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Performance Audit Report

Procurements with a negotiated procedure without publication of contract notice



Prishtina, January 2019

The National Audit Office of the Republic of Kosovo is the highest institution of economic and financial control, which according to the Constitution and domestic laws, enjoys functional, financial and operational independence.

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Performance audits undertaken by the National Audit Office are independent, objective and reliable reviews that assess whether government actions, systems, operations, programs, activities or organizations comply with the principles of economy¹, efficiency² and effectiveness³, and whether there is room for improvement.

Auditor General has decided in relation to this report **“Procurements with a negotiated procedure without publication of contract notice”** in consultation with Assistant Auditor General Vlora Spanca, who has supervised audit.

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1 Economy - The principle of economy connotes minimising the cost of resources. Resources used should be available on time, at the right quantity and quality and with best price

2 Efficiency - The principle of efficiency connotes securing the most out of available resources and has to do with the relationship between the resources mobilised, and results given in terms of quantity, quality and time

3 Effectiveness - The principle of effectiveness connotes achievement of established objectives and expected results.

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List of acronyms

CA- Contracting Authority

Customs - Kosovo Customs

TD - Tender Dossier

MEST - Ministry of Education, Science and Technology

MIA - Ministry of Internal Affairs

EO - Economic Operator

SCEC - Secretariat of Central Election Commission

TS - Technical Specification

Executive Summary

In 2015-2017, on average, about €428 million was contracted per year through public procurement. Out of these €428 million, on average, about 13% have been contracted through the negotiated procedure without publication of the contract notice which compared to that of European Union is twice as high⁴.

The basic principles of the Law on Public Procurement are Economy and Efficiency as well as Equality in Treatment / Non-Discrimination. These principles can be applied best if Contracting Authorities use the open procurement procedure when purchasing goods/services/works. This procedure, unlike that of negotiated procedure without publication of the contract notice, is transparent; it enables competition and lower prices. However, the negotiated procedure is sometimes indispensable due to objective purposes, but its use should be well justified.

Considering the importance of using the negotiated procedure without publication of the contract notice, the National Audit Office has evaluated whether the Contracting Authority has sufficiently justified and documented the use of this procedure and whether they have managed to achieve more economical prices.

There were four Contracting Authorities as an audit subject, and in each of them there audited four contracts each, except in the Secretariat of the Central Election Commission where we took five contracts because they had conducted more procurement activities under this procedure (see Annex 1 Audit Scope) that resulted from procurement activities conducted during 2015-2017. The value of audited contracts amounts €21.5 million or 52% of the total value of contracts with negotiated procedure without publication of contract notice in these entities for the period 2015-2017. The audit involved the process of planning, development of tendering procedures and implementation of contracts. The purpose of this audit was to examine whether best practices have been applied throughout the process and whether there is room for improvement.

Overall conclusion

The audit revealed that the use of the negotiated procedure without publication of the contract notice was not sufficiently justified and the contracting authorities had not exhausted all the possibilities to avoid using this procedure. With a number of improvements in terms of market research and analysis of preliminary contracts, the Contracting Authorities audited could provide higher competition and more economical prices. Contracting Authorities did not take into account compiling a list of potential suppliers, which would be used in procurement activities with negotiated procedure, especially in cases where external factors impose urgent procurements and had not considered alternatives in the market as a replacement for products /services which they

⁴http://ec.europa.eu/internal_market/scoreboard/performance_per_policy_area/public_procurement/index_en.htm#maincontentSec2

needed. In addition to these, there deficiencies identified in Contracting Authorities audited were that they did not conduct benefit and cost analysis after the implementation of contracts.

General recommendation

Contracting Authorities should develop market research to identify potential suppliers and solutions they offer, they should properly assess needs, and consider alternative products. Then they should make an analysis of the benefits and costs after the implementation of each contract so that future purchasing decisions are based on consistent information to ensure that more economical prices are obtained.

Response of parties involved in auditing

The Ministry of Internal Affairs, Kosovo Customs and the Secretariat of the Central Election Commission have agreed with audit findings and recommendations. We have not received a response from the Ministry of Education, Science and Technology. We encourage the institutions involved in this audit to make every effort to address the recommendations made.

1 Introduction

Public procurement is one of the areas that uses the biggest part of the state budget. Expenditures through public procurement are constantly increasing. In the last three years, works, goods and services were contracted through procurement in an average value of €428 million⁵.

The Public Procurement Law (LPP) is based on the principles of economy, efficiency and equal treatment/non-discrimination. The purpose of the law is to ensure the most efficient, transparent and fair manner of using public funds by the Contracting Authorities (CA).

LPP has foreseen several types of public procedures that CA may use during the procurement of goods or services. The most commonly used is the open procedure and, as necessary, but not often, is also used the negotiated procedure without publication of the contract notice (hereinafter the negotiated procedure).

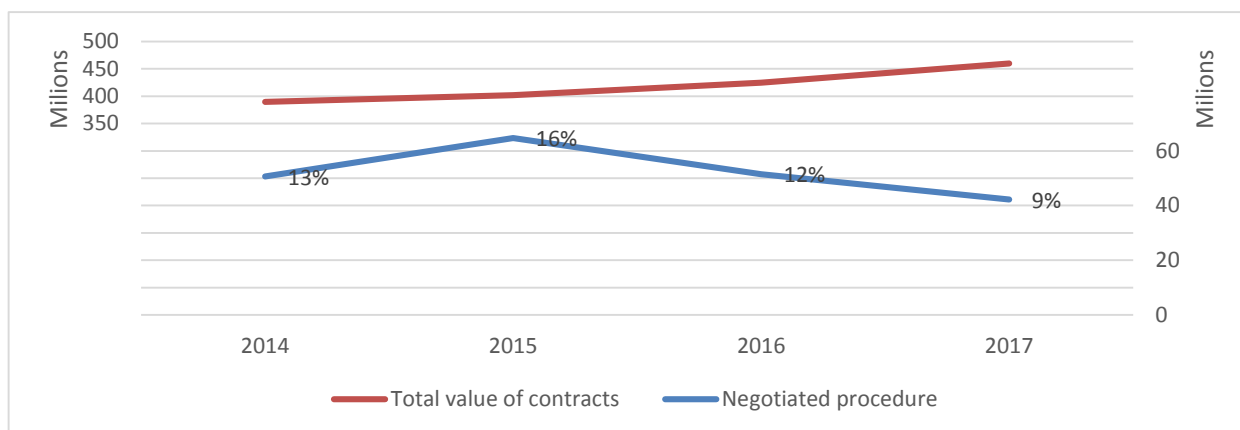
The use of the negotiated procedure is conditional on the occurrence of certain circumstances (e.g., emergency cases) and should be justified because it is less transparent and does not ensure competition, which could risk the value for money and could result in non-economic contracts, and in case there is no basis for its use, it may also result in an unequal treatment /discrimination of potential bidders. When using, therefore, the negotiated procedure, the CAs are required to take care to achieve the main goal of each purchase (value for money). CAs are responsible for taking all measures to achieve the best value for money.

