORING** of procurement system is the exception to the rule. Few countries monitor the performance of procurement systems and processes based on data and benchmarks;
- **RISKS AND OPPORTUNITY COSTS** are rarely assessed when using procurement to support socio-economic and environmental objectives. In half of OECD countries there is no prior assessment to verify that public procurement is an effective tool to achieve these objectives;
- **ACCESS** to international procurement markets is still a challenge. Even in an integrated market such as EU, less than 4% of the value of contracts is awarded to firms, from another member state.⁴

Measuring performance is the first step in understanding the strength and weaknesses of any system and takes corrective actions. In order to help the implementation of evidence based procurement policies and support required reforms, OECD develops indicators to measure the performance of public procurement systems.⁵

Indicators established by OECD:

1. Efficiency of procurement process

Efficiency in procurement can be measured in terms of transaction costs and time of procurement procedures.

2. Openness and transparency of the procurement process

Openness is understood as the fair and equal treatment of participants in the procurement process. It includes public disclosure of procurement rules, publication of procurement opportunities; publication of procurement process results, contract modification and justifications for the use of procurement methods other than open tendering.

3. Professionalism of the procurement workforce

If the procurement workforce is not equipped to handle the increasing complexity of procurement, officials will not be able to maximize value for money and implement

⁴ www.oecd.org/gov/ethics/procurement-knowledge-sharing.htm

⁵ www.oecd.org/gov/ethics/procurement-key-performance-indicators.htm

the goals of national procurement strategies. Capacities and training of the workforce are indicators for the performance of a procurement system.

4. Contract management and supplier performance

Contract management and supplier performance can be measured in terms of delivery management, relationship management and contract administration.⁶

2. CORUPTION IN PUBLIC PROCUREMENT

Corruption is a harmful social phenomenon which undermines morality and legal norms and undermines the rule of law, at the same time it is economic, psychological, sociological and legal phenomenon. In a broader sense, corruption is any form of abuse of public authority for private gain. More specifically, it can be defined as an act of illicit exchange between a public official and another person, committed for the purpose of acquiring an own advantage. One of the major consequences of corruption is a lack of public trust in public administrative bodies, and this in turn stunts economic growth. Thus, not only corruption, but the suspicion of corruption, or the perception of corruption, undermines the credibility of any government. Corruption is a systemic weakness that can be controlled and reduced by application of strict and preventive measures through quality education programs on moral conduct, ethical values and civic norms. Success in the elimination of corruption is in direct correlation with the success of law enforcement and the effectiveness of the judicial processes. However, the role of the preventive measures in elimination of the corruption through public tutorials, ethical codes of conduct, education and acknowledgement of corruptive risks in all aspects of society, should not be overlooked.

The impact of the public procurement system on the economy is vital. According to research conducted by the Organization for Economic Co-operation and Development (OECD), the procurement of contracting authorities makes up on average 13% of GDP.⁷ The value of public procurement is attractive for economic operators that make tough competition for acquiring contracts. Public procurement process is activity conducted by government due to the size of financial flows which includes economic operators is susceptible to fraud and corruption. The integrity in public procurement is crucial for maintaining citizen's trust in the government institution.

Hereby, Organization for Economic Co-operation and Development (OECD) undertake measures aimed at establishing the risks at all levels of public procurement process as well as measures against elimination of this harmful phenomenon that leads to distortion of economic system in general.

There are two main forms of corruption in public procurement:

- Negotiate a contract with economic operators selected in advance due to the exercise of illegal advantage and

⁶ www.oecd.org/gov/ethics/procurement-key-performance-indicators.htm

⁷ www.oecd.org/gov/ethics/public-procurement.htm

-Signing cartel agreements that clearly have a detrimental effect on public procurement by distorting competition and rational spending of public funds.⁸

2.1 Risk areas and possible measures of preventing corruption in public procurement

The Organization for Economic Co-operation and Development (OECD), in the report "Integrity in Public Procurement from A to Z" determines the risks of corruption in all of the public procurement stages, from invitation to tender to execution of the contract and payment. OECD through profound analysis has developed tools enabling the integrity part of the procurement process. These tools help OECD countries and others as well to apply the basic public procurement principles on a daily base. The information contained in this tool enables officials working in the field of public procurement to develop guidelines and procedures in order to enhance the integrity, transparency and accountability in the public procurement system, including tools for ensuring the integrity, efficiency and effectiveness of procedures public contracts awarding.⁹

