

SUMMARY:

In 2009, over 433 million euros have been spent on public procurement in Montenegro. Although the public procurement system has been enhanced since its establishment, it still mirrors numerous imperfections related to the untimely and unrealistic planning, incoherence between the procurement contract and the tender requirements, additional changes of the procurement conditions, and the absence of control over the execution of the contract. The lack of transparency and control is particularly emphasised in the phase following the contract assignment. The margin for the development of corruption, especially in relation to additional works is particularly large in this phase. Although numerous irregularities have been pointed to in almost all stages of the public procurement process, disciplinary, misdemeanour or criminal liability has never been established. As a consequence of the different interpretations of the Misdemeanour Act and the Law on Public Procurement, the proceedings for the initiation and determination of misdemeanour liability does not function in practice. The Decision, pursuant to which the contracting authority pays the fine for misdemeanour to the state budget, further undermines misdemeanour proceedings, which are already non-functional. Within three years, the Police Directorate has filed only three criminal cases. In line with our findings, no enforceable court judgments for the abuse of the process of public procurement have been reached so far.

"Arguments and opinions presented in this publication are those of authors and do not necessarily reflect the views of the Foundation Open Society Institute - Representative Office Montenegro".



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INTRODUCTION

Public procurement entails the sum of all actions and activities that the public sector undertakes with the aim of a cost effective procurement of goods, services and works. According to the Public Procurement Directorate (DJN), the share of public procurement in Montenegro's GDP has been downsized from 17.74% in 2008 to 14.43% in 2009.¹ The large amount of public funds that is devoted to public procurement is an area of high risk for corruption. This points to the need and the significance of the strengthening of transparency and liability in this area. The public procurement system has been established in Montenegro in 2001, when the first Law on Public Procurement was adopted. The system has significantly been improved with the adoption of the new Law in 2006. However, the public procurement system in Montenegro is still not fully harmonised with the relevant EU Directives.² The revision of the legislative framework regulating public procurement with the aim of its harmonisation with the EU Acquis is ongoing. Hence, the aim of this document is to outline some advantages, significant disadvantages, and possible areas of improvement of transparency and liability in the public procurement system in Montenegro.

This publication was prepared in the framework of the "EU Matrix - Monitoring the process of European integration with a focus on the implementation of the National Program for the integration of Montenegro into the EU" project. This project is being implemented in partnership with the Monitoring Centre and the European Movement in Montenegro, with the support of the Foundation Open Society Institute - Representative Office Montenegro.

¹ Data compiled on ground of the final assessment of the Statistical Office (MONSTAT) for 2008 and the preliminary assessment of the Ministry of Finance of Montenegro for 2009.

² SIGMA, *Public Procurement in Montenegro: Assessment, 2009*.

TRANSPARENCY IN THE PUBLIC PROCUREMENT SYSTEM IN MONTENEGRO

According to PEFA³, 82.54% of all public procurement in Montenegro has been concluded through transparent tenders. This data indicates that over 75% of contracts have been assigned in tenders that are based on open competition.⁴ The average number of bidders is on the rise as well. In 2009, there has been an average of 44.29 bidders per tender, unlike in 2008 and 2007 when the number of bidders per tender amounted to 3.51 and 3.03, respectively.

The planning of public procurement

The Law on Public Procurement stipulates the obligation for the contracting authority to adopt a public procurement plan by the end of the current calendar year, if he or she intends to engage in a public procurement with a value exceeding 100,000 euros in the following year. The contracting authorities need to clearly define the object of public procurement, available funds, necessary quantities, and the period in which public procurement will take place.⁵ The outline of the content of the plan of public procurement is published on the webpage of the Public Procurement Directorate.⁶

In practice, despite the legal obligation to adopt an annual plan, a number of contracting authorities fail to do so. Another share of the contracting authorities are not bound by law to adopt public procurement plans at all. In 2007 and 2008, the State

³ *Public Expenditure Financial Accountability (PEFA)*

⁴ *Public Procurement Directorate, The Report on Public Procurement in 2009*, p. 20