International academic papers have dealt with the use of this procedure, and according to them, in most EU countries; the use of this procedure does not exceed 6% of the total value of procurement⁶. In addition, official statistics⁷ on public procurement in Europe have highlighted that the use of this procedure during 2015-2017 is below 7% of the total value of contracts. This use was at the same level also in Kosovo in 2013, but since 2014, the use of this procedure has stricken the values as shown below.

⁵ <https://krpp.rks-gov.net/krpp/PageFiles/File/Raportet%20Vjetore/2016/Raporti%20vjetor%202015%20Shqip.pdf>, page 15

⁶ https://www.cairn-int.info/article-E_NCAE_022_0001--strengthening-the-efficiency-of-public-p.htm

⁷ http://ec.europa.eu/internal_market/scoreboard/performance_per_policy_area/public_procurement/index_en.htm#maincontentSc2

Chart 1. The trend of using the negotiated procedure without publication of the contract notice

The chart shows that in 2015 the contracts entered into under this procedure comprised 16% of the total value of contracts.

Although the use of this procedure from 2015 to 2017 dropped down, to date, there was no analysis made to understand the reasons for using the negotiated procedure. The National Audit Office has, therefore, carried out this audit to understand whether its use is being justified and whether there is room for improvement.

Objective and Audit Questions

The objective of this audit is to evaluate the justification of using the negotiated procedure, whether these processes have been sufficiently documented and whether more economical prices have been provided. The purpose of this audit is to examine whether best practices have been applied throughout the process and whether there is room for improvement.

The main audit questions are:

1. Has the decision on acquisition been taken based on a proper analysis of circumstances?
2. Have acquisition benefits and costs properly assessed?

This audit covered the period 2015-2017, where the selected sample institutions have entered into a total of 87 contracts, while we have selected 17 contracts (see annex 2), the total value of which is about €21.5 million or about 52% of the total value of contracts with negotiated procedure. The institutions audited are as follows: Kosovo Customs, Ministry of Internal Affairs, Ministry of Education, Science and Technology and Secretariat of the Central Election Commission.

Detailed auditing methodology, audit criteria and audit scope are presented in annex 1 to this report.

2 Description of the process on the negotiation procedure without publication of the contract notice

Cases when the use of the negotiated procedure is justified

Contracting Authorities may choose either open procedure or restricted procedure for the procurements they conduct, any of them for any procurement. Other procedures, in particular, the negotiated procedure without the publication of the contract notice may only be used after the legal conditions have been met. When using this procedure, CA should take into consideration that the main purpose of CA is to achieve value for money. CA is responsible for taking measures to achieve the best value for money.

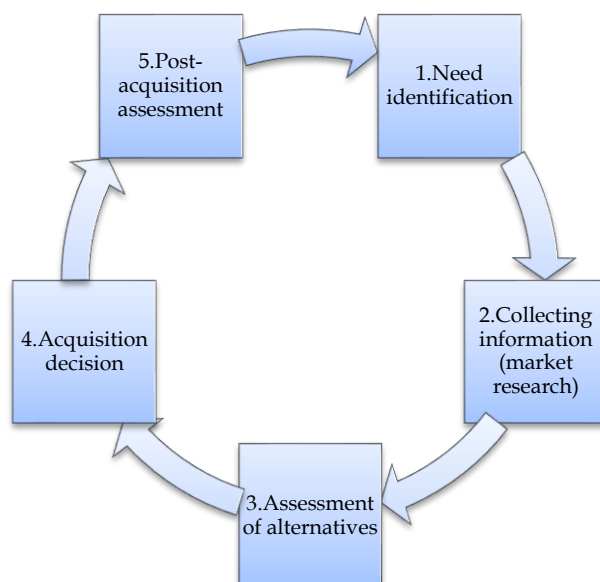
According to Article 35 of LPP, the negotiated procedure may be used for:

- Any public contract when:
 - Due to technical or artistic reasons, the contract should be given to an economic operator;
 - Due to protection of intellectual or industrial property or the exclusive rights; and
 - In cases of extreme emergency.
- Supply contract:
 - For additional supplies from the same supplier, not more than 10% of the contract value, depending on certain circumstances.
- Service contract:
 - If it derives from the projecting competition or if an EO enjoys exclusive rights to provide such services.
- Work or service contract:
 - which are not included in the original contract subject to certain conditions such as services or additional works cannot be divided technically or economically, although they are extremely needed for completion and the value should not be more than 10% of the value of the original contract;
 - for approval of new contracts (for new works) consisting of repetition of similar works or services entrusted to the EO by a prior contract (provided they are in compliance with the basic project, this opportunity is disclosed in the tender, it occurs within 2 years after the conclusion of the contract and the value is not more than 10% of the value of the original contract).