The preparatory phase of public procurement is a phase which determines the need for procurement, assessment of the value of the procurement and provision of funds and selection procedure. The most important risks of corruption in the preparatory phase are:

- Determining the need, assessing the value and security of assets;
- Unnecessary investment that has no value to society;
- Overpricing of the required quantities;
- Non-compliance with the requirements of public procurement to estimated values and sharing contract with the intention of avoiding the application of the prescribed procedure for public contract awarding or negotiating a contract for just one part, then canceling the rest of the agreement and negotiating a contract without implementing proper procedure.¹⁰

In order to prevent or minimize the risks of corruption in the preparatory stage of the procurement process it is possible for certain measures to be applied for increasing transparency and accountability in the preparatory phase. Such measures undertaken in this phase are:

- Preparation and publication of annual procurement plan that contains all public procurement intended for that year;

⁸ P.H.D Micovska M.A. M.A Argirovski, A., M.A Gligorijevska, R. Papesh, G., Karanfilovski, K., Madzhevskaa, A.,S., M.A. Gjorgieva, K., Blazevski, A.: Handbook for Public Procurement, USAID Project for microenterprises approach to public procurement, Skopje, 2013, p.172;

⁹ P.H.D Micovska M.A. M.A Argirovski, A., M.A Gligorijevska, R. Papesh, G., Karanfilovski, K., Madzhevskaa, A.,S., M.A. Gjorgieva, K., Blazevski, A.: Handbook for Public Procurement, USAID Project for microenterprises approach to public procurement, Skopje, 2013, p.173

¹⁰ P.H.D Micovska M.A. M.A Argirovski, A., M.A Gligorijevska, R. Papesh, G., Karanfilovski, K., Madzhevskaa, A.,S., M.A. Gjorgieva, K., Blazevski, A.: Handbook for Public Procurement, USAID Project for microenterprises approach to public procurement, Skopje, 2013, p.173

- Contracting authorities must have a planned budget required for the implementation of public procurement at the time of commencement of proceedings.¹¹

Submission of offers phase during the procurement process includes advertisement or invitation for public procurement, preparation and submission of bid, evaluation and contract award. The most significant risks that should be recognized at this stage in order to prevent corruption are following:

1. Upon the announcement of the public procurement and tender documentation;
 - Collection of information regarding the advertisement or documentation violating the principles of equal treatment;
 - Publication of information whose publication is not allowed;
 - Defining the technical specifications of the subject agreement in favor of a product or economic operator.
2. Upon bid submission:
 - Negotiating cartel agreement in order to influence on the outcome of the proceedings

However, contracting authorities can recognize cartel agreement on the grounds of following formal and material parameters:

- Formal: Same tender mistakes by different bidders, same bidding layout that indicates correlation between the bidders during the proceedings;
 - Material: Huge price discrepancies between the lowest and rest of the bids, when unknown (new) bidders submit application with extremely high price while the rest of the bidders adjust their bids towards it.
3. During tender evaluation and contract awarding following risks can occur:
 - Conflict of interest is not under supervision;
 - Exclusion of bidders and bids that meet the requirements of the procedure;
 - Evaluation of a tender that should be excluded;
 - Negotiating an agreement with an extremely low price, followed by additional purchases from the same contractor without proceedings.

