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z online medzinárodnej vedeckej konferencie  
doktorandov a mladých vedeckých  
pracovníkov**

**24. – 25. jún 2021**



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V STREDOEURÓPSKOM PRIESTORE  
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IN CENTRAL EUROPE  
**2021**

**SYMPÓZIÁ, KOLOKVIÁ, KONFERENCIE**

**MÍŤNIKY PRÁVA  
V STREDOEURÓPSKOM PRIESTORE  
2021**

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# CORRUPTION RISK IN IMPLEMENTING URGENT PUBLIC PROCUREMENT DURING COVID -19 PANDEMIA IN R. NORTH MACEDONIA

Aleksandra Rogleva, Natasa Doneva

University "Goce Delcev" – Shtip, Republic of N.Macedonia

**Abstract:** Public procurement as an instrument by which central and local government institutions procure goods, services or works, by their nature are one of the most serious financial interactions in the public sector and are therefore inevitably accompanied by corruption risks. These risks have significantly increased in the implementation of public procurement in a crisis situation caused by the pandemic of Covid – 19, which in the past period has made huge changes in the overall way of social life. Namely, with the emergence of the global health crisis, the need for procurement of goods, services and works for preventing the spread of the disease was urgently imposed. That is why the legal possibility for conducting public procurement by shortened and accelerated procedures was used, but that increase the risk of illegal disposal of state money. This primarily refers to negotiated public procurement procedures without prior publication of a notice, for reasons of extreme urgency, which have emerged as a necessity in the spending of budget funds due to the general lack of some of the most essential goods to deal with the crisis caused by the coronavirus pandemic. In conditions of widespread corruption in public procurement, this situation is an additional problem, because the facilitated and non-transparent procedure in which urgent public procurement is conducted, increases the probability of budget transfers that are contrary to the spirit and goals of the Law on Public Procurement.

**Keywords:** Covid - 19, public procurement, corruption, urgency, crisis, prevention.

## Introduction

Corruption in the public sector is undoubtedly one of the most serious social malformations, because in the long run it undermines the foundations of national economies, leading to serious losses of available economic resources and a significant reduction in the level of legal certainty in the country. This problem is especially pronounced in public procurements, which in modern conditions are often at risk of corruption, due to the continuous flow of budget funds for the purchase of common goods and the dominant presence of human factor in making decisions on the disposal of those funds. Although it is indisputable that the risk of corruption in the public sector is particularly present in public procurement, for some experts it is debatable whether corrupt behavior in the implementation of procedures and public procurement contracts is really the most common form of public corruption. Or the problem should be sought elsewhere? It is indisputable, however, that this is a widespread form of public authority abuse and one of the most harmful forms of corruption where public goods are abused to achieve personal or private interests. According to the latest data, the procurement of goods/services /works by public bodies averages 15 to 25 percent of a country's gross domestic product (GDP), and in some countries even more<sup>1</sup>. Because of this, it is quite expected that there will be attempts to abuse authority by favoring a particular economic operator and to use illegal bargaining as the basis of the corrupt public procurement process. Thus, if not controlled, in the long run the misuse of public finances through illegal public procurement can become a systemic problem and a serious threat to sustainable economic development and continued social progress. Given the above, today the fight against corruption in public procurement is one of the most important priorities in democratically governed societies, and the question of finding mechanisms to reduce the negative effects that it causes, is constantly in the focus of attention.

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<sup>1</sup> Best Practices in the Fight against Corruption, OSCE, Office of the Coordinator for Economic and Environmental Activities, p.103.