Actions of CAs when using negotiated procedure

When the CA uses the negotiated procedure, the CA should notify the Public Procurement Regulatory Commission (PPRC) within two days from the date of the decision taking. The notice should contain data regarding procurement identification and the detailed legal justification and the facts that were taken into consideration for the use of this procedure. The CA must prove that it had previously taken the measures to avoid situations of using the negotiated procedure by doing the following steps.

Chart 2. Decision-making process for purchase.



The first step of the process is identifying the need when CA determines whether there is need for certain goods/services/works. Then the market is researched for potential suppliers, knowledge is gained on the solutions they offer followed by the assessment of various alternatives found in the market. And finally, an acquisition decision is made, a contract is concluded which, after full implementation, should be assessed to determine what its benefits and costs were. This is the cycle of actions that CA should apply in every procurement.

The CA remains responsible to prove that it has played an active role in determining the terms of the contract, in particular, the contract price (which should not be higher than the market price), delivery deadlines, quantity, quality, guarantees, etc.

In order to make more rational decisions regarding the negotiated price, the CAs should consider the negotiating power of the EO during the negotiation, which means they should know about the position of the EO in the market⁸:

1. Is it a company with a dominating position in the market - EO that sells its product to more buyers can usually exert influence on the price and quality of the product and the terms of the contract;
2. Does the EO product compete with replacement products - if the EO product has no competitor in the market, its negotiating power is greater;
3. Is the CA an important buyer for them - when purchases of the CA represent a very small proportion of sales, the EO is in a more favourable negotiating position;
4. Is the EO product an important input for CA - if the product is important for the development of the CA activity, this puts the EO in a more favourable negotiating position;
5. Does the EO product have the replacing cost for CA - if the costs for product replacement are high, then the EO is in a better negotiating position?

At the same time, the CA should also evaluate its own negotiating position in relation to the EO taking into consideration the following issues:

1. Does it purchase a big volume compared to the EO sales;
2. Does the purchase comprise a big part of CA expenses;
3. The product purchased by CA, is it standard or differentiated (the product belongs to a particular brand, it is patented); if the product is standard, the CA is in a better negotiating position.
4. Is there a cost for replacement (of the product); if there is no replacement cost or if they are low in relation to the costs incurred by the product purchase of the designated EO, the CA is in a favourable negotiating position;
5. Is the product that important to the quality of CA activities; if not, the CA is in a better negotiating position.

In addition to the abovementioned issues, the CA should also consider the additional costs of the life-cycle of product (whole life cycle costs), should be careful not to create dependence on the EO:

1. Being vigilant and professional in implementing projects e.g., purchasing Information Technology (software, hardware or other technological equipment) by clearly stipulating terms of contract, rights and possibility for maintenance, improvement etc;

⁸ Michael E. Porter, 'Competitive Strategy - Techniques for Analysing Industries and Competitors'

2. Determining maintenance and usage costs when purchasing complex equipment; Care should be taken that the cost of use is not a many times higher than the purchase price;
3. When purchasing software, one should be interested whether also to purchase “the copy right”.

The use of the negotiated procedure must have proper and well-documented justification. In addition, there should also be a national and international market research to ensure that there is a market for the goods/services needed for the CA or to ascertain the opposite. Based on market research, the CA should recognise its position towards the EO and should act based on this position. These actions are necessary to achieve value for money.

3 Audit Findings

This section presents the audit findings related to the value for money in procurement procedures with negotiation. Initially, findings related to decisions on the use of negotiated procedures by CA were presented, whether they were made based on proper analysis of the circumstances. Following are presented the findings of whether CA has properly assessed the benefits and costs of purchase through negotiated procedures.

3.1 Has the decision on acquisition been taken based on a proper analysis of circumstances?

The audit results have pointed out that prior to making the decision on using the negotiated procedure CAs had not taken into account all the circumstances or reasons why open procedures cannot be applied or why the negotiated procedure should be used. As a result of lack of sufficient analysis, needs assessment and market recognition, CAs had concluded contractual agreements through the negotiated procedure, which in a number of cases have resulted in higher costs for services/goods received than previous contracts or opportunities on the market. Although 8 out of 17 audited contracts entered into under negotiated procedures have resulted in higher costs compared to open procedure or alternatives, all 17 contracts have been concluded in accordance with the Law on Public Procurement, procedurally.

Criterion-Needs Assessment should be based on empirical data⁹ provided by the requesting unit using the goods/service for operational needs. The quantity and quality of goods/services necessary based on the trend and the forecast for the future should be specified as accurately as possible.

Needs assessment was not properly done in audited entities, in 3 out of 17 audited contracts and, as a result, technical specification was not appropriate. Needs were not properly defined in two (2) contracts to include all of them in the basic contract, while in another contract, needs were drafted in a generalised way leaving it to the entity's discretion to determine them during the performance of the contract.

The needs assessment in MIA for the contract "Supply with passports, ID cards, driving licenses and maintenance of their systems" was not properly proved, because MIA had not conducted a proper analysis of the current systems to ascertain the investments made up to the conclusion of the contract as well as to identify the exact investments needed in the future. Moreover, the current contract has not specified what is the upgrading to be made to the system and the relevant prices to justify the increase of expenditures by €448 thousand per year. Furthermore, no time has been set for the