In order to diminish the risks factors in this phase, it is vital to be applied measures for increasing transparency and accountability in the implementation phase of the procedure such as:

- Preparation of regular reports in each phase of the proceedings
- Establish regulations on reporting irregularities ;
- Separating procedure functions for public contract;
- In event of contract authority to be in contact with any bidder, other bidders must be notified in written form;
- Announcement of the proceeding results and

¹¹ P.H.D Micovska M.A. M.A Argirovski, A., M.A Gligorijevska, R. Papesh, G., Karanfilovski, K., Madzhevskaa, A.,S., M.A. Gjorgieva, K., Blazevski, A.; Handbook for Public Procurement, USAID Project for microenterprises approach to public procurement, Skopje, 2013, p.174

- Announcement of contract award notice.¹²

Third phase of the procurement process comprises of contract management and payment procedure. At this phase, risks are significantly increasing, such as:

- Failure in provision conduct, particularly in terms of quality, price and deadlines;
- Non-transparent choice or lack of accountability of subcontractors;
- Insufficient separation of financial activities related to payment;
- Amendment of the essential terms of the agreement contrary to law (cost, content, completion date etc.);
- Change of subcontractor;
- False or double invoicing or false accounting.

Preventive measures taken at this phase due to increasing transparency and accountability in order to reduce the risks of corruption:

- Publish / correction notice;
- Control of advertisements;
- Publication of the contracts;
- Separating the functions, between signing and contract execution.

3. REGULATORY PUBLIC PROCUREMENT FRAMEWORK IN REPUBLIC OF MACEDONIA

Public Procurement system in Republic of Macedonia was established in 1998 with passing of the first Law on Public Procurement. Then, for the first time in Republic of Macedonia was established a system for regulation on the manner and procedure of public procurement for entities and individuals from the funds of the State budget, national and municipal budget funds as well as agencies, establishments, public institutions and other bodies and organizations established by the State.¹³ Adoption of this law was first attempt to be determined the concept of “procurement” by defining it as: *„Public procurement is purchase, leasing, rental, acquiring of goods, works and services.“*¹⁴ Thus, was established institutional foundation of public procurement development based on the principles of transparency and equality of bidders and budget funds users.

Regarding the fact that public procurement is a multidisciplinary field which overlaps with certain areas it is possible to be influenced by additional material regulations. In this

¹² P.H.D Micovska M.A. M.A Argirovski, A., M.A Gligorijevska, R. Papesh, G., Karanfilovski, K., Madzhevskaa, A.,S., M.A. Gjorgieva, K., Blazeovski, A.; Handbook for Public Procurement, USAID Project for microenterprises approach to public procurement, Skopje, 2013, p.175

¹³ Law on public procurement (Official Gazzete no.26/98, 12.06.1998), article 1

¹⁴ Law on public procurement (Official Gazzete no.26/98, 12.06.1998), article 5, p.1

context, should be mentioned: regulations governing obligations, administrative law regulations, criminal law procedures and regulations, regulations on the protection of competition and fight against corruption. In a broader sense, the regulatory framework of the public procurement system consist of regulations governing certain specific purchases, such as establishing regulations that contracting authorities must obey when implementing procedures for awarding contraction contracts.

3.1 Law on Public Procurement

The foundation of modern public procurement system in the country was established in 2007 with the adoption of the new Law on Public Procurement enforced on 1 January 2008. This law underwent many changes in order to compliances the national legislation with the Direction of the European Union. Hence, we can safely conclude that the procurement system is quite dynamic and subject to numerous changes. Efficient and effective public procurement system is the backbone of a well-functioning government, ensuring the provision of quality services to the public. On the other hand, public procurement matter is particularly sensitive bearing in mind the fact that it regulates the manner and procedure for awarding public service contracts, respectively the manner of use and disposal of the budget for which economic operators are mostly interested in.

Namely, this Law regulates the procedures for awarding public contracts, establishment and competence of the Public Procurement Bureau, authorization of the Public Procurement Council, establishment and competence of the State Commission regarding public procurement and legal procedures for public contracts awards, as well as concession and public private partnership.¹⁵ In order to be established a competitive and non-discriminatory public procurement system, in this law basic principles which are the pillar of institutional public procurement system are defined, such as:

- competition among economic operators,
- equal treatment and non-discrimination of economic operators,
- transparency and integrity in public procurement awarding, and
- rational and efficient use of funds in the public procurement awarding process¹⁶.