In modern conditions, public procurement as one of the most common models of managing state money for the acquisition of goods/services or works, is a particularly current issue that is constantly undergoing changes<sup>2</sup>. This changes aimed at improving the functionality of the system, but also narrowing the space for possible abuses and illegal dispositions with public finances. The Law on Public Procurement<sup>3</sup> regulates all the main aspects of the procurement activities of the governmental and public bodies and provides mechanisms that should enable the realization of the principle of best value for money in the procurement of goods, services and works. According to Article 3 paragraph 1 of the Law, the regulation, development and implementation of the public procurement system, are based on the principles of free movement of goods, freedom of establishment, freedom to provide services, as well as the principles of economy, efficiency, competition between economic operators, transparency, equal treatment of economic operators and proportionality. However, the current practice in public procurement shows that insufficient competition in the procurement of goods/services/works, non-transparency and discriminatory treatment of economic operators, are the most common violations in public procurement<sup>4</sup>, which unequivocally indicates to the risks of injury of the other principles on which the public procurement system in the country is based. Thus, in conditions of low competition, the economical, rational and efficient use of budget funds is almost always in question, and at the same time the risk of corrupt behavior in the overall management of the process, increases. Given that the legal and transparent conduct of tender procedures in the face of widespread corruption in this area, is an issue that is constantly in the focus of public interest, it gained additional weight during the coronavirus pandemic which necessarily imposed the need for implementation of emergency procedures to protect the population from infectious diseases. The actualization of the problem of corruption in public procurement during the pandemic is due to the fact

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<sup>2</sup> The Law on Public Procurement of 2007, published in the "Official Gazette of the Republic of Macedonia" no. 136/2007 had a total of 17 amendments: (Law on Amendments to the Law on Public Procurement published in the "Official Gazette of the Republic of Macedonia" No. 130/2008, Law on Amendments to the Law on Public Procurement published in the "Official Gazette" Gazette of the Republic of Macedonia "No. 97/2010, Law on Amendments to the Law on Public Procurement published in the " Official Gazette of the Republic of Macedonia "No. 53/2011, Law on Amendments to the Law on Public Procurement published in the " Official Gazette of the Republic of Macedonia " Gazette of the Republic of Macedonia "No. 185/2011, Law on Amending the Law on Public Procurement published in the " Official Gazette of the Republic of Macedonia "No. 15/2013, Law on Amending the Law on Public Procurement published in the " Official Gazette of the Republic of Macedonia No. 148/2013, Law on Amendments to the Law on Public Procurement published in the "Official Gazette of the Republic of Macedonia" No. 160/2013, Law on Amendments to the Law on Public Procurement published in o "Official Gazette of the Republic of Macedonia" no. 28/2014, Law on Amending the Law on Public Procurement published in the "Official Gazette of the Republic of Macedonia" no. 43/2014, Law on Amending the Law on Public Procurement published in the "Official Gazette of the Republic of Macedonia" no. 130/2014), Law on Amending the Law on Public Procurement published in the "Official Gazette of the Republic of Macedonia" no. 180/2014, Law on Amending the Law on Public Procurement published in the "Official Gazette of the Republic of Macedonia" no. 78/2015, Law on Amending the Law on Public Procurement published in the "Official Gazette of the Republic of Macedonia" no. 192/2015, Law on Amending the Law on Public Procurement published in the "Official Gazette of the Republic of Macedonia" no. 27/2016, Law on Amendments to the Law on Public Procurement published in the "Official Gazette of the Republic of Macedonia" no. 120/2016, Law amending the Law on Public Procurement published in the "Official Gazette of the Republic of Macedonia" no. 165/2017 and the Law amending the Law on Public Procurement published in the "Official Gazette of the Republic of Macedonia" no. 83/18. In 2019, a completely new Law on Public Procurement was adopted, published in the "Official Gazette of the Republic of Macedonia" no. 24/19. To date, the law has been amended once in 2021 (Law amending the Law on Public Procurement published in the Official Gazette of the Republic of Northern Macedonia, No. 87/21).

<sup>3</sup> Official Gazette of the Republic of Macedonia, no. 24/19, 87/21.

