

**PRELIMINARY (EX-ANTE) CENTRALIZED CONTROL OVER NEGOTIATED
PROCEDURES WITHOUT PRIOR NOTICE – THE PRACTICE OF THE
PUBLIC PROCUREMENT AGENCY OF BULGARIA**

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ABSTRACT. Procurement through negotiated procedure without notice is sometimes the only possible way to award a public contract in case of copyright, force majeure and when changes are needed in a project already being implemented. However, this procedure appears to be the least transparent and for that reason, it is regarded as an exception to the general principles of openness and transparency. This makes such an award especially vulnerable to corrupt practices.

The paper presents the realization of the concept of the Public Procurement Agency of Bulgaria regarding ex-ante control over negotiated procedures in respect to the need to confirm their compliance with the law prior to contract award. A brief analysis of the results of ex-ante control based on monitoring of the system in recent years is also presented. The results show unambiguous indications of the positive impact of this type of control over the procurement system.

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INTRODUCTION

Each year significant amount of funds is being spent through public procurement contracts awarded in the budgetary sphere and in some sectors of public significance. Indication of its magnitude is the fact that according the European Commission, in 2009 the public sector spent over 2100 billion EUR on goods, services and works – amounting to around 19% of EU GDP[†]. This statistical data is irrefutable proof of the importance of this sector for the global and the national economies.

The great significance of public procurement sector requires the introduction of mechanisms which can guarantee in a sufficient degree the efficiency and efficacy of public spending on the basis of transparent and fair competition between economic operators. This is the rationale for creation of national rules, compliance with which can make possible not only the achievement of the mentioned goals, but also can contribute to fraud prevention and reduction of corruption risk. Nevertheless, in some cases circumstances can arise that exclude the competitive award of a public contract. In some of these cases only a negotiated procedure without notice can be conducted. In order to avoid the misuse of that procedure, it is generally accepted and provided for in procurement legislation that it shall be used only in exceptional cases, exhaustively listed in law. This principle is fundamental for European procurement legislation which shall be applied by national contracting authorities and entities since Bulgaria's accession to EU in 2007.

Despite the fact that negotiated procedure without publication of a prior notice is conducted only as an exception, the high flexibility it provides, as well as the low degree of transparency typical for it, tempt contracting authorities to use it even in cases, when that award is not in compliance with procurement rules. In order to reduce the number of unlawful negotiated procedures and to increase

[†] European Commission (2011). *Evaluation Report Impact and Effectiveness of EU Public Procurement Legislation*. [Online]. Available at <http://ec.europa.eu>. [Retrieved April 1, 2012]

understanding of its nature and main characteristics, in the beginning of 2009 Bulgaria introduced ex-ante (prior to contract award) control over negotiated procedures without notice in some of the cases when the conduct of this procedure is admissible according to Public Procurement Law. The power to execute that type of control was given to the Public Procurement Agency, the institution responsible to assist the Minister of Economy and Energy with policy implementation in the area of public procurement. Three years after the launch of that control there is sufficient data to conduct detailed analysis and to draw important conclusions about the trends in the general use of negotiated procedures and about the degree of their compliance with the requirements of the law. Apart from that, it is an appropriate moment to reflect on the positive effects of that type of control over the public procurement system in Bulgaria as a whole.

PROCUREMENT BASICS

Public procurement can be viewed as a set of tools for the award of contracts, which are financed with taxpayers' money. These funds are usually accumulated in certain budgets through the taxation, health insurance, pensions and other systems. The funds are spent by institutions, authorized to administer them observing certain principles and rules – contracting authorities and entities. The set of principles and rules observed in the selection of contractors when spending these funds forms the essence of the term public procurement. As far as contract payments are covered with other people's money (usually referred to as public funds), contracting authorities and entities shall demonstrate that they have acted in the public interest, seeking the most efficient solution while taking into account the rights of all parties interested in acquiring the contract. Through a number of specific provisions the law introduces a framework, which determines the admissible forms of behavior for contracting authorities and entities and builds a system of obligations, which observance is a guarantee that public interest is observed in all actions taken in the procurement process.