These principles aim at ensurin that all participants will fully comply with laws and obligations considering the procedures for awarding public contracts, as well as effective control of the implemented procedures. These principles have been introduced as a result of the need for harmonization with the European Union aimed at establishing a transparent system of public procurement, therefore reducin the risk factors for corruption. In this context are United Nation recommendations set out in the United Nation Convention against Corruption, adopted by the General Assembly of the United Nations on October 31, 2003 year under Resolution No.APEC/58/4, ratified by Parliament of the Republic of Macedonia in 2007.¹⁷ The Convention states the following:

¹⁵ Law on public procurement (Official Gazzete no.136/2007, 130/2008, 97/2010, 53/2011, 185/2011, 15/2013, 148/2013, 160/2013, 28/2014, 43/2014, 130/2014, 180/2014, 78/2015, 192/2015), article 1

¹⁶ Law on public procurement (Official Gazzete no.136/2007, 130/2008, 97/2010, 53/2011, 185/2011, 15/2013, 148/2013, 160/2013, 28/2014, 43/2014, 130/2014, 180/2014, 78/2015, 192/2015), article 2

¹⁷ Law on Ratification of the UN Convention against Corruption (Official Gazzete no.37/07, 26.03.2007)

„1. Each State undertakes, in accordance with the fundamental principles of its legal system, necessary measures for the implementation of appropriate public procurement systems based on transparency, competition and objective criteria for decision-making, effective for the prevention of corruption. These systems, the application of which can be taken into account as a baseline, provide in particular:

- a.) Public distribution of information on the public procurement procedures and contracts as well as information on tender invitation and relevant information on the public procurement awarding, so that potential bidders have sufficient time to prepare and submit tenders;
- b.) Determination of the conditions for participation in advance, criteria for selection and participation and rules on complains of tenders and their publication;
- c.) The use of objective and predetermined criteria used for decision-making in public procurement in order to facilitate the later control on the proper application of the rules and proceedings;
- d) An effective system of internal audit, as well as an effective system of appeal, that guarantees the right to legal remedies in case of violation of the rules or procedures established pursuant to this paragraph;
- e.) If necessary, measures to regulate matters concerning officials responsible for procurement process, such as requiring a statement of interest for some public procurement, procedures for selecting aforementioned officials and requirements regarding the training.

2. Each State Party undertakes, in accordance with the fundamental principles of the legal system, appropriate measures for promoting transparency and accountability regarding the execution of public finances. These measures include:

- a.) Procedures for national budget adoption;
- b.) Timely information on expenditures and revenues;
- c.) System of standards for compliance and audit and second degree control;
- d) Effective risk management systems and internal control; and
- e.) When necessary, measures for correction in case of not compliance with the requirements of this paragraph.

3. Each State Party undertakes, in accordance with the fundamental principles of its domestic law, civil and administrative measures necessary to preserve the integrity of accounting books, financial status or other documents regarding the expenditure and public revenue to prevent falsification.¹⁸

Taking into account the recommendations of the United Nations for establishing preventive measures to fight corruption in public finance as well as adaptation of principles for preventing corruption in public procurement by the OECD, the Macedonian lawmakers established the 4 basic principles of public procurement system.

3.1.1 Competition between economic operators

Procedures for awarding public contracts should be conceptualized and implemented in a manner that will foster competition between economic operators. "Economic operator" refers to any person or legal subject or group of such people that offers goods, services or

¹⁸ Law on Ratification of the UN Convention against Corruption (Official Gazzete no.37/07, 26.03.2007), article 9

works on the market¹⁹. Namely, economic operators should be able to determine whether the subject of the contract is in their interest and fulfill the requirements for determining the ability for taking part in the proceedings. Creating the conditions for fair competition will create enormous benefits for both contracting authorities as receiving competitive, accepted bids could result in saving and rational use of public funds. Savings in public funds, on the other hand, leave room for their distribution of money in other important sectors. The principle of competition between economic operators should be respected not only in the course of the procedure for awarding a public procurement, but also in the preparatory phase, specifically in the preparation of tender documentation and technical specifications. Contrary to this, non-compliance with this principle leads towards restriction or disabling of proper competition, which will negatively affect not only on economic operators but on contracting authorities as well.