<sup>4</sup> Monitoring of public procurement at the local level: Report no.11, Center for Civil Communications, Skopje, 2018, pp.11-21

that dealing with the situation from its inception until today, among other things, involves making serious financial transactions in the economy in order to mitigate the crisis and reduce the negative implications that it causes in all segments of social life. These transactions, which by nature presuppose a direct outflow of funds from the state budget, are performed through the use of public procurement as the most common legal model for spending state money, in order to achieve mutual social benefit. Namely, in conditions when the danger of spreading the virus became more widespread, state institutions and other bodies with public authorizations began to frequently conduct procurements that were mainly intended for protection and prevention of infection from Covid - 19. Due to the unpredictability of the situation, these public procurements were not previously planned in the annual public procurement plans. And since they had to be implemented immediately, instead of regular procedures, state institutions often used negotiated procedures<sup>5</sup> from reasons of extreme urgency without prior announcement. The implementation of these procedures is regulated by Article 55 paragraph 1 d of the Law on Public Procurement which stipulates that the contracting authority may conduct a negotiated procedure without announcing a public procurement notice (urgent procurements) of goods, services or works, if due to extreme urgency, caused as a result in the event that the contracting authority could not have foreseen, the deadlines for other proceedings may not apply. The circumstances justifying the extreme urgency must in no case be such as to be attributed to the contracting authority. The law, among other things, stipulates that for procurements conducted through the negotiated procedure without publishing an announcement, the opinion of the Public Procurement Bureau should be sought, as a kind of control mechanism that should prevent their abuse<sup>6</sup>. However, there is an exception to the obligation for a previously obtained opinion from the Bureau, and that is when the safety, life and the health of people are directly endangered (the need of urgency here is more that obvious). Given that in conditions of health crisis all these assumptions were met, the implementation of emergency procedures took place without any prior control mechanisms, i.e. without obtaining an opinion from the PPB. In this regard, the Public Procurement Bureau also informed all contracting authorities that they can implement urgent procurements without obtaining its opinion. Which means that procurements directly related to the Covid 19 pandemic can be realized without prior request of the opinion of the Public Procurement Bureau (in accordance with Article 55 paragraph (6) of the Law on Public Procurement). This decision was in order to meet the needs as soon as possible without any delay, and the reasons for applying such a procedure should be properly explained in the public procurement act<sup>7</sup>. Given that negotiated procedures without announcing an announcement are free from the various formalities inherent in regular procedures, this way of procuring goods/services/works in conditions of a pandemic only further emphasizes and actualizes the already existing problem of corruption in public procurement.

Regarding the public policies for dealing with the pandemic, it is important to note that the Republic of North Macedonia on March 18, 2020, for the first time declared a state of emergency throughout the country<sup>8</sup>. According to the law, one of the most specific Government's authorities in emergency conditions is the adoption of decrees with legal force that are directly applicable. The only decree with legal force in the field of public procurement was the one that referred to the application

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<sup>5</sup> The negotiated procedure is a procedure that enables the contracting authority to negotiate the terms and conditions with one or more economic operators. There are two types of negotiated procedures - negotiated procedures with the publication of an advertisement/notice and negotiated procedures without the publication of an advertisement/notice. According to the law, both are exceptional procedures and can be used only in cases of fulfillment of the precisely established legal preconditions.

Article 55 paragraph 5 of the Law on Public Procurement.

<sup>6</sup> Article 55 paragraph 5 of the Law on Public Procurement.

<sup>7</sup> Notification on the manner of work of the PPB, available at <https://www.bjn.gov.mk/novosti/izvestuva-e/> [last accessed: 10.04.2021].