PROCUREMENT LAW – FROM NATIONAL TO GLOBAL RULES

Immediately after the democratic changes in Bulgaria in 1989 public procurement is not regulated in a separate legal act. The first law on that matter dates back to 1997 when the Law on the award of government and municipal procurement is adopted. In 1999 this law is repealed with the adoption of the Public procurement law, in force till 2004. The current Public procurement law, which is elaborated in accordance with the European directives, comes into force as of 1 October 2004. This law, as well as a number of bylaws for its implementation, draws the legal framework in the sphere of public procurement. These acts undergo series of amendments and supplements, the most essential of which take place in 2006 in relation to the accession of Bulgaria to the European Union. The amendments aim at accomplishing full compliance of national legislation with European law in this area, more specifically with the fourth generation of procurement directives adopted in 2004 and the other regulations in force[‡].

As is apparent from the above, the development of national legislation on public procurement is part of a process of globalization which is seen in all sectors of world economy and ascertains the principles of free movement, trans-border transparency and equal treatment irrespective of the country of origin. Before the rise of free trade, it was national government that had to guarantee the transparent and competitive conduct of public procurement. For that reason, regulations were different in each country and often excluded the participation of foreign entities. With the liberalization of trade a change in procurement practices gradually occurred. The process of liberalization of cross-border procurement, however, is quite long. As public procurement was excluded from the scope of the General Agreement on Tariffs and Trade signed in 1947, the beginning of the true liberalization of procurement happened when the first Agreement on Government Procurement (GPA) was signed in 1979 following the Tokyo Round of trade negotiations. With the establishment of the

[‡] Public procurement agency of the Republic of Bulgaria (2012). *National and European public procurement legislation*. [Online]. Available at <http://www.aop.bg>. [Retrieved April 1, 2012]

World Trade Organization after the Uruguay Round of trade negotiations and the conclusion of the existing GPA in 1994, signatory to which are the EU and its member states, the foundations of the current European public procurement rules were laid. These rules, based on the principles of freedom of movement of goods, freedom of establishment and freedom to provide services, going through many transformations since the first procurement directive was adopted in 1970, are already applicable in Bulgaria as well.

PROCUREMENT PRINCIPLES AND PROCEDURES IN BULGARIA

Public procurement legal framework in Bulgaria, which is an EU member state, is in compliance with the applicable directives of the European Parliament and the Council. In this respect, national law reflects the common European understanding of the role, meaning and manner of carrying out public procurement. The foundation of the mentioned directives and Bulgarian procurement legislation is based on certain fundamental principles. In Public procurement law of Bulgaria these principles are presented as follows:

- publicity and transparency;
- free and fair competition;
- equal treatment and non-discrimination.

All other legal norms essentially aim at assuring compliance with these principles. Nevertheless, not all contracts are similar in their nature and the whole set of principles cannot be respected in each and every procurement. For that reason, when selecting contractors for diverse procurements, contracting authorities have at their disposal different procurement regimes (shortly called as procedures) prescribed in legislation. Procedures give contracting authorities the possibility to use different approaches focused on different aspects of choosing the best tenderer. In European directives and Bulgarian procurement law certain basic procedures are provided for.

The open procedure is the generally applicable and most commonly used procedure. It guarantees full compliance with the above mentioned principles. This procedure requires the publication of

contract notice accessible to all interested parties. The notice must contain all conditions and requirements to participants and their tenders. The circle of participants is not limited and all interested persons may submit a tender. The tenders are presented in sealed envelopes, which are opened simultaneously in the presence of representatives of all tenderers, NGOs and media. After their evaluation the successful tenderer is publicly announced.

The second basic procedure is the so called restricted procedure. It may be regarded as a special case of open procedure. The difference lies in the fact that the procedure is divided into two stages. At the first stage selection of suitable candidates is carried out. The contractor is chosen at the second phase. All principles of public procurement are fully respected in this procedure. It is typical for the restricted procedure that only the best candidates after the selection stage (those that have proven their ability to execute the contract in due quality and time) are invited by the contracting authority to submit a tender. Due to its nature, these two procedures can be chosen freely by contracting authorities in all applicable cases.