⁹ Data based on practice and experience

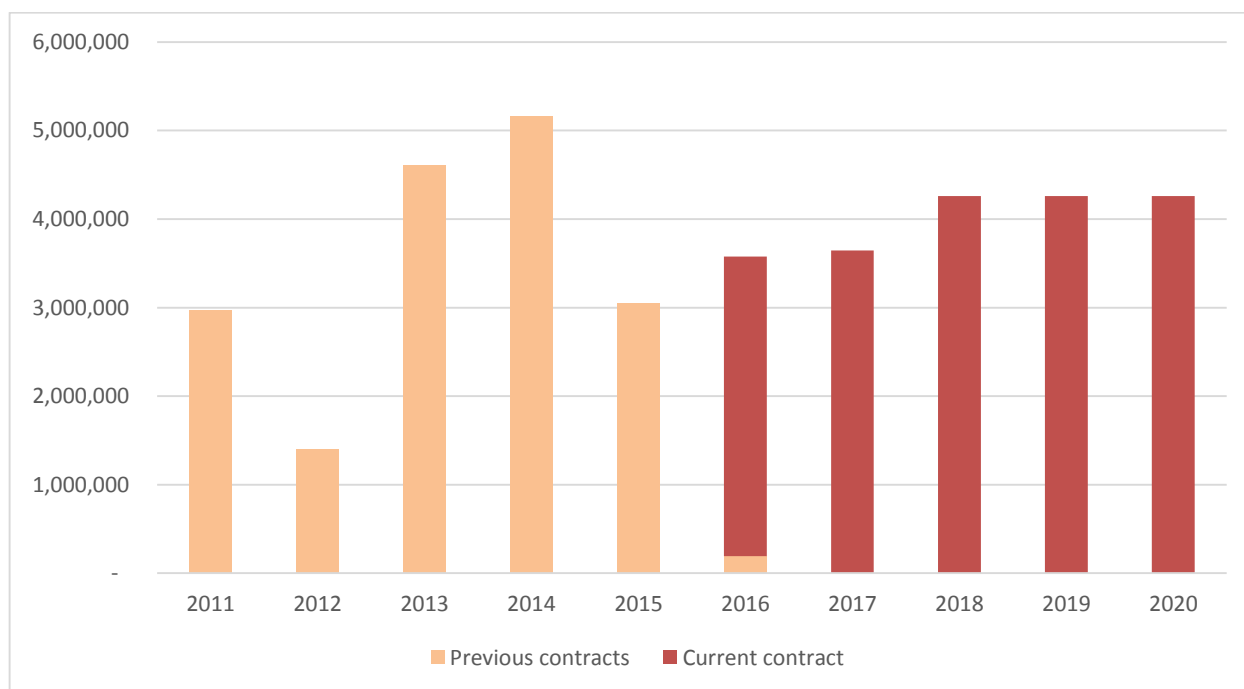
upgrading (investment), i.e., there may be investments even in the last year of the implementation of contract and, in this respect; MIA is in constant dependency from this EO.

MIA concluded this contract with negotiated procedure in 2016 for a time period of five years with the same EO, the following of whom, 1) the contract for supply with biometric passports 2) another contract for supply with biometric ID cards, and, 3) contract for supply with driving license, had just expired. The value of the new contract was €19,817,750, of which €7,498,800 was for maintenance and advancement, the rest for blank documents. Whereas from 2011 to 2016, MIA spent €17,578,017, of which €6,235,147 was spent for equipment and maintenance.

The reason for the use of the negotiated procedure for this contract was that a considerable amount of documents - about 280,000 passports and 240,000 IDs were more than needed to MIA- from two previous contracts and MIA had no right to engage other EOs for maintenance or advancement of the systems in order not to violate the industrial property right to the EO, the contracts of whom had just expired.

Under new contract, MIA had integrated the contracts for the three existing systems for personalisation of documents (three systems - passports, ID cards and driving licences) into a single contract.

Chart 3. Expenses for previous contracts and the current contract for personalisation of documents.



The data presented in the first part (previous contracts) on the chart are taken from the Kosovo Financial Management Information System. The second part (current contract) gives the planned expenditures (how the contract is planned to be implemented by 2021).

The average annual expenditures from 2011 to July 2016, when these contracts expired, were over €3.5 million. While, under the current contract – entered into with negotiated procedure – that started to implement in August 2016, the annual expenditures foreseen amount to about €4 million a year or about 13% higher compared to previous contracts.

Despite the fact that MIA, through negotiation, had attempted to lower the prices at the level of previous contracts, it did not fully succeed.

Table 1. Phases of negotiation of the bid:

Type of document	Initial bid	Fist negotiation	Second negotiation	Contacted price	Nominal value deduction
Passports	9.9	9.56	9.5	9.19	0.71
ID cards	3.9	3.66	3.66	2.98	0.92
Driving licences	3.5	3.5	3.5	3.28	0.22
Maintenance	141,600	141,600	135,700	124,980	16,620

As is shown on the table, the bid price was negotiated twice to get a deduction, but still did not manage to reach the prices it had had according to previous contracts (see table 4 for pricing of previous contracts).

Table 2. Comparison of prices of current contract with the prices of previous contracts

Type of document	Price according to previous contracts	Price according to current contract	Difference	%
Passports	8.22 ¹⁰	9.19	0.97	12%
ID cards	2.45	2.98	0.53	21%
Driving licences	2.19	3.28	1.09	50%
Average				28 %

Prices for ID cards were increased by 28% on average, compared to the prices of previous contracts. The MIA dependence on EO services, which was the cause for the use of the negotiated procedure, resulted in the increase of prices of documents.

Also for the contract "Supply with driving licences¹¹" dated 2015, the unit price was higher by €0.85 per unit, or by €118.300 (62%) more expensive, compared to the previous contract¹² dated 2012. Price for a driving licence increased from €1.35 to €2.19 just because of the fact that MIA was dependent on EO due to industrial rights.

¹⁰ The supply, the system of personalisation, and the maintenance of the system for three years are included in this price.

¹¹ Contract 15-009-115

¹² Contract 12-017-115

Ministry of Education, Science and Technology (MEST) did not properly define the needs for two construction contracts. The technical specification (TS) in the initial contract was deficient, because the measurements at the location where construction work was to be carried out to compile the bill of order and bill of accounts was not done properly. As a result, the need for additional work had arisen which was completed using the negotiated procedure. The total value of contracts for additional work entered into under negotiated procedure was about €58,000 or about 10%, namely 2%, of the value of the basic contracts.

Lack of knowledge on potential suppliers

Criterion- When defining the needs, CA has to take into account the **specifics of the market**, it is necessary to know who the potential suppliers are, what solutions they offer and should draft the technical specifications of goods/services in harmony with the solutions offered by the market.