<sup>8</sup> Announcement published at the Media Center of the President of the country, available at <https://pretsedatel.mk/medi%0%b0centar/> [last accessed: 10.04.2021].

of the Law on Public Procurement during a state of emergency<sup>9</sup>. The Decree provided that the Law on Public Procurement will be fully applied for the duration of the state of emergency, unless otherwise is provided by the decree itself. As can be seen from the available data on the Electronic Public Procurement System, during the period of the state of emergency, almost all procurements related to protection against the pandemic were conducted in negotiated procedures without announcing an announcement due to reasons of extreme urgency. This was due to the fact that at the very beginning of the announcement of the pandemic, the contracting authorities were completely taken aback by this situation, as no one could have predicted that the virus would spread to such an extent. Therefore, all procurements related to prevention and protection from the infection, were not planned in the annual public procurement plans and the projected budget funds for spending in the current year. However, even after the state of emergency officially ended, the crisis caused by the spread of the corona virus continued with undiminished intensity, so the procurement of means of protection was still frequently carried out as a procedure of extreme urgency. Meanwhile, the Public Procurement Bureau, as the central body responsible for coordination and monitoring of the public procurement system in the Republic of North Macedonia, did not intervene in any way in the overall organization of the public procurement system, except in accordance with the Government recommendations and conclusions for taking measures for prevention of the corona virus, has only adjusted its work to electronic handling of cases and opinions, i.e. serving users electronically<sup>10</sup>.

When it comes to procedures related to Covid 19, from the available data<sup>11</sup> it can be concluded that very often the prices at which the goods, services or works were procured in such procedures are higher than the real market ones, which directly points to the fact that the crisis may be abused for personal gain at the expense of budget funds that ultimately belong to the citizens. On the other hand, it is very important to determine whether in the implementation of public procurement contracts of this type, the short deadlines for product delivery are being obtained. Given that the urgency of procurement is a key factor in time of crises, there is a doubt whether the deadlines are sometimes used only as a modality of discrimination. Because it is very common afterwards, during the realization of the contract with the economic operator, a prolongation of the same deadline is being allowed. Only in 2020 on the basis of urgent procurements related to Covid - 19, state and other bodies with public powers in the Republic of North Macedonia has concluded contracts in a total value of about 499,852,856.00 denars or approximately 8,127,700.00 euros. In the first quarter of 2021, based on negotiated procedures without prior publication of a notice for reasons of extreme urgency, the contracting authorities concluded contracts in the amount of MKD 57,046,607.00 or approximately EUR 927,600.00. This means that the total amount of concluded contracts based on negotiated procedures without prior publication of a notice for reasons of extreme urgency from the beginning of

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<sup>9</sup> Decree with legal force for application of the Law on Public Procurement during the state of emergency, available at <https://www.bjn.gov.mk/novosti/uredba-so-zakonska-sila-jvnite-nabavki-za-vreme-na-vonredna-sostojba/> [last accessed on 20.04.2021].

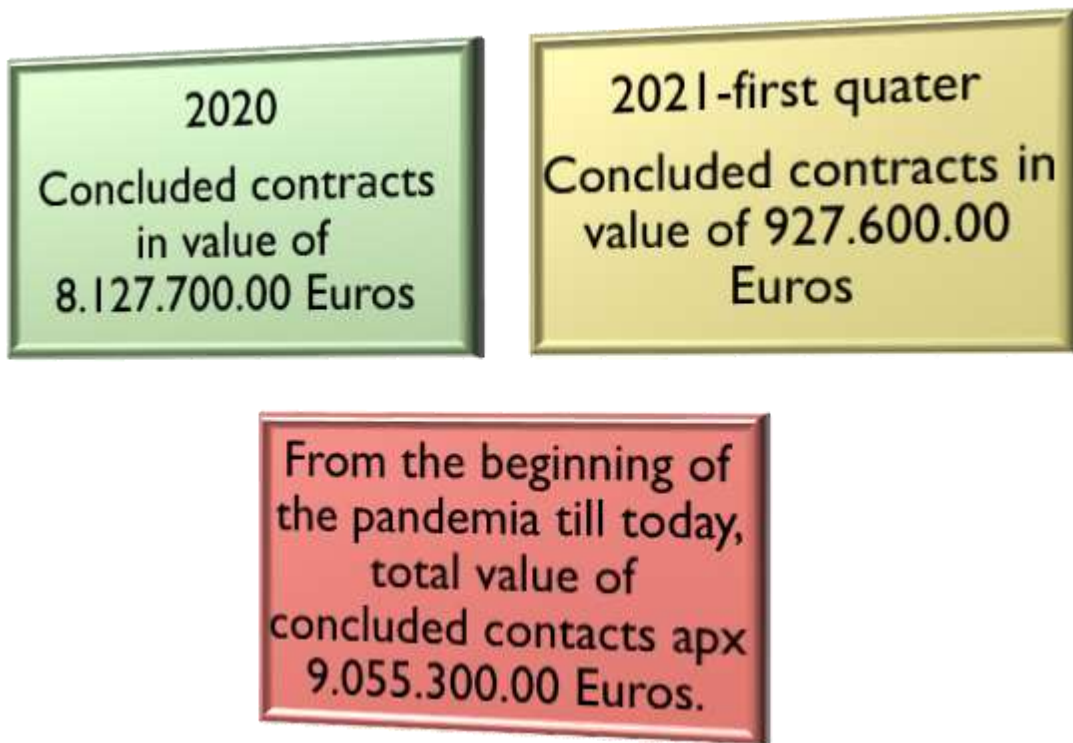
<sup>10</sup> <https://www.bjn.gov.mk/> [last accessed 20.04.2021].