⁵ *Mujević Mersad, Ivan Krkeljić and Sandra Krstović, Javne nabavke u Crnoj Gori (ostvarivanje osnovnih principa)*, p. 29

⁶ See: *Official Website of the Public Procurement Directorate*: <http://www.djn.gov.me>

Auditing Institution (DRI) established that it was a common practice to execute public procurement without the prior adoption of the public procurement plans.⁷ In cases of several institutions (Ministry of Defence, Hydro-Meteorological Institute, Municipality of Rožaje, Employment Institute, Montenegrin Railways plc., Public Enterprise Morsko Dobro), DRI pointed to the need for a more realistic planning. In 2009, DJN also highlighted that the municipalities of Podgorica, Pljevlja and Bar were the contracting authorities who ‘in spite of written and oral notices, have shown the lack of understanding or an irresponsible attitude [...] in view of the preparation of adequate public procurement plans’.

Realistic and timely planning of public procurement is key to the success of the process. Since the public procurement plans that are available to the public do not contain any explanation, it is not possible to assess the justifiability of certain procurements and their value. Such a practice is contrary to the possibility of public oversight of the main principle of public procurement: that the public sector should purchase only those items that are necessary, only in the quantities that are necessary, and at the time when those items are necessary. In relation to the existing public procurement plans, state institutions and authorities have concluded public procurement contracts with savings. However, in case of the Public Works Directorate, these savings have been substituted by the contracted value of works that exceeds the planned value of works by over ten million euros.⁸

⁷ *Annual report on the revisions and activities of the DRI from October 2008 to October 2009*, p. 39 (In 2008, the public procurement plan was not adopted by: Secretariat for European Integration, Civil Aviation Directorate, Montenegrin Committee for Establishing the Existence of Conflict of Interest, and the Montenegrin Academy of Sciences and Arts. In 2007, the public procurement plan was not adopted by the Agency for Electronic Communications and Postal Services, Pension and Disability Insurance Fund and the Ministry of Culture)

⁸ *Public Procurement Directorate, The Report on Public Procurement in 2009* (estimated value 61,983,746.18 euros; contracted value 72,062,335.14 euros)

The availability of information and documentation about public procurement tenders

The DJN publishes the calls for tenders regularly on its webpage, along with the decisions on the allocation of contracts in the tenders for public procurement. Calls for tenders and decisions on contracts are not published on the DJN website for procurements of a small value, as these are conducted through direct agreements.⁹ In this respect, there has been a significant increase in transparency, which has also been noted by the relevant actors.

However, the level of transparency in public procurement tenders is limited due to the poor availability of public procurement contracts, contract annexes, and reports on the implementation of individual agreements, either on the DJN website or on the websites of the contracting authorities.

The PEFA¹⁰ report outlines that the DJN, which is in charge of collecting data on public procurement from the contracting authorities, has simplified the forms for the verification of the submitted information. Although a large share of contracts are concluded following a public tender, the PEFA report highlights the lack of precision in the statistical data. This very problem was also outlined by the DRI in its 2008 Annual report, which concluded that the lack of data about public procurements concluded through direct negotiation seriously undermines the data included in the part of the DJN's report dealing with the share of public procurement in the total consumption.

The overall discipline of the contracting authorities in terms of delivering reports on public procurement contracts has been on an upwards slope in the past years, amounting to 74.1% in 2007,

⁹ *Ibid.*, p. 20

¹⁰ *Ibid.*, p. 20.

88.67% in 2008 and 88.63% in 2009. However, some institutions do not deliver a separate annual report on public procurement, because they operate within the authority of other institutions. Hence, it is difficult to determine the exact amount of funds that these institutions have spent¹¹. This has been the case with public enterprises established by municipalities, with schools that are under the authority of the Ministry of Education and Science, etc.

The phase after the adoption of the decision on the allocation of the public procurement

The most common example of the violation of laws and the principle of transparency is that the requests stipulated in the procurement notice, call for tender or tender documentation, are subject to change in the contract that is concluded with the selected bidder, i.e. the conditions of the enforcement of the contract are being changed after the contract has been concluded.¹² In this way, abuse occurs after the adoption of the decision on the allocation of the contract. In addition, The DJN is not in the possession of any data related to contracts that have been terminated due to the failure of the contracted party to fulfill the terms of the contract.