In 2 out of 17 contracts, the CA requests were very specific and not in line with the solutions offered by the market. The reason was the failure to know professional skills of potential suppliers that resulted in the change of TS and in the use of the negotiated procedure. Failure to recognise the market and TS of the goods offered by the market resulted in negotiated procedures.

MIA compiled detailed TS for the contract "Supply with vehicle number plates" and had left no tolerance for deviation from it, while ISO¹³ standards allow for tolerance. This procurement activity, conducted with an open procedure, failed because none of the bidders had provided number plates that corresponded to TS. As a result of the prolonged procurement activity, the inventory of the number plates was spent and MIA was unable to respond to citizens' requests regarding number plates. Therefore, procurement with negotiated procedure was used as a response to this emergency situation. However, there was competition in this procedure because three EOs were invited to bid and had contracted only 15% of the amount that was initially planned to be purchased to overcome the emergency situation. Subsequently, MIA, through the open procedure, contracted 85% of the planned amount.

Failure of the Customs to recognise the market for the contract "Supply with shirts" in the amount of €15,850, concretely the professional skills of the potential suppliers, as well as the too detailed TS, had resulted in five cancelled open tenders because none of the EOs was able to respond to Customs requirements. In the absence of valid bids, the Customs faced an emergency procurement situation (lack of shirts for the staff) and as a consequence it had entered into a contract with the negotiated procedure but changing the requirements for professional skills and the initial TS. In this respect, the Customs provided no opportunity to other EOs to bid according to the amended requirements of the Tender Dossier. In addition to the change of the TS (which Customs had initially taken readily from another CA), Customs had also removed the practice of testing the shirts in the laboratory in the negotiated procedure, which was precisely why five previous tenders conducted with open procedure had been cancelled.

¹³ ISO 7591, ISO 9001 and ISO 14001

Emergency situation as a cause for the negotiated procedure

In some cases, the need for purchase was determined by external factors over which CA had no influence. The need for "Supply of stickers for vehicle number plates" was a result of the Free Movement Agreement reached in Brussels between the negotiating parties of the Republic of Kosovo and the Republic of Serbia with the mediation of the European Union, an agreement which MIA was responsible to implement. Since its implementation had to start as soon as possible (immediately), MIA had used the negotiated procedure so as not to waste time. MIA had sent an invitation to only one EO to participate in this tender, the contract was concluded in July 2017, but the implementation of this agreement has not begun yet. For this tender, €294,000 was spent. All material purchased (stickers) is in the warehouse until a decision for use is taken.

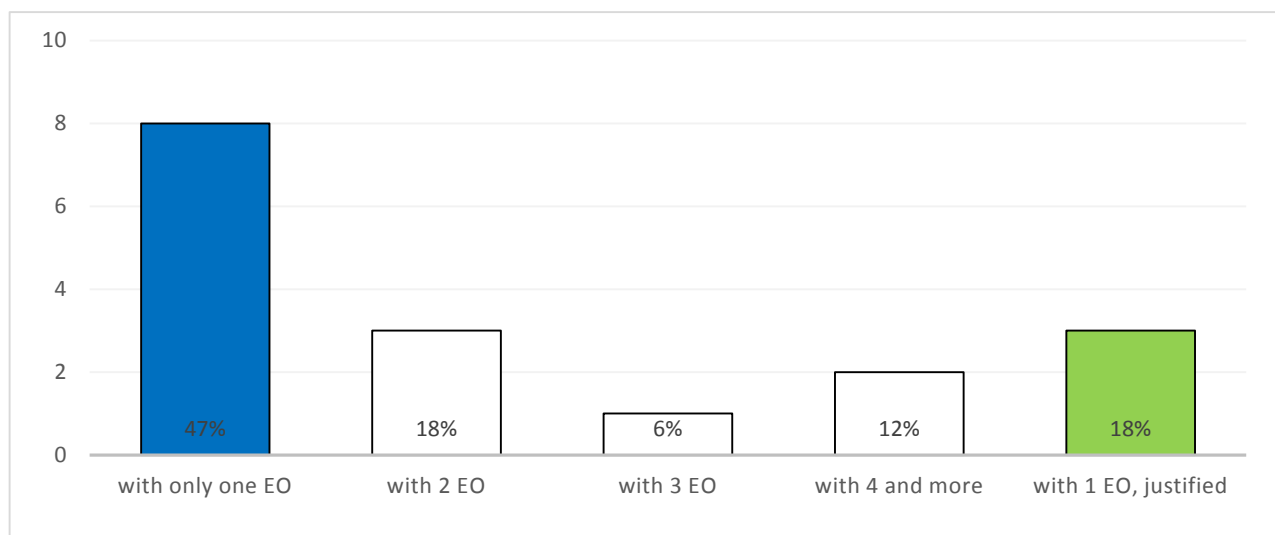
In the Secretariat of Central Election Commission, the use of the negotiated procedure was imposed by the announcement of extraordinary elections in 2016. The necessary supplies had to be secured within 30 days of the announcement of the elections. Therefore, all SCEC contracts, following the announcement of the extraordinary elections, were entered into with the negotiated procedure, and one or two EOs the most were invited to bid in each procurement activity. As a result, the contracted prices resulting from the negotiated procedure, in two of the five audited contracts, were higher than the contracted prices with the open procurement procedure.

In MEST, the need for work "Roof renovation in the primary school in Bllacë, Suharekë" and "Construction of primary school in Halabak - Podujevë" arose as a result of unpredicted factors (fire). The urgent need to functionalize the school facility had imposed the use of the negotiated procedure. Unlike other CAs, MEST had contacted six EOs for one procedure, namely four EOs for the other procedure from which it requested bids and had rewarded the cheapest bid with a contract.

Failure to explore the market - Alternatives assessment

Criterion- Whenever possible the CA will use open procedure to enter into a contract for supply with goods/services/work in order to ensure transparency, sufficient competition and lower prices. In cases when the open procedure cannot be used, and when the negotiated procedure is indispensable, the CA must ensure that a competitive process has been conducted, should receive an optimal number of bids from as many EOs as possible.