<sup>11</sup> Notifications for concluded contracts of the ESPP, available at <https://www.e-nabavki.gov.mk/PublicAccess/home.aspx#/notifications-for-acpp> [last accessed 20.04.2021].

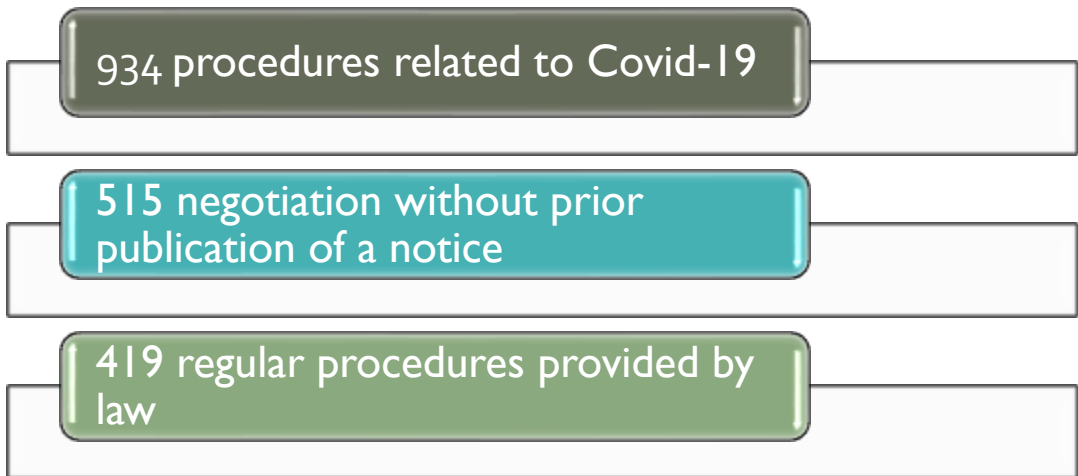
the pandemic until today (March 30, 2021) is around 556,899,472.00 denars, or approximately 9,055 .300.00 euros.

**Picture 1:** Concluded contracts related to Covid -19 procurement in R.N.Macedonia

The subject of procurement are mostly goods that serve to protect the population from infectious diseases such as medical protective material (surgical gloves, protective masks), disinfectants, drugs for Covid 19, medical oxygen, test reagents, rapid (fast) tests for detection of Covid 19 or construction work for setting up modular hospitals and etc. From the moment when the beginning of the coronavirus pandemic was officially announced, until today (March 30, 2021), a total of 934 procedures have been carried out that are directly related to Covid 19, i.e. procurements of



goods/services/works intended for protection of the population from spreading the disease or to treat / hospitalize those in need. Out of the total conducted procedures, 515 are by negotiation without prior publication of a contract notice, while the rest are regular procedures of those provided by law, with prior publication of a contract notice. This percentage means that over 55% of the procurement procedures related to dealing with the pandemic were carried out without using a regular procedure, i.e. by taking the opportunity not to seek prior opinion from the Public Procurement Bureau.