The Law on Public procurement regulates the process of public procurement up until the adoption of the decision on the allocation of the contract. As such, it does not entail mechanisms that would guarantee the harmonisation of the contract with the requests envisaged in the tender documentation. Moreover, the Law does not enshrine any mechanisms aimed at overseeing the subsequent changes to the contract, while the very supervision of the enforcement of the contract falls outside the scope of application of this Law. This is particularly relevant in relation to

¹¹ *Ibid.*

¹² *Mujević Mersad, Ivan Krkeljić and Sandra Krstović, Javne nabavke u Crnoj Gori (ostvarivanje osnovnih principa)*, p. 32

the procurement of works, whereby the majority of examples indicate that the additional works, agreed upon during the negotiation process without the prior public tender, significantly change the conditions of the initial tender, thus discriminating those bidders whose offers were rejected. Additional works¹³ may only be concluded with the bidder who was offered the main agreement, while the total value of the contract for additional works may not exceed 25% of the value of the main contract.

The consent of the DJN is required for the contracting of additional works. However, instead of using this provision in exceptional and well-justified cases, the latter has a wide application in practice. In 2009, the DJN received 270 requests, while consenting to the initiation of negotiations without the prior publication of the public tender in a total of 203 cases. For example, the daily newspaper *Vijesti* outlined that ‘the construction and the refurbishment of the Public Health Institute, that was contracted with the company “Lipa”, cost 2,474,611.93 euros. As it turned out to be, the need arose for additional works, estimated to 618,653 euros, i.e., a few tenths of percent above the 25% of the value of the original contract’. Such subsequent precision in the cost planning enabled the Directorate to conclude an agreement with “Lipa” without the need for direct negotiations, thus avoiding a public and a transparent tender.

The case of construction of the new building of the Hydro-meteorological Institute in Podgorica is even more interesting than the previous one. According to *Vijesti*, at the time when the call for tender was published, in summer 2007, the estimated value of works was 2.8 million euros. However, the value of the contract, assigned to the Podgorica-based company “Fidija” exceeded the estimated value by 50%, and amounted to 4,151,051.80 euros. Two years later, it happens that not even this amount would suffice to cover all of the expenses, because the additional works have been estimated to 1,037,762

13 Additional works entail all those works that were not included in the original project, or in the original contract, but which, due to the unpredicted circumstances, become essential for the execution of works and services; and when such additional services may not technically or economically be separated from the main contract without major difficulties for the contracting party.

euros, that is - an amazing 0.95 euros below the legally prescribed maximum! In practice, had the additional works been estimated to a single euro over the amount requested, a tender would have to have been called. Yet, this mathematical precision managed to circumvent such an option. Thus, the Directorate and “Fidija” were able to initiate direct negotiations without public bidding. Eventually, the final cost of the works was twice as high as the initial estimate.¹⁴

Since the procurement of works is 51.63% of the total value of public procurement, it is safe to assume that the above-described practice obstructs the entire public procurement system, and it needs to be controlled and limited more strictly.

LIABILITY IN THE PUBLIC PROCUREMENT SYSTEM IN MONTENEGRO

“The message needs to be the following: the state has clearly formulated the rules for the implementation of the process of public procurement, and it intends to apply them in the strictest way; the trespassers will be punished by Law; officials involved in corruption will be dismissed; bidders who violate the rules will be published and excluded from future tenders by being placed on a black list”.¹⁵ This sentence is a quote that shows how the Public Procurement Directorate highlighted the determination of the government in relation to the legality and liability in public procurement in February 2010.

Doubtless, the strengthening of the mechanisms of control and liability in public procurement is crucial in the fight against corruption. Still, the true determination of the relevant state authorities to enforce control and liability can only be assessed through the practice of determining disciplinary, misdemeanour and criminal liability.