3.1.2 Equal treatment and non-discrimination of economic operators

Economic operators as participants in the procedure for public contract awarding must be treated equally in all stages of the procedure, discrimination on any ground is strictly prohibited. The principle on equal treatment of economic operators refers to same treatment of all people in the same situation, as well as equal access to information in public procurement process that should be available to all potential economic operators and general public.

3.1.3. Transparency and integrity in contracts procurement awarding

The principle of transparency is an obligation for contracting authorities to provide economic operators with all information regarding procedures for the award of public contracts, the conditions that must be met in order to participate in the proceedings, the criterion based on which contract is awarded, decisions taken in the course of proceedings, notice of contract awarded etc. Therefore, in order principle of transparency to be executed, contracting authorities are obliged to inform economic operators at all stages of the public procurement process, particularly at the beginning of the procedure for awarding the contract, the decisions made and the outcome of the procedures for awarding public procurement contracts.

Transparency, as one of the principles upon which the public procurement system is based, enables achievement of price competitiveness. With the increasing number of interested economic operators for concluding a public contract, the competition is increasing as well. Increasing competition will lead to the submission of a large number of admissible tenders to the contracting authority, which on the other hand will lead to achieving savings and procurement in accordance with the principle of best value for money. This principle is closely linked to the principle of integrity and accountability of procedures for public contracts awarding due to greater transparency in the procedures which strengthen the integrity of the process and accountability of the officials involved in conducting the same.

¹⁹ Law on public procurement (Official Gazzete no.136/2007, 130/2008, 97/2010, 53/2011, 185/2011, 15/2013, 148/2013, 160/2013, 28/2014, 43/2014, 130/2014, 180/2014, 78/2015, 192/2015), article 3, p.1

3.1.4. Rational and efficient use of funds in awarding public contracts

The principle of efficient use of funds, also known as the principle of best value for money spent, or "best value for money" refers to the choice between two or more tenders that must be based on a comparison of costs in terms of the result. Thus, the selected bid must be:

- Offer (bid) that reflects the same result, but with lower relevant costs;
- Offer (bid) although with bigger relevant costs, reflects better results (under condition that given performance will justify the increased costs).

The procedure for the public contracts awarding should be directed towards achieving the best value for money spent on procurement of goods, services and works. The purchase price itself is not an adequate indicator of the total relevant costs of procurement. Contracting authorities in the procurement process should take into account the exchange value of money in terms of the relevant costs over the entire procedure. Lowest price offer does not mean at the same time the highest value for money. Accordingly, in those cases where it is possible and practicable, contracting authorities should take into account other factors besides price. This principle means that should be taken into account the costs of the procedure, in other words there shouldn't be disproportion to the value of the contract subject to specific procedure.

To sum up, principles are mutually connected and complement one another. Non-compliance with one principle has implication on other principles as well. When principle of transparency is valued, more economic operators are aware of the opportunities offered, thus competition automatically increases and opportunities offered are improved, which automatically increases competition and the possibility of rational and efficient use of public means. Respecting fundamental principles of public procurement system signify application of preventive measure in the fight against corruption. Provided that principles are obeyed throughout all of the stages of the process, corruption would be reduced or eliminated entirely.

4. INCRIMINATION OF UNLAWFUL ACTIONS IN PUBLIC PROCUREMENT PROCESS

According to the aforementioned, it is clear that the public procurement role and significance for proper economic development and competition is enormous. The importance of a well-balanced public procurement system can be determined through concrete figures, or its volume as part of a country GDP. Thus, in 2012 in the Republic of Macedonia were awarded public contracts totaling 56 billion denars, which represents 12% of GDP and 35% of the national budget, whereas in 2011, the value of public procurement accounted for 13% of GDP and 37% of the national budget.²⁰

Public procurement is an area that is most susceptible to corruption. Financial interests and large number of interested participants in procurement procedures make procurement risky area for the emergence and development of corruption due to the fact that in the core of the corruption is abuse of public office for personal gain. Therefore, in addition to developing preventive measures for corruption prevention, establishing a system of sanctions in the field

²⁰ <http://bjn.gov.mk/bjn-portal/wordpress/?docs=annual-reports>

of general and special prevention is mandatory. Incrimination of abuse in the public procurement process in Macedonian law is an imperative, executed through penal system introduced by the amendments to the Public Procurement Law as *lex specialis* and amendments to the Criminal Code.