The third procedure is called negotiated procedure with publication of a notice (the competitive dialogue[§] can be considered as its variation). In this hybrid procedure we also find two distinct phases. At the first phase, a notice shall be published and a selection of candidates shall be carried out. This phase is in full compliance with the general principles. At the second phase, contracting authorities consult selected operators in order to clarify their tenders and negotiate the terms of contract with them. It is the content of the second phase, or the negotiations, that indicate certain diversion from some of the mentioned procurement principles. Even if they are conducted in the most open and transparent way, negotiations imply the presence of subjective element which is in collision with the requirement for ensuring equal opportunities and fair competition.

[§] 'Competitive dialogue' is a procedure in which any economic operator may request to participate and whereby the contracting authority conducts a dialogue with the candidates admitted to that procedure, with the aim of developing one or more suitable alternatives capable of meeting its requirements, and on the basis of which the candidates chosen are invited to tender.

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Consequently, we can assume that in that procedure the fundamental procurement principles are partially ignored. For that reason, the choice of that procedure is not left to the discretion of contracting authorities and is admissible only in certain cases. These cases are exhaustively listed in the law, and include hypotheses, in which due to the nature of the subject matter of the future contract, it is necessary that the tender is clarified through direct negotiations. It shall be noted that the possibilities for the conduct of a negotiated procedure with notice are rather limited.

Regarding the topic of the present paper, our interest is focused on the next procedure, the conduct of which is provided in the directives and national legislation – the negotiated procedure without publication of a prior notice. As it can be seen from its name, it can be assumed that most of the fundamental procurement principles are not respected in its conduct. It does not require the publication of a contract notice and the award of the contract is preceded only by negotiations with possible contractors, invited by the contracting authority. By its nature, this is a fully non transparent procedure, the implementation of which is not visible to the general public. The element of publicity is totally ignored in it and it is only up to the contracting authority to decide whether any competition will be present. Due to these characteristics, the negotiated procedure without notice cannot be chosen freely by contracting authorities and is applicable only if certain conditions, exhaustively mentioned in the law, are met. In particular, the conduct of this procedure is admissible only if there is no alternative way to select a contractor and the implementation of open and restricted procedure is impossible or inefficient. For better understanding of the scope of application, we will note that the cases in which contracting authorities can resort to that procedure are generally the following:

- if an open or restricted procedure is already conducted, but there are no admissible tenders (provided that no substantial change of conditions takes place);
- if an open or restricted procedure is already conducted, but all tenders submitted are too high (i.e. they are beyond the financial resources of the contracting authority), suitable tenderers may be consulted so that reduction of tenders can be achieved;

- if the subject matter of the contract is subject to copyright, intellectual property rights, special or exclusive rights, granted by law to a certain person, negotiations may be conducted with that person, because the contract cannot be awarded to any other contractor (i.e. there is no real competition);
- if as a result of earthquakes, floods and other disasters, urgent measures must be taken, which do not allow the conduct of competitive procedure;
- if products to be purchased are related to R&D and cannot be acquired in the open market;
- if there is need of additional deliveries from the same supplier, provided that its change will make contracting authority acquire assets which are not compatible with those already delivered;
- if negotiations with the winner of design contest shall take place;
- if due to unexpected circumstances additional works or services are needed for contract completion and they can be accomplished only by the entity which implements that contract;
- if contracting authority announced during the conduct of a competitive procedure that additional works or services of the same nature may be needed;
- if the transaction will take place at a commodity exchange, at publicly announced price and conditions;
- if especially favorable conditions occur and delivery of goods can be made at prices lower at the market ones (at public sales of property of bankrupt companies).

Due to its nature, the transactions mentioned above does not imply adherence to the general procurement rules. They either have to be concluded in a very short period of time or the circle of possible contractors is very narrow.

RISKS RELATED TO NEGOTIATED PROCEDURES AND WAYS TO MITIGATE THEM

The risk for violation of fundamental procurement principles and provisions of the law are present throughout the whole negotiated procedure without notice.

The risk levels are very high even at the beginning of the procedure, because its launch is not announced with publication of a contract notice and only the invited persons are aware of it. It is not exactly the case in Bulgaria where this procedure has some peculiarities. Because of certain provisions in the national administrative law, all procedures, launched by Bulgarian authorities, start with the adoption of decision (administrative act) which publication is compulsory. In other words, the launch of all procedures, including the non-transparent ones such as the negotiated procedures without notice, is announced to the general public. Thus, any interested person considering that any procedure started in violation of procurement rules can file an appeal against that decision in front of the Commission for protection of competition, the appeal body of first instance, in order to protect its rights and legitimate interests to compete for the contract. This characteristic of the Bulgarian procurement system does not change the fact that many contracting authorities tend to use the negotiated procedure without notice even when that is not sufficiently justified.