**Picture 2:** The number of procurement procedures made in time of pandemic.

As stated above, in negotiation procedures for reasons of extreme urgency, the decision on how many and with which companies to negotiate, is left to the free discretion of the contracting authority. Thereby, the contracting authority is not obliged to submit an invitation to all companies that are interested and that offer the required goods/services/work at the market, but only to those for which it in its opinion is suitable to invite them to submit a bid. There is no explicit obligation even for submitting an invitation to several companies, so the contracting authority can negotiate with one company about the prices and conditions of delivery of the requested goods/services and works, but this seriously questions the legitimacy and transparency of the overall process. The so far experience, from the beginning of the pandemic to the present day, shows that even when more companies participate in the negotiations, their number is relatively small. This directly points to another feature of the emergency procurements related to corona virus protection - the lack or low competition between economic operators. Particularly worrying is the fact that in many of the analyzed procedures only one company was negotiated, while most often the average number of bidders negotiated before concluding emergency procurement contracts, does not exceed 3. The practice also shows the existence of such cases where the contracting authorities, in order to ostensibly ensure competition, asked the economic operators for offers that are fictitious in nature, but it is already known in advance with which bidder the contract would be concluded. These situations practically disable through real existence of the market competition, achieving lower prices and higher quality for the same money. In this regard, the problem with fictitious bids, non-submission of bids, rotating bids and market segmentation as the most common forms of illegal contracting in public procurement, has been particularly relevant for some time now<sup>12</sup>. Additionally, it is a common practice not to give an accurate description of the products that are procured by preparing a comprehensive and precise technical specification, and that also leaves space for abuses in the implementation of contracts.

In the research made for the needs of this paper, several conducted negotiated procedures were analyzed for reasons of extreme urgency, whose subject of procurement is related to dealing with the pandemic of Covid 19. The results of the analysis are based on available data from published notices of concluded contracts on the site of the Electronic Public Procurement System. A general

<sup>12</sup> More about this: Guide to Detecting Illegal Contracting in Public Procurement Procedures, Public Procurement Bureau, Commission for Protection of Competition, 2020, p.5.

remark in this regard is that despite being legally obliged<sup>13</sup>, many of the contracting authorities that have conducted a public procurement procedure, have not submitted appropriate notifications for the concluded contract within the legally established deadline. Among those who have published notices, it can be concluded that price lists are often missing, so the unit prices for the goods/services/works they procure can't be seen. A similar conclusion was reached by the Center for Civil Communications, which during the monitoring of the process of conducting urgent public procurement related to the coronavirus, found that in every fifth public procurement contract or act for selection of the most favorable bid, are not published the quantities of procured products, nor the individual prices<sup>14</sup>. Some of the institutions (almost 20%), in the public procurement contracts published on the Electronic Public Procurement System, give only informations about the subject of the procurement, i.e. what they procure and the total value of the contract<sup>15</sup>. This seriously jeopardizes the transparency of the whole process and it is practically impossible to determine whether the prices achieved in the negotiations correspond to the market or significantly deviate from them. In addition, if a comparison is made, it can be easily established that for an identical subject of procurement, in procedures carried out by different authorities, prices that are achieved differ significantly. Thus, in negotiated procedures without prior publication of a contract notice for procurement of protective masks, two different contracting authorities concluded contracts for public procurement of masks N95 with the same economic operator in the first half of 2020. According to the agreements, one contracting authority procured the goods for a single price of 150 denars without VAT and the other one procured the same goods for a single price of 260 denars without VAT. In this case one contracting authority paid approximately 42% more value for the same goods than the other contracting authority. For the same subject of procurement (masks N95) another contracting authority by conducting a negotiated procedure without publishing an announcement, at the beginning of the second half of 2020 concluded a contract with another economic operator at a single price of approximately 135 denars without VAT. At the end of 2020, a contracting authority by conducting a regular public procurement procedure by publishing an announcement on the electronic system for public procurement and conducting an electronic auction, for the same subject of procurement achieved a single price of 16 denars without VAT.