For 8 out of 17 audited contracts, CAs had negotiated only with one EO each, for three contracts with two EOs, i.e., 47% of sample contracts were entered into without any competition, while about other 18% with low level competition. The lack of competition has resulted in contracts with higher prices than similar contracts with open procedures.

Chart 4. Number of bids for procurement activities

In absence of market research, Customs had used the negotiated procedure to conclude the contract on "Supply with vehicle evaluation catalogue". Customs had not researched the market for other potential suppliers providing this service. As a result, the price offered by the current supplier was imposed to the Customs while the contract price per unit was increased by 97%. The service for access in vehicle evaluation catalogue had changed in form (now the application was in an electronic form, while in the past it had been in the physical form) but the price of service per unit was increased from €1,345 for a catalogue (a total of 10 catalogues) to €2,640 for access (five accesses to the application).

Failure to research the market for EOs providing data on reference prices of certain goods had resulted in the entering into of a contract "Access to Stock Exchange" with the EO whose previous contract had just expired for the same service. Nor does the price of this contract differ from the previous contract. However, from on-line research we have found that there are other EOs¹⁴ providing this service, while the use of negotiated procedure has not been sufficiently justified.

Failure of SCEC to research the market for the contract "Supply with badges" had resulted with the invitation of only two EOs to bid for this procurement. This negotiated procedure did not ensure an economic price. The price of the negotiated contract was €13,800 or by 18% higher than the price of subsequent contract conducted with the open procedure for the same type of supply¹⁵. Moreover, the same EO had won both of them, namely the open procedure contract and the first contract with negotiated procedure

For the same reason, the negotiated procedure for the contract "Printing of training manuals" resulted as not economic, about which the SCEC had invited only two EOs in negotiations. The price of the negotiated contract was about €15,000, the value of which was reduced by 3% after the

¹⁴ <http://en.boerse-frankfurt.de/commodities>

¹⁵ This result is from the comparisons made with unit prices in the contract with open procedure

negotiations. However, SCEC had later conducted a procurement activity with an open procedure for the same supply with the same technical specifications, which resulted with a contract with a price of €4,740, which, unlike the contract with a negotiated procedure was cheaper by €9,732 or by 205%.

SCEC had entered into a contract "Supply with UV Spray" using the negotiated procedure without ever considering the alternatives (replacements) offered by the market for these goods. From study visits to the neighbouring countries, SCEC learned that the ultraviolet spray alternative, used to prevent multiple voting, was a coloured pencil (marker). However, it had never formally assessed it as an alternative to consider the possibility of replacing UV Spray, for which it spent €44,400 for 6,000 units (€7.4 per unit) and at the same time for the UV Lamp for which it had spent €24,900 for 6,000 units (4,15 € /per unit)

The coloured pencil is a more efficient tool¹⁶, 600 people can be marked with such a pencil of 5ml. The pencil is much cheaper (about € 2), easier to transport, significantly reducing the expenses of organisers of elections, and it is advised to use them when signs are needed to remove within 3 to 5 days¹⁷. If 6000 units of UV lamps and 6,000 units of UV spray which altogether cost €69,300 (11,55 €/per unit) are replaced with 6,000 coloured pencils with an estimated cost of € 12,000 (€2 / per unit), € 57.300 could be spared.

In three audited procurement activities, the use of negotiated procedure was a necessity. In one of the procurement activities, Customs had no other choice but to conduct a negotiated procedure, because there was no EO in the market. Such a case is the contract on "Laboratory tests", where only two laboratories were accredited by the Ministry of Trade and Industry, and none was accredited to carry out all sorts of tests necessary for Customs. While the use of negotiated procedure with only one EO has been justified in the two procurement activities in MEST, because they were contracts for additional work and none had exceeded 10% of the value of the initial contract.

3.2 Are post-acquisition benefits and costs assessed properly?

The assessment of post-acquisition benefits and costs is an area of improvement in every CA, as none of them is practicing making such an analysis. In the absence of this analysis, CAs have no benchmarks they can use when evaluating bids, whether they are with the negotiated procedure. It is good practice that post-acquisition benefits are assessed after the implementation of the contract. This practice was not implemented in the contracts we have audited. The lack of an analysis after the implementation of the contracts was the main cause that CAs had no information as to what the product/service was, and how much the benefits or expenses were per unit of the product/ service performed by the CA.

¹⁶ <https://www.alibaba.com/showroom/indelible-marker-pen-for-elections.html>

¹⁷ https://en.wikipedia.org/wiki/Election_ink

Criterion - Some goods, other than the cost of purchase, also have operating and maintenance costs. These should be timely identified and should be taken into account when evaluating the bid of the EO. This is because the price achieved when combining these two costs determines which bid best reaches the value for money.

The current structure of contract of MIA on the personalisation of identification documents is comprised of the maintenance costs of the system about 38%, while the rest is spending material (blank documents). The maintenance costs under the current contract are higher compared to those of the previous contract for supply with passports for which MIA had not paid neither for equipment (system and the machine for personalisation of documents) nor for maintenance because these were both included in the price of blank documents.

MIA did not make a post-acquisition analysis of costs and benefits, but during the evaluation of the bid, the bid evaluation committee for the personalisation system of identification documents based on the previous contract had ascertained that the cost of a passport was €8,22 , including the maintenance of the system for three years, printing colours, etc., while the price of a passport according to the current bid with negotiated procedure was €9.19, plus the monthly maintenance fee was about €125,000. In other words, according to the evaluation commission, the bid price was higher compared to the previous contract. Despite this price difference, after some attempts were made to lower the bid price, the bid was accepted and the contract was concluded.