There are serious risks of violation of procurement rules during the negotiation phase as well. The extreme case is when only one person is invited and there are no guarantees that the contract will be awarded in an efficient and effective manner. As mentioned above, even if more than one participant is invited, the discretion provided by the negotiation process implies high risk of unlawful decisions, actions and inactions of the contracting authority. Although negotiations increase flexibility in decision making and provide more tools for accomplishing more favorable terms and conditions of the contract, they also may give unrestricted freedom of choice, which often is prerequisite for corruption and other negative phenomena. For that reason, Bulgarian legislation requires that an evaluation commission is formed and all offers made and terms agreed on are reflected in minutes, unless only one person is invited. Apart from

that, after the end of the negotiations, the evaluation commission is obliged by law to elaborate a report about the results reached. After a final decision for the award of the contract is made, this decision is also publicly announced and can be appealed against. Moreover, all procurement procedures, including negotiated procedures without notice, are also subject to ex-post control, executed by the National Audit Office and the Public Financial Inspection Agency.

Another instrument that can bring more transparency and publicity into the award of negotiated procedures without notice is the so called voluntary ex-ante transparency notice, introduced in Bulgarian legislation with the transposition of Directive 2007/66/EC on appeal procedures. This notice enables contracting authority to announce its intention to award a public contract after the conduct of a negotiated procedure without notice, or other exceptions from procurement rules. If all required information is provided in the notice and the contract is awarded only after the notice becomes effective (i.e. can not be appealed against), then the contract signed cannot be declared ineffective.

INTRODUCTION OF EX-ANTE CONTROL OVER NEGOTIATED PROCEDURES IN BULGARIA

On the basis of detailed analysis of the implementation of Bulgarian procurement legislation, many omissions in the use of the negotiated procedure without notice were found. This necessitated the introduction of a new power of the Executive director of the Public procurement agency at the beginning of 2009 – the function to execute preliminary (prior to contract award) control over those procedures. This measure was also provoked by the consistently high number of negotiated procedures without notice in comparison to the total number of procedures – 833 out of 3767 or 22,11% in 2006, 956 out of 4608 or 20,75% in 2007, 1232 out of 6306 or 19,54% in 2008.** As the figures suggest, the share of this procedure varies

** Public procurement agency of the Republic of Bulgaria (2009). *Annual report 2009*. [Online]. Available at <http://www.aop.bg>. [Retrieved April 1, 2012]

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between 19 and 22 per cent of the total number of procedures, conducted pursuant to the Public procurement law. All too often choice of this procedure is justified by contracting authority with the need to satisfy public needs in cases when competitive procedures cannot be implemented. Irrespective of the reason, data shows that more than 1/5 of significant procurement transactions are made in relative lack of transparency and limited accessibility. The results from comparative analysis based on data for procurement practices in other EU member-states also showed that the incidence of negotiated procedure without notice in Bulgaria is relatively high.

The new form of ex-ante control aims at the creation of guarantees for more publicity and transparency in the conducted negotiated procedures without notice, which is considered as an exception to the general procurement rules. Apart from that, with this type of control policy makers pursue to diminish the level of unjustified use of the procedure in order to circumvent the law. Last but not least, this control has a preventive function and can contribute to better understanding of the nature and main characteristics of the procedure.

The ex-ante control is regulated in the Public procurement law and the Rules for its implementation. Its scope covers negotiated procedures without notice conducted only by contracting authorities (not contracting entities in some utility sectors of public significance) and only in the cases characterized by high risk levels:

- procurement related to copyright, intellectual property rights, special or exclusive rights;
- procurement in extreme urgency due to unforeseen event;
- procurement of R&D related goods;
- procurement of additional deliveries from the same supplier for sake of compatibility;
- award of public contract to the winner in design contest;
- award to the same contractor of a public contract for the implementation of unforeseen additional works or services essential for contract completion;

- announced public contract for repetition of works and services awarded to the same contractor;
- direct award because of especially favorable conditions at public sale of property of bankrupt companies.