14 Vijesti 27/02/2010

15 kroz sistem javnih nabavki u Crnoj Gori, Podgorica, 2010

Disciplinary liability

The Law on Civil Servants and State employees stipulates that the major disciplinary misdemeanours include 'irregular disposal of the entrusted funds, abuse of authority or exceeding the official authority; any fault that prevents citizens or legal persons from exercising their rights guaranteed by law; the provision of incorrect data that influence the adoption of a decision'.¹⁶

However, in cases of contracting authorities whereby irregularities were established in the revision process of public procurement, no disciplinary proceedings against the responsible individuals or civil servants have taken place.¹⁷ We have corroborated this fact by reviewing the available decisions on disciplinary liability. The aforementioned leads to the conclusion that the practice of disciplinary measures against senior officials and public servants liable for public procurement does not exist. That is, the disciplinary liability in the process of public procurement is not developed.

Misdemeanour liability

The Law on Public Procurement stipulates fourteen activities that are considered a misdemeanour, and that are subject to financial liability for the legal person of the contracting authority. Only one out of the fourteen activities stipulates any liability for the authorised individual of the contracting authority. In contrast to the anti-corruption declarations enshrined in the Law on Public Procurement, no misdemeanour liability is envisaged for the violation of the provisions related to the conflict of interests and anti-corruption regulations.

The reality reveals the dilemma over whether the Public Procurement Directorate is in charge

¹⁶ *Law on Civil Servants and State Employees*, art. 59

¹⁷ No disciplinary proceedings have taken place at the Ministry of Culture, Agency for Electronic Communications and Postal Services, Employment Institute of Montenegro, Ministry of Defence, Development Fund, the Ombudsman, Hydro-Meteorological Institute.

for lodging the requests for the initiation of the misdemeanour proceedings, or only for reporting to the relevant authorities. Namely, the Law on Misdemeanours stipulates that the misdemeanour proceedings are initiated by a request of an authorised institution or by a request of the injured party.¹⁸ 'Management authorities' are also enlisted among the entities authorised to file a request, and the individuals whose legal interest has been violated may file complaints.

The Law on Public Procurement stipulates that the Public Procurement Directorate 'informs the State Auditing Institution and submits complaints to other relevant institutions on the instances of the violation of procedures of public procurement, whereby those cases are disclosed in the course of activities that fall within its scope'.¹⁹ In the second half of 2009, the Public Procurement Directorate filed nineteen requests for the initiation of misdemeanour proceedings with the regional misdemeanour units.²⁰ The majority of these requests was however rejected on grounds that they were filed by an authority that has no competence to file such requests. One of the requests was rejected on grounds of the sloppy and untimely action on the behalf of the DJN. The President of the Misdemeanour Council and the President of the Regional Unit for Misdemeanours in Podgorica maintain that the Directorate does not have the competence to file requests for the initiation of misdemeanour proceedings. They also attribute these circumstances to the 'mistake' in the Law on Public Procurement, because the Law does not clearly stipulate the competences for the initiation of misdemeanour proceedings. In addition, the Ministry of Finance has filed no requests for the initiation of misdemeanour proceedings.

¹⁸ *Law on Misdemeanours* (Official Gazette of the Republic of Montenegro No. 048/99-1), art. 58.

¹⁹ *Law on Public Procurement* (Official Gazette of the Republic of Montenegro No. 46/06), art. 17, para. 12.

²⁰ Customs Authority, Statistical Office, Prison Institute, Danilovgrad Municipality, Pljevlja Municipality, Šavnik Municipality, the Institute for Environmental Protection, Directorate for the Development of Small and Medium Enterprises, Insurance Supervision Agency, Biotechnology Institute, Standardisation Institute, the Medical Chamber, Public Enterprise Utility Services Bar, Public Institution Radosav Ljumovic, ICN Montenegro, Milun Božović University, Multidisciplinary High School in Podgorica, Railway Infrastructure, plc.