Namely, with the first amendments to the Law on public procurement, published in the Official Gazette of RM, under number 148/13, published on 29.10.2013, were determined several crimes regarding public procurement procedures as *lex specialis* in this area.²¹ Subsequently, more amendments to the Law on Public Procurement were added complementing the range of crimes in the area of public procurement. Such amendments are made to strengthen the control and narrow the space for subjective actions of contracting authorities, i.e. for sanctioning abuses done in the key segments which are most frequent. Established penal system is incentives to the business community towards gaining and maintaining confidence regarding safety of the public procurement system that contributes enormously in increasing the competition in public procurement procedures. Imposing penalty provisions on the Law on Public Procurement creates new and improved tools for fighting corruption, firmly narrowing the space for manipulation and the attempts for abuse of national interest and clients' funds or illegally providing profits. Thus, public interest is protected by determining the mandatory legislation which sanction unlawful actions of public officials as well as other authorized people in the process of awarding public procurement.

Public procurement principles are objectives for protection in any intended criminal provisions offences, i.e. protection of public procurement competition among economic operators, equal treatment and non-discrimination of economic operators, transparency and integrity in the awarding of public contracts and rational and efficient use of funds in the awarding of public contracts. Through all of the aforementioned criminal acts are incriminated illegal actions of execution or omission of the presiding by authorized entities of the contracting authorities or other legal professionals in the process of awarding public procurement. This leads to acquiring of unlawful material benefit or subject to damage in the public procurement system. The main purpose of the introduced penal system is preventing corruption and reducing the unlawful actions by public officials involved in the procurement process as well as respecting the basic public procurement principles in order to be maintained a stable and competitive market. Introduction of new criminal offenses followed by frequent amendments in the penal provisions of the Law on Public Procurement is result of continuous improvement and modernization of the public procurement process, which on the other hand, opens space for the emergence of additional corruption risks. Requirements for implementation of such strict penal system in the field of public procurement only confirms the importance of the existence of a stable and efficient public procurement system, which on the other hand acknowledges the absence of the system of moral standards.

Despite the penalty system which was introduced with the amendments to the Public Procurement Act as *lex specialis*, in the Criminal Code were introduced significant innovations in the area of abuses against official position in compliance with Article 20 of the Convention against Corruption of the United Nations and the Criminal Law Convention against corruption of the Council of Europe (1999) and the Civil Convention against corruption of the Council of Europe (1999). Hence, Article 353, paragraph 5 of the Criminal Code has incriminated any act committed by an official or authorized person in foreign legal entity that has a branch or performs business activities on the territory of Republic of Macedonia as well as person that performs public activities using his official position or authority by exceeding the limits of his official authority, moreover, abuse of power of his

²¹ Law amending of Law on public procurement (Official Gazzete no.148/13 from 29.10.2013)

official duty in the performance of public procurement if acquire for himself or another person unlawful gains, causing harm to other person or committing an act of abuse of funds from the State Budget of RM, public funds or other state assets.²² The perpetrators of such crimes will be punished with imprisonment of at least five years. The main purpose of implementing such legal acts is to prevent corruption which in Republic of Macedonia is manifested in very specific forms. Due to profound analysis of this Article, can be firmly concluded that sanctions would be enforced against officials involved in public procurement process, by acquiring personal material gain performing unlawful actions, or impaired other person and will be punished with imprisonment of at least five (5) years. Other participants in the process would not be penalized. Macedonian lawmakers through the system of severe penalties in the field of public procurement, has determined a special and general prevention plan in a way that the most severe legal penalties will be taken against public officials involved in the public procurement process by performing illegal actions gaining material profit and causing damage to the state budget or other economic operators.