Another case where the difference in the achieved prices for the same procurement item is especially visible, are the negotiated procedures without prior publication of a contract due to urgency for procurement of tests for antibodies to Covid 19. Namely, during 2020 one of contracting authorities achieved a price of 660 denars per piece (test), while the other contracting authority for the same subject of procurement achieved a price of 450 denars per piece<sup>16</sup>. This means that one contracting authority bought the same goods on the market for about 30% higher price than the other contracting authority.

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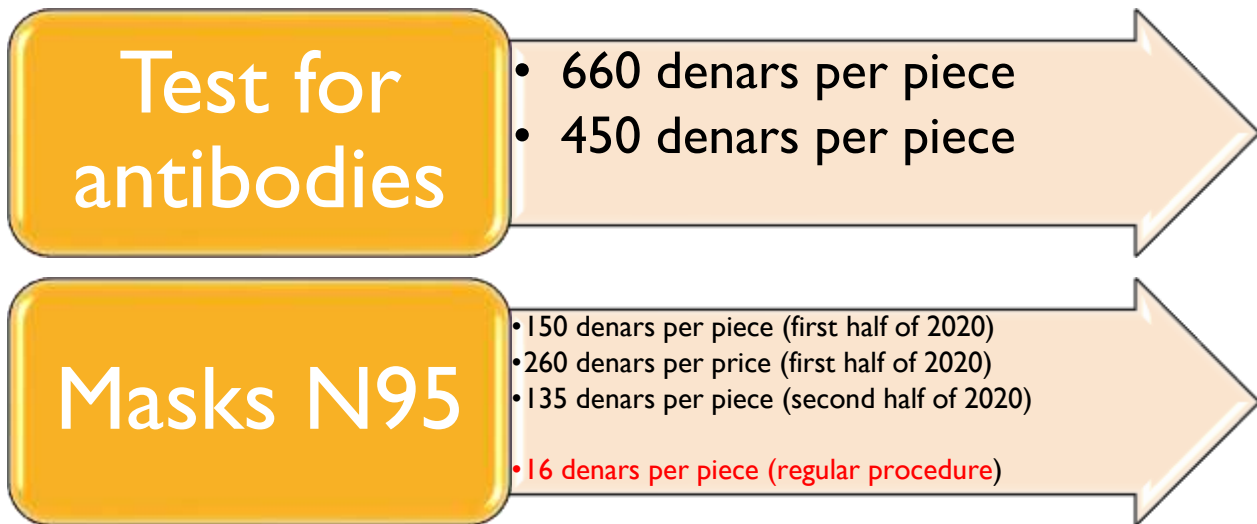
<sup>13</sup> Pursuant to Article 70 of the Law on Public Procurement, the contracting authority must publish a notification on the concluded contract of the ESPP within ten days after concluding the contract in open procedure, restricted procedure, competitive negotiated procedure, competitive dialogue, innovation partnership or negotiated procedure with or without announcing an announcement, by awarding a public procurement contract or concluding a framework agreement. The contracting authority is obliged to publish a simplified notification for the concluded contract of the ESPP within ten days after the conclusion of the contract for small value procurement, simplified open procedure and for procurement of special services. In addition to the notification of the concluded contract and the simplified notification of the concluded contract, the contracting authority publishes a copy of the concluded contract or framework agreement. The contracting authority does not publish the information that has the status of personal data in accordance with the regulations for personal data protection.

<sup>14</sup> Report on the monitoring of urgent public procurements related to protection against coron virus and Covid - 19, Center for Civil Communications, 22 April 2020, brief number 2, p.2.