When executing ex-ante control PPA experts check the justification of the choice of procedure made by the contracting authority in the initial decision as well as all documents proving its lawfulness that are sent to the agency. The control is focused on the objectivity of the stated reasons and their compliance with the requirements of the law. Taking into account the fact that it is contracting authority that takes the responsibility for the conduct of the procedure and the award of the contract, the conclusions about the lawfulness of the procedure are not legally binding. Nevertheless, if the choice is not found lawful by the Agency, it informs the bodies for ex-post control (the National Audit Office and the Public Financial Inspection Agency) about the concluded contract. This increases the preventive effect of control and improves its efficiency.

RESULTS FROM THE EX-ANTE CONTROL

According to statistics from the Annual report of the public procurement agency for 2009, during the first year after the introduction of ex-ante control 263 procedures within its scope are launched. The biggest share in them is held by the contracts for services (52%), followed by those for supplies (28%) and works (20%). The distribution by legal ground is as follows - 103 procedures related to copyright, IPR, special and exclusive rights, 41 related to extreme urgency, 3 related to R&D, 18 related to additional deliveries, 4 related to design contest, 83 related to unforeseen contracts for additional works or services, 11 related to announced repetition of works or services и 0 related to especially favorable conditions. Data shows that almost half of all procedures subject to control are related to copyright, IPR, special and exclusive rights. Unfortunately, only in 41% of the cases this legal ground is implemented lawfully. In all other cases different weaknesses and omissions are found in the justification and the proofs. The second most commonly chosen legal ground for the conduct of negotiated

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procedure without notice is the award of additional works or services to the same contractor. In this case, lawful choice of procedure requires the presence of unforeseen circumstances that occurred after the conclusion of the main contract and necessitate the additional award. Two other conditions shall also be met – the additional award cannot be separated from the main contract or it is essential for its implementation, and its value does not exceed 50% of the value of the main contract. Analysis of the procedures launched in this hypothesis show that this legal ground is not very well understood by contracting authorities – only 12% of the cases the Agency expressed a positive opinion about the lawfulness of such procedures. In all other cases different inconsistencies with law are found – the gravest mistakes are related to the attempts of contracting authorities to present as unforeseen circumstances such events that are foreseeable and even plannable.

In 2009 the Agency expressed opinion on the lawfulness of 255 negotiated procedures without notice. In 93 cases the choice of procedure is considered lawful, in 48 it could be lawful if more evidence could be presented, in 63 the choice could not be considered lawful because of omissions and in 51 cases the choice is categorically unlawful. Statistics suggests that lawfulness is undoubtedly proven in less than half of the cases. Only in 35% of the cases the Agency finds that the conduct of negotiated procedure without notice is in full compliance with the requirements of the law. In other 65% of the cases the justification and the documents presented are either incomplete or not enough for positive opinion, or law violations of different magnitude are found.

As a result of the ex-ante control executed in 2009, 32 procedures for which positive opinion for lawfulness is not expressed are suspended. It means that in about 20% of the cases contracting authorities took into account the opinion of the Agency despite its non-binding nature. In 96 of the other cases in which lawfulness is not proven it was found that contracts are awarded. In accordance with special provisions in the Rules for the implementation of the Public procurement law these cases are sent to the bodies for ex-post control. Till the end of 2009 control bodies checked 7 of these

allegedly unlawful contracts and confirmed law violations in 3 of them.

On the basis of the results from ex-ante control over negotiated procedures without notice in its first year of existence the following conclusions can be drawn:

1. Beyond doubt, in some cases the negotiated procedure is the only possible solution for the award of certain public contracts.
2. There is high degree of inconsistent conduct of this procedure, which makes the low share of lawful procedures particularly troublesome.
3. The reasons for wrong implementation most probably are apparent misunderstanding of the nature of this procedure and the legal grounds for its choice as well as bad experience and mistakes made in the past.

The results of the first year of monitoring are the basis for the conclusion that its implementation has a positive impact on the public procurement market in Bulgaria. It could be stated that ex-ante control is a way of reducing the incidence of illegal and non-transparent spending of public funds and corruption. The real effect of this control, however, are expected to take place in the next years when it will become apparent if the expressed opinions improve understanding of negotiated procedure and change procurement practices.