From our expense analysis of previous year contracts, we have concluded that the average cost per unit for the personalisation of identification documents is as follows:

Table 3. Cost per unit of documents compared to the calculated cost of the current contract

	Previous contracts	Current contract	Difference	Difference in %
Passports	13.06	14.81	1.75	13%
ID Cards	3.81	4.80	0.99	26%
Driving licences	2.41	5.29	2.88	119%
Total	19.28	24.9	5.62	29%

The first column gives the average costs for a document based on costs of previous contracts. To calculate the cost per unit, the total amount of expenses (including maintenance costs) was divided by the number of documents supplied. The second column gives the average costs for a document calculated by dividing the current contract price to the contracted amount of the documents. To reduce the cost per unit for a passport at the level of cost of previous contracts, MIA needs to be supplied with 595,000 additional passports within the five year period, which is 70% more than the contracted amount:

The Customs had no analysis of the costs of its contracts, and as a result costs per unit were unknown. The contract price for vehicle evaluation catalogue was increased from €1,345 per unit per year to about €2,640 per unit. Despite the price difference expressed in the absolute value may be small this percentage difference is about 97%.

MEST did not have an analysis of post-acquisition costs either. Out of the two additional work cases which were as a result of inaccurate measurements and calculations at construction sites, MEST did not learn from the lessons in order to eliminate shortcomings in future procurement procedures and avoid negotiated procedures. MEST during 2018 had also signed three other¹⁸ contracts for additional work with a negotiated procedure in the amount of €160 thousand.

MEST had two cases of emergency procurements, where a cause were external factors (fire) but were not able to initiate procurement procedures, because these two activities were not included in the procurement plan and did not have budget for them either. In absence of budget, MEST had to apply for funding from the Ministry of Finance, which had to be approved by the Government. From the moment of the funding request to its approval, a month and a half had passed, namely more than two months, and as a result the negotiated procedure without publication was indispensable not to waste time.

¹⁸ Contracts: 18-7022-525; 18-5119-525; and 18-5113-535

4 Conclusions

The four public institutions that were audited by NAO had not acted adequately to avoid using the negotiated procedure without publication of the contract notice or to obtain the best price in cases where the negotiated procedure was inevitable. An element that contributed to this situation in most of the CAs was the lack of market research – identification of potential suppliers and identification of solutions they offer. As a result, 65% of contracts audited through the negotiated procedure were entered into under minimum competition conditions, of which about 47% were entered into only with one EO and 18% of them with only two EOs. This way of procurement of goods, services, and works is not transparent and does not guarantee that CA has received the value for the money it has spent.

Lack of proper needs assessment and lack of proper market research had resulted in the use of negotiated procedures consequently resulting in contracts with higher prices than contracts with open procedures.

For the above-mentioned contracts, the effect of increase of costs resulting from the negotiated procedure could be avoided if CAs would have conducted a market research to identify potential suppliers and if more of them were invited for negotiation.

Lack of market research makes CA unable to identify potential suppliers, the goods /services they offer, their prices, the alternatives to goods/services, which consequently brings the use of negotiated procedure and higher costs for CA, due to higher prices.

There were cases when CAs used the negotiated procedure for reasons which were beyond their control, such as the case of the lack of EOs in the market and the urgency of acquisition.

Emergency procurements in the SCEC were phenomena which occurred repeatedly due to extraordinary elections, but SCEC had not considered alternatives to benefit the best from using the negotiated procedure. From the experience of the extraordinary elections, SCEC was supposed to learn the lesson and prepare for an emergency situation by compiling the list of EOs and contact as many of them as possible for any procurement activity that should have been developed, rather than contact only one or two by risking to receive higher prices than market prices, as has happened.

An addiction to an EO is created also in the absence of market research. Due to non-identification of potential suppliers, CA may face a situation where it is entirely dependent on an EO. Thus the CA is exposed to a high risk because if the EO comes out of the market or fails in the provision of contracted services, CA's continuity of operations will be at risk.

Lack of market research makes CA unable to compile requests and TS to whom EO may respond. The inability to respond to the TS leads to the cancellation of the tender with an open procedure and this cancellation leads to the imposed use of the negotiated procedure. This is because CAs can face emergency supply situations that arise as a result of stock shortages, such as the case of MIA with number plates and the case of Customs with shirts.

Assessment of post-acquisition benefits and costs is an area for improvement in every CA because none of them is practicing making such an analysis. In the absence of this analysis, CAs have no benchmarks that they can use when evaluating bids, especially those with a negotiated procedure. The unit cost of the product, resulting from the assessment of the benefits and costs should be used as a reference against which bid prices are compared and which determines whether or not an offer is to be accepted or refused.

The lack of assessment of benefits and costs after the implementation of the contract puts CAs in a situation to make uninformed decisions because we do not know how much the cost would be and what the post-acquisition benefits were. Therefore, the assessment of costs/benefit is indispensable.

Taking these necessary actions by the CAs would avoid the possible negative effects from using the negotiated procedure and, as a result, CAs would be more transparent, would provide more competition in their purchases and lower prices.

5 Recommendations

Proper needs assessment and market research are issues to be addressed by the Contracting Authorities in order to avoid the use of negotiated procedures without publication of the contract in order to ensure transparency, competition and consequently to achieve more economical prices.

Cost and benefit analysis after the implementation of the contract is also a matter to be addressed in order for CAs can make informed decisions about each procurement activity even in cases when the negotiated procedure without publication is inevitable.

We recommend, therefore, the Contracting Authorities to:

- Conduct market research to identify potential suppliers, and to recognise their professional capacities;
- Conduct market research to identify the products/ services offered by the market in order to design TS for a product /service that is in the market and that meets the needs of the CA;
- Conduct an analysis of the contracts implemented by identifying the costs and benefits from the acquisition so that this analysis can serve as a benchmark for future acquisitions;
- Compile lists of potential suppliers for procurements of similar nature;
- Using the above list, they should apply competitive procedure with negotiations in case the open procedure cannot be applied for objectively justifiable reasons; and
- For emergency procurements, when a negotiated procedure without publication is indispensable, the list of suppliers should be used in order that the negotiated procedure can ensure competition.

Annex 1 Audit motive, audit criteria, methodology and scope

Audit motive

Since 2013 and onwards, the value of contracts signed with negotiated procedure has increased both in nominal value and as a percentage of the total of contracts signed.