The conflict between the two laws is also mirrored in the provision of the Law on Misdemeanours, according to which ‘Ministries and other state authorities [...] conduct the misdemeanour proceedings that may inflict a fine’. This is the case with all the misdemeanours in the Law on Public Procurement. However, there are no officials in the Ministry of Finance who are in charge of the misdemeanours in public procurement. It is a cause of concern that the local misdemeanour authorities have not raised this concern so far, although they voiced concerns on some other issues.

Even if the competences for the initiation and the conduct of misdemeanour proceedings were functioning flawlessly, and if the liability for misdemeanour were determined, the fine imposed would unlikely achieve its aim. The Law on Public Procurement stipulates that the competent public authority who is the contracting authority in the case of public procurement is liable to pay the fine, and all of the fines are subsequently directed to the Budget of Montenegro. Hence, these solutions are pointless and they do not reflect the aim of imposing a sanction for misdemeanour.

It is obvious that the different interpretations of the provisions enshrined in the two laws, combined with DJN’s indolence, have resulted in the non-implementation of the misdemeanour provisions, and subsequently to the absence of liability.

Criminal liability

The Criminal Code of Montenegro enshrines a set of definitions of criminal acts related to the abuse of authority. These provisions may be the grounds for raising the issue of criminal liability in public procurement.

The cooperation between DJN, the Commission for the Oversight of Public Procurement, Police Directorate and State Prosecution is of particular significance in revealing and determining criminal acts in public procurement. Still, DJN and the Commission have filed no criminal cases, there is

no cooperation between the Police Directorate and DRI, the DRI filed no criminal cases to the State Prosecutor. The Police Directorate has independently filed only three criminal cases in the past three years. These cases were grounded on reasonable doubt that criminal acts of abuse of authority in public procurement were committed. According to the available data, no legally enforceable judgment has been reached for criminal acts in the area of public procurement.

Therefore, regardless of the fact that the area of public procurement is a particularly fertile ground for a number of criminal acts, the number of cases filed is rather insignificant. This fact indicates that criminal liability in the system of public procurement in Montenegro is underdeveloped.

Political liability

There are no data that indicate that some of the political or administrative office-holders have born the political consequences for the irregularities in public procurement. Throughout 2009, the government has shown an irresponsible attitude towards the process of appointment of the members of the Commission for the oversight of the process of public procurement. Following the expiry of the Commission’s mandate, it took almost a year, that is until 29 February 2010, for the government to appoint new members or renew the old members’ membership. During this period, the Commission worked outside the scope of the Law. Due to such a relationship between the government and the Commission, a number of the Commission’s decisions have been annulled by the Administrative Court throughout 2010.

In the last published Progress Report on Montenegro, the European Commission has highlighted the need to further harmonise the legal framework for public procurement with European standards. To this end, the EU has been financing a project that, among other areas, offers support to legal reform. Notwithstanding, the government’s Agenda for 2010 contains no reference on the adoption of the draft amendments and addenda to the Law on Public Procurement.

Recommendations:

- Detailed criteria for the adoption of public procurement plans need to be adopted, while the contracting authorities need to be bound to realistically and timely plan public procurement. Also, the mechanisms of control and sanctioning in this area need to be developed. The planning of public procurement needs to be an integral part of the state's budget planning. The justification of public procurement needs to be open to the public, with details on the arguments that vindicate the need for each procurement.
 - A legal duty should be established, stipulating that the procurement contracts, contract annexes, and the reports on the implementation of the contract should be available to the public.
 - Additional works need to be defined as an exception, rather than a rule. Clear conditions and criteria need to be developed for these works. In the original tender, the bidders need to have an explicit possibility to complain for the allocation of contracts for additional works.
 - DJN needs to formally determine the status of the individuals and entities covered within the scope of the Law on Public Procurement in relation to the institutions that inconsistently interpret their obligation to submit a report on public procurement.
 - It is necessary to establish institutional mechanisms of control and transparency in the implementation of basic contracts and annexes through amendments and addenda of the Law on Public Procurement.
 - Police Directorate and State Prosecutor need to devote more attention to revealing and processing criminal acts in the area of public procurement.
- Functional mechanisms for the determination of disciplinary liability of office-holders and officials need to be established in the institutions and organs, whereby the violation of the process of public procurement has taken place. The implementation of these mechanisms should also be ensured.
 - It is necessary to define the competence for the initiation of misdemeanour proceedings, and the authority in charge of conducting such proceedings. This issue needs to be streamlined by concurrent changes in the Law on Misdemeanours and the Law on Public Procurement. In the meanwhile, the Ministry of Finance needs to create the conditions for the conduct of the misdemeanour proceedings, while the DJN should have full rights to submit requests for the initiation of misdemeanour proceedings to the named Ministry.
 - Disciplinary liability needs to be individualised in relation to concrete senior offices or civil service posts, i.e., disciplinary liability should not fall on the entire authority as is the case at the moment.