Many of the expected results did happen in 2010, the second year of ex-ante control – year characterized by fewer procedures subject to control and higher share of lawful procedures. According to the Annual report of the Public procurement agency for 2010^{††}, 201 negotiated procedures are launched during the year (for comparison, the number for 2009 is 263). Taking into consideration the overall decline in the amount of public spending due to the economic crisis, the more suggestive fact for the efficiency of ex-ante control is the

^{††} Public procurement agency of the Republic of Bulgaria (2010). *Annual report 2010*. [Online]. Available at <http://www.aop.bg>. [Retrieved April 1, 2012]

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share of negotiated procedures in the total number of procedures conducted pursuant to the Public procurement law (bigger public contracts) which drops from 9,1% to 6,6%. In comparison with the almost 6% growth in the number of procedures under the law (bigger procurement), this indicator can be interpreted as an achievement of the implemented ex-ante control.

Regarding the findings of control, there is clear trend of increase in the number of lawful negotiated procedures. In 2010 positive opinion is expressed in 45% of all cases (the number is 35% in 2009).

As far as the distribution by legal ground is concerned, the most commonly used negotiations again are those related to special and exclusive rights with share of 43%. In comparison with 2009 data (39%), this percentage increased more than symbolically. This is due to the fact that a substantial part of public procurement is related to activities, which implementation is partly or fully regulated in special legal acts (Law on copyright and related rights, Law for energy, etc.). It can be assumed that the use of this legal ground is an indicator for lawfulness because in most cases it implies the presence of objectively verifiable facts.

Data on the use of negotiated procedures for additional works and services is also suggestive for the fulfillment of the objectives of the Agency. This type of negotiation procedure requires the presence of unforeseen circumstances, which necessitate the award of additional works or services to the same contractor. The share of this procedure drops substantially from 32% in 2009 to 28% in 2010. It could be concluded from that decrease that as a result of the opinions expressed by the Agency a higher degree of responsibility in law implementation is accomplished. This legal ground is one of the most problematic and the efforts of the Agency are focused on its limitation. Apart from that, better understanding of the nature of this type of procedure can also be assumed.

Similar trend is also observed in the number of procedures related to extreme urgency – their share drops from 16% in 2009 to 15% in 2010. Taking into account the fact the choice of these two procedures depends on the assessment of contracting authority for

compliance with law requirements, a conclusion can be drawn that ex-ante control is instrumental for their correct application.

The implementation of ex-ante control achieved the main objective of the adopted preventive approach, namely, reducing and limiting the cases of unlawful use of negotiated procedure without notice. In addition, it shall be stated that the public access to all ex-ante control opinions allowed contracting authorities to learn from the experience of other authorities. The reported results justify the need to keep this type of control in place in order to address the risk of corruption and other negative practices in this procedure characterized by low levels of openness and transparency.

Most of the trends mentioned above remain in the third year of ex-ante control. One of the exceptions is the 30% growth in the number of procedures subject to control – 261 out of 4777 for 2011^{##} in comparison with 201 out of 4052 in 2010. This growth can be viewed as a part of a general tendency of slight economic recovery. It is obvious, however, that the share of negotiated procedures subject to control remains about 5%. The number of opinions for lawful choice of procedure increases and reaches 67% (the number for the first year of control is 35%). The share of procedures related to special and exclusive rights continues to rise, while the share of contracts for unforeseen additional works and services continues to drop. Despite the slight increase in the number of procedures related to extreme urgency and announced repetition of works and services from the main contractor, there are clear indications for better use of negotiated procedure without notice. This conclusion is confirmed by the fact that in 83% of the cases the opinions about law consistency expressed by the Agency are confirmed by the ex-post control bodies. Beyond doubt, ex-ante control accomplishes its main preventive objective and contributes to the development of the procurement system in Bulgaria.

^{##} All statistical data is retrieved from the Public procurement register, maintained by the Public procurement agency of the Republic of Bulgaria, accessed through the Public procurement portal, available at www.aop.bg

ANALYSIS OF RESULTS

On the basis of data presented in the previous part, many conclusions can be drawn about the use and the lawfulness of negotiated procedures without notice conducted in the period 2009-2011. All these indicators are also suggestive for the usefulness of this type of control for the procurement system in Bulgaria as a whole.