Unlawful actions in the procurement process, as well are incriminated with article 275-c of the Penal Code. Unlike Article 353, paragraph 5 of the Criminal Code that incriminates unlawful activities where perpetrators are exclusively officials who perform public duty, legally authorized to protect state interests, perpetrator of the offense under Article 275 of the Criminal Code is any participant in the public procurement process. Thus, there is an impact on the behavior of the other participants whose activities may affect public officials to perform corruption. However, measures are not to be enforced on every action performed. Namely, in Article 275-c of the Criminal Code is stated that a person who knowingly violates the rules of public tender procedure, awarding a public contract, submission of false documentation, making arrangements with other participants to circumvent the procedure for awarding procurement contracts with non-execution of contractual obligations and with the intention of intentionally violation of the rules of the procedure, acquiring personal gain or causing damage, will be punished with a fine or imprisonment up to three years.²³ Not only the performance of this crime is punishable but also the attempt to commit the same will be sanctioned according to law regulations. In regard to this article, any unlawful action taken by the other participants in the public procurement procedure such as economic operators, not complying with legal procurement procedures, acquiring property as personal gain or causing damage to another, will be incriminated. However, not every unlawful action undertaken by participants in a procurement procedure constitutes a criminal offense, only in case of being performed intentionally or premeditated by perpetrator. Such a regulation on the other hand, stimulates manipulation and misuse of the system.

Conclusion

To sum up, public procurement comprises of government purchasing of goods and services for State activities in order providing external resources by commercial vendors i.e. economic operators. To conclude, it can be stated that public procurement system is a crucial pillar of strategic governance and services delivery for governments. However, despite its

²² Види: Кривичен законик (Службен весник на РМ бр.80/99, бр.19/2004, 81/2005, 60/2006, 73/2006, 114/2009, 51/2011, 185/2011, 142/2012, 55/2013, 27/2014, 28/2014, 199/2014, 226/2015), член 353 став 5

²³ Criminal code (Official Gazette of RM бр.80/99, бр.19/2004, 81/2005, 60/2006, 73/2006, 114/2009, 51/2011, 185/2011, 142/2012, 55/2013, 27/2014, 28/2014, 199/2014, 226/2015; article 275-v

economic significance, public procurement is often handled as an administrative, compliance-oriented process rather than a strategic function of government. Due to the sheer volume of spending it represents, well governed public procurement can and must play a major role in fostering public sector efficiency and establishing citizen' trust. Well designed public procurement system contributes in achieving pressing policy goals. Having in consideration the importance of public procurement for the overall socio-economic prosperity of a country, especially in developing countries such as Republic of Macedonia, it is of utmost importance to be determined basic principles of the institutional public procurement system. These principles provide strategic use of public procurement enabling modernization of public procurement systems. Respecting fundamental principles by all of the participants in the public procurement process, particularly by officials is the first step in the fight against corruption in public procurement. Corruption as a negative social phenomenon is any abuse of public authority for the exercise of private interests. Thus, public procurement value is particularly interesting for economic operators, which results in tough competition in contract awarding. Due to the size of financial flows involving economic operators, corruption in public procurement is imminent.

The contribution of this paper lies in theoretic underpinnings of public procurement system, it is concluded that due to the significance of the public procurement system and the harmfulness of corruption, the international community continually undertake measures for determination of possible risks, performance of systems based on predetermined parameters as well as importance for establishment of preventive measures and introduction of sanctions system in the fight against corruption. Obeying the fundamental principles of public procurement system is the first tool and preventive measure in the fight against corruption. However, implementation of preventive measures regarding corruption elimination is insufficient; it is a prerogative to be established a system of sanction in the field of general and special prevention in the fight against this harmful phenomenon.

Republic of Macedonia in the process of integration into the international community, respecting the recommendations of the aforementioned has implemented penalty system for fighting corruption in public procurement process established by the Public Procurement Law as *lex specialis* and the Criminal Code. Penalty system of the Republic of Macedonia in the area of public procurement is particularly strict, enforcing severe prison sentences for all participants in the procurement process that knowingly violate the rules of the procedure. This penalty system was introduced in order to influence the awareness of public officials involved in the procurement process for understanding the importance of the stability of the system for overall development and prosperity of the entire socio-economic system. It appears that strict penalty system is a vital tool in the fight against corruption if we take into consideration that the system of morality is declining. Therefore, successful implementation of regulatory framework in the fight against corruption depends to great extend of the stability of the entire institutional system and the effective performance of the statutory power institutions.

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