About us

institut alternativa

Institute Alternative is a non-governmental organization, established in September 2007 by a group of young, educated citizens, experienced in the civic society, public administration and business sectors.

The mission of Institute Alternative is the strengthening of democratic processes in Montenegro by identifying and analyzing public policy options.

Strategic Aims of Institute Alternative are to: increase the quality of development of public policy, contribute to the development of democracy and the rule of law, and to contribute to the protection of human rights in Montenegro.

Values that we follow in our work are the devotion to our mission, independence, constant learning, networking, cooperation and teamwork.

The Institute has completed the project "Public administration in Montenegro – salary schemes, mechanisms of appraisal and possibilities for professional advancement in law and in practice" (January to June 2008). Under the aegis of the project, research was conducted, yielding a study with the aforementioned title, and a roundtable whereby the study was discussed.

The Institute has published a short brief with recommendations on the transparency of financial affairs of the Parliament of Montenegro (June 2008).

Institute distributes its Weekly Brief to a large number of recipients. Institute Alternative' Weekly Brief contains the most important information in the areas of politics, society, economy and regional cooperation. The recipients of Institute Alternative's Weekly Brief are mostly the representatives of foreign organizations and diplomatic envoys to Montenegro.

The Institute is the co-publisher of the publication "Political Criteria for the Accession to the European Union", authored by Aleksandar Saša Zeković, MA.

In June 2009, a study entitled "The Case of the First Bank – experiences for supervisors and other decision makers". The author of the publication is Mila Kasalica. This publication has been supported by Friedrich Ebert Foundation. In December 2009, the Institute has published a study, entitled "Lipci Case 2008 – How to Prevent it from Repeating?" In January 2010, Institute Alternative has

published "Parliamentary oversight of the security and defense sectors in Montenegro – What next?", also with the support of Friedrich Ebert Foundation. In February 2010, an analysis entitled "The Assessment of Legal Framework and Practice in the Implementation of Certain Control Mechanisms of the Parliament of Montenegro (Consultative hearing, control hearing and parliamentary inquiry)" was published.

A representative of Institute Alternative has participated to the session of the Committee for economics, budget and finance, when the Draft Law on the Budget of Montenegro for 2009 was on the agenda. The representative of Institute Alternative has presented Institute Alternative's comment on this draft law.

Institute Alternative is participating in the project entitled "EU Matrix – monitoring of the process of European integration – monitoring of the National Program for Integration of Montenegro to the EU" as a partner institution of the European Movement in Montenegro and the Monitoring Centre. The focuses of Institute in this project are public private partnerships and public procurement.

European Fund for the Balkans has supported a project of Institute Alternative dealing with external financial control, that is, with the examination of the legal framework and practice of the State Audit Institution. The publication of the results of this research is forthcoming in August 2010.

Activities of Institute Alternative have been supported by the Foundation Institute for an Open Society – Representative Office Montenegro (FÖSI ROM) and Think Tank Fund, Friedrich Ebert Foundation, Commission for the distribution of funds for NGO projects of the Parliament of Montenegro, Canada Fund and the European Fund for the Balkans. Institute Alternative has established cooperation with the European Stability Initiative (ESI), with the seat in Berlin. ESI has conducted a capacity-building program for IA's associates.

Institute Alternative is a member of the self-regulatory body of NGOs, and has offered full details on its financial affairs in line with the Activity Code for NGOs, to which Institute Alternative is a party.

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