The main conclusions about the share of negotiated procedures in the total number of procedures are as follows:

1. The number of negotiated procedures subject to ex-ante control drops in 2010 but increases in 2011 and reaches the 2009 level. This is part of a general trend of economic recovery in 2011.
2. The share of negotiated procedures drops in 2010 and remains comparatively low in 2011 which, together with the improved composition by legal ground, is a clear indication for the preventive effect of ex-ante control and the improved understanding of the procedure.

Procedures pursuant to Public procurement law	2009		2010		2011	
	Number	%	Number	%	Number	%
Procedures with publication of notice	2325	80,5%	2488	81%	2946	82%
Negotiated procedures without notice not subject to control	303	10,5%	376	12%	386	11%
Negotiated procedures without notice subject to control	263	9%	201	7%	261	7%

Table 1. Number of all procedures pursuant to Public procurement law, negotiated procedures without notice not subject to ex-ante control and negotiated procedure without notice subject to ex-ante control (Data: Public procurement agency)

The main conclusions about the share of negotiated procedures by legal ground are as follows:

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1. The most commonly used grounds for the launch of negotiated procedures without notice are those related to special and exclusive rights, extreme urgency, unforeseen additional works and services awarded to the same contractor and announced repetition of works and services by the same contractor. The grounds related to R&D and design contests are used very rarely. Those related to exceptionally favorable conditions are never used.
2. The share of the procedures related to special or exclusive rights increases, the share of procedures for additional supplies, works and services decreases, the share of procedures related to extreme urgency is comparatively stable.

Legal grounds for the conduct of negotiated procedure without notice subject to control	2009		2010		2011	
	Number	%	Number	%	Number	%
Copyright, intellectual property rights, special or exclusive rights	103	39%	86	43%	157	60%
Extreme urgency due to unforeseen event	41	16%	31	15%	44	17%
R&D related goods	3	1%	2	1%	0	0%
Additional deliveries from the same supplier for sake of compatibility	18	7%	18	9%	6	2%
Award of public contract to the winner in design contest	4	2%	1	0,5%	2	1%
Award of unforeseen additional works or services to the same contractor	83	32%	56	28%	35	13%
Repetition of works and services awarded to the same contractor	11	4%	7	3,5%	17	7%
Especially favorable conditions	0	0%	0	0%	0	0%

Table 2. Number of negotiated procedure without notice subject to ex-ante control by legal ground (Data: Public procurement agency)

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The main conclusion about the lawfulness of the procedures is that the number of negotiations compliant with law requirement is on the rise and reaches comparatively high levels.

Opinions for lawfulness expressed by the Public procurement agency	2009		2010		2011	
	Number	%	Number	%	Number	%
Lawful choice of procedure	93	35%	90	45%	174	67%
Choice of procedure could be considered lawful	48	18%	39	19%	31	12%
Choice of procedure could not be considered lawful	63	24%	30	15%	34	13%
Unlawful choice of procedure	51	19%	33	16%	12	5%
No opinion is expressed	8	3%	9	5%	10	4%

Table 3. Number of negotiated procedure without notice subject to ex-ante control by opinion for compliance with the law (Data: Public procurement agency)

CONCLUSIONS

Due to its nature, in negotiated procedure it is possible to eliminate competition and award a contract to a pre-selected economic operator. This possibility urges a lot of contracting authorities or entities to justify a need to conduct a negotiated procedure in cases where there are no objective impediments to the use of standard competitive procedures. For that reason, in the beginning of 2009 Bulgaria introduced ex-ante control over the most risky legal grounds for the conduct of negotiated procedures without publication of a prior notice. After three years of implementation of this type of control, results suggest that there are significant positive changes in the use of this procedure. The opinions expressed by the Public procurement show an increasing share of lawful choice of negotiated procedure. Apart from that, relative share of the most problematic legal grounds generally decreases. Thus, there is clear evidence that this type of control has an important role for ensuring compliance with the principles and provision of national and European procurement legislation. Consequently, it contributes to the further

development of the procurement system in Bulgaria and brings the country closer to the best practices in the other EU member states.

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