<sup>15</sup> Ibid, p.2.

<sup>16</sup> All data is taken from the notifications for concluded contracts available at <https://www.e-nabavki.gov.mk/PublicAccess/home.aspx#/notifications-for-acpp>.





**Picture 3:** Difference in achieving prices for the same products

The cited examples indicate huge differences in the price achieved for the same procurement item in negotiated procedures without publication of a contract notice. It is particularly worrying that there is a large difference in the achieved prices for the same procurement item when a negotiated procedure without publication of a contract notice is applied, and regular procedure by publishing an announcement and conducting an electronic auction on the Electronic Public Procurement System. This speaks in support of the fact that the conduct of public procurement during a pandemic with Covid 19 is a matter of particular interest and should be given special attention in the context of the problem of corruption in public procurement.

**Concluding remarks**

The fight against corruption in the public sector and various forms of misuse of public finances have long been one of the basic challenges faced by almost all modern social organizations, and the question of finding mechanisms that would reduce the negative effects it causes, arises as a kind of imperative in the legal-political discourse dedicated to this issue. This issue has come to the fore in a time when non-publication negotiation procedures have become particularly relevant and applicable during the coronavirus pandemic. The main feature of these procedures is the lack of transparency and control mechanisms, as well as the lack of specific, legally established rules for their implementation. Therefore, the risk of corrupt behavior of the main participants in the procedure is multiplied. The general position of the professional public is that the negotiated procedure without prior publication of a contract notice, should not be applied, unless the situation objectively doesn't allow the implementation of regular procedures for awarding public procurement contracts<sup>17</sup>. But even in such cases its use must be careful, to be minimized only when the legal preconditions for that are met. The spread of Covid 19 infection was undoubtedly one of the preconditions for carrying out such proceedings because legal requirement regarding the extreme urgency caused by events that the contracting authority could not foresee, was met. In this regard, we can conclude that the implementation of urgent public procurement procedures was a necessity at the beginning of the pandemic. But given the fact that it has been going on for a long time, it is quite logical to expect contracting authorities to adapt to the new reality and to realize such procurements by conducting regular procedures in full compliance with the provisions of the Law on Public Procurement. In those

<sup>17</sup> Also: Brochure - Negotiated Procedure, Public Procurement Bureau - Ministry of Finance, 2016, p.12.

cases where circumstances impose the need of negotiated procedures related to the coronavirus, it is necessary to ensure optimal transparency, and accountability of the authorities, as well as increased monitoring and control of the overall process by state bodies and the non-governmental sector. Only in this way, in procedures that are free from formalities due to the state of urgency, can the goal of procurements be achieved in the spirit of the basic principles of the Law on Public Procurement. Continuous monitoring of negotiated procedures in order to prevent abuses by contracting authorities and economic operators, significantly contributes to the purposeful and rational spending of budget funds as the most important feature of responsible social management. In this regard, efforts should be made to monitor urgent procurement related to the coronavirus in order to timely detect weaknesses in the process and contribute to overcoming them, in order to use rationally the limited budgetary resources at our disposal. Additionally, the system should hold government officials accountable for the purposeful and rational spending of public money through a transparent and accountable process<sup>18</sup>. This commitment is crucial in order to create a stable, transparent and efficient public procurement system in which the fight against corruption in the public sector would be placed high on the agenda of priorities in action.

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<sup>18</sup> More about this: Fakic, S., Reducing Corruption in Public Procurement through Enhanced Control, Macedonian Center for International Cooperation (MCIC) and Transparency Macedonia (TA), Skopje, 2015, p.20.

**Contact information:**

Aleksandra Rogleva

[aleksandra.rogleva@ugd.edu.mk](mailto:aleksandra.rogleva@ugd.edu.mk)

Natasa Doneva

[natasa.doneva@ugd.edu.mk](mailto:natasa.doneva@ugd.edu.mk)

University "Goce Delcev"

Faculty of Law

Shtip

Republic of N.Macedonia