CAs, a total of 129, during 2014-2017¹⁹ contracted 1,352 contracts in the value of over €208 million using the negotiated procedure. On average, therefore, 338 contracts were entered into per year, with an average value of over €52 million a year.

Table 4. The value of contacts signed according to procedures ('000€)

Type of procedure	2014	2015	2016	2017
Negotiated procedure	50,591,999	64,695,069	51,458,448	42,164,760
Other procedures	389,737,957	401,843,625	424,574,379	459,789,945
Percentage	13%	16%	12%	9%

Based on the analyses of the reports of the signed contracts of CAs, the value of contracts entered into with a negotiated procedure without publication constitutes about 13% of the total value of contracts entered into under other procedures.

Audit criteria:

The following criteria based on standards will be applied for the purposes of this audit.

- CA should collect information on the characteristics of the market where it purchases and also for the latest industry activities or tendencies that may impact on the competition for the tender in question.
- CA should collect information on potential suppliers, their products and their prices. If possible, it should compare the prices of its contracts with the prices of the contracts of other CAs.
- CA should collect information about previous bids for same or similar products.
- CA should collect information on recent price changes. It should be informed about prices in the vicinity of geographical areas and about possible alternative product prices.
- CA should be co-ordinated with other public sector procurement officers who have recently purchased similar products or services to understand better the market and participants.

¹⁹ Report on public procurement activities in Kosovo for 2017, Public Procurement Regulatory Commission

- CA should conduct a cost-benefit analysis to determine the ratio between costs and benefits.
- Other than the acquisition cost, CA should recognise also the operating and maintenance costs of the product intending to purchase. The calculation of life-cycle costs should include operating and maintenance costs of the product along with its purchase or lease price; costs of spending material, training and cost of alienation at the end of product life-cycle.
- CA should evaluate the post-acquisition benefits, once the contract has been fully implemented to determine the cost per unit of its product/service.

Audit questions

1. Has the decision on acquisition been taken based on a proper analysis of circumstances?
 - 1.1. Has proper need identification been done?
 - 1.2. Has a proper market research been done?
 - 1.3. Has the proper alternative (replacement) assessment been done? Is there a cost for the product replacement?
2. Have acquisition benefits and costs properly assessed?
 - 2.1. Have the necessary measures been taken to ensure that the purchased product is the best in terms of the costs of the life-cycle of the product?
 - 2.2. Are post-acquisition benefits properly assessed?

Audit scope

This audit covered the 2015-2017 periods; during which CAs selected for sampling had concluded a total of 87 contracts using the negotiated procedure. The sample consists of four CAs: Kosovo Customs, Ministry of Internal Affairs, Ministry of Education, Science and Technology, and Secretariat of the Central Election Commission.

We have selected 17 contracts as a sample (see annex 2), the joint value of which is about €21.5 million or about 52% of the total value of contracts with negotiated procedure. Although the sample includes the 2015-2017 period, we have also taken previous contracts to compare them to those included in the sample. A concrete case is MIA where we have taken contracts for 2011-2014 period in order to compare with the contract included in the sample.

Methodology and audit scope

The audit questions will be answered by:

- Analysing the documentation which CAs have in their records by evaluating the justification for using the negotiated procedure;
- Analysing CA activities towards market research;
- Analysing the minutes of negotiating meetings between CA and EO;
- Assessing the analyses made by CAs about their supplies and the accompanying costs (whole life cycle costs)
- Assessing the analyses of CAs on the possibility of using alternative procurement procedures.

Annex 2 Sample of contracts entered into with negotiated procedure

The sampled CAs, during 2015-2017, had entered into a total of 87 contracts using the negotiated procedure, of which 52 were with higher values than €10,000, totalling about €42 million. We have selected a total of 17 contracts as an audit sample, as follows:

	Contracting Authority	Year	Procurement number	Title	Contract value €	Contract duration ²⁰
1.	Kosovo Customs	17	12	Supply with summer shirts for Customs staff	15,849	
2.	Kosovo Customs	17	9	Supply with vehicle evaluation catalogues – online access to the application	13,203	
3.	Kosovo Customs	17	10	Services for goods analyses Part II	220,000	3 years
4.	Kosovo Customs	17	11	Services for access to the world stock exchange	50,400	
5.	Ministry of Education, Science and Technology	15	58	Construction of the Primary school in Halabak-Podujevë"	194,500	
6.	Ministry of Education, Science and Technology	17	13	Additional works "Construction of Secondary School in Prizren"	35,764	
7.	Ministry of Education, Science and Technology	17	15	Renovation of the roof in the Primary school "Ramë Bllaca" in Bllacë - Suharekë	79,845	
8.	Ministry of Education, Science and Technology	17	32	Additional work for completing the project in the Physical education hall in Bllacë-Suharekë	22,127	
9.	Ministry of Internal Affairs	15	9	Supply with driving licences	307,300	
10.	Ministry of Internal Affairs	16	10	Emergency supply with number plates for vehicle registration	93,411	
11.	Ministry of Internal Affairs	16	23	Supply with passports, ID cards, driving licences and maintenance of their systems	19,817,750	5 years
12.	Ministry of Internal Affairs	17	3	Emergency supply with stickers for vehicle number plates	294,000	
13.	Secretariat of Central Election Commission	17	42	Printing of ballots	180,365	
14.	Secretariat of Central Election Commission	17	32	Printing of badges for extraordinary elections 2017	89,968	
15.	Secretariat of Central Election Commission	17	65	Supply with UV spray for local elections 2017	44,400	
16.	Secretariat of Central Election Commission	17	25	Supply with UV lamps for extraordinary elections 2017	24,000	
17.	Secretariat of Central Election Commission	17	41	Printing of training manuals	14,472	
	Total				21,497,354	

²⁰ Other than two (2) contracts the implementation deadline of which is three (3) namely five (5) years, all other contracts have one (1) year implementation deadline or are one-time supply.