

# PUBLIC PROCUREMENT IN MONTENEGRO: CORRUPTION WITHIN THE LAW



September, 2015.

**Publication title:**

Public procurement in Montenegro: Corruption within the law

**Publisher:**

**institut alternativa**

Institute Alternative, Đoka Miraševića (Kroling 3/3),  
Podgorica, Montenegro  
Tel/fax: + 382 (0) 20 268 686  
e-mail: info@institut-alternativa.org  
web site: www.institut-alternativa.org

**For publisher:**

Stevo Muk, President of the Managing Board

**Editor:**

Stevo Muk

**Authors:**

Stevo Muk  
Dr. Jovana Marović

**Project associates:**

Ana Đurnić  
Marko Sošić  
Vasilija Obradović

**Design:**

Ana Crnić

**Number of copies printed:**

150



**Kingdom of the Netherlands**

*The making of this report has been supported by the Embassy of the Kingdom of the Netherlands.*

*The Embassy takes no responsibility for the views expressed in the report.*

*The report expresses views and opinions of the author(s) who take full responsibility for all that has been stated herein.*

CIP – Каталогизacija y publikaciji  
Национална библиотека Црне Горе, Цетиње

ISBN 978-9940-533-53-3  
COBISS.CG-ID 28355088

## TABLE OF CONTENTS

Introduction . . . . .	5
1 Reporting on public procurement – Multiple levels of non-transparency . . . . .	6
1.1. The portal – Painful transparency . . . . .	6
1.2. Same assessments, different forms . . . . .	7
1.3. Incorrect information by competent authorities . . . . .	8
1.4. The Public Procurement Administration hides its report . . . . .	9
1.5. The issues underlined by competent institutions’ reports . . . . .	10
1.6. Media reports on procurement: Tenders are “falling” . . . . .	11
2 Implementation of the Law – Ignorance or deliberate elusion? . . . . .	12
2.1. Unequal implementation of legal provisions . . . . .	12
2.2. Imprecise legal norms . . . . .	13
2.3. Inadequate planning. . . . .	14
2.4. Lack of understanding of the Law by state authorities’ senior management . . . . .	15
3 Do new legal provisions put an end to uncertainties and improve reporting? . . . . .	16
4 Conclusions and recommendations. . . . .	18
5 Literature. . . . .	21
6 Annexes . . . . .	22
6.1. Methodology . . . . .	22
7 About Institute Alternative . . . . .	24



## Introduction

Since the implementation of the Law on Public Procurement started in 2012, the number of contracting authorities has decreased, e-publishing of documents has been introduced, the Law has undergone a first series of major amendments, and the EU negotiating chapter covering this area has been opened. However, the problems have remained the same. In our monitoring of this area since 2010, long before the adoption of the Law, we have been repeatedly pointing out two notable limitations for the implementation of public procurements: insufficient transparency and lack of accountability.<sup>1</sup> These two problems are still central and to a great extent limit any improvements in this area, especially efforts related to curbing the susceptibility to corruption. Taking into account our hitherto activity in the area of public procurement, in this report we shall focus on the following:

- Imprecise, incorrect, and incomplete presentation of information pertaining to the procedures and the public procurement agreements concluded;
- Poor implementation of the Law on Public Procurement.

Considering the irregularities we have found in the reporting procedures and the implementation of the Law, we wish to show that the public procurement data is either (a) not made available at all, (b) not sufficiently credible when made available, or (c) presented poorly, all of which bear negatively on transparency. The second objective of this report is to highlight how poor implementation of legal provisions is widening the vulnerability to corruption, while persons representing the contracting authorities in procurement are not called to account, i.e. remain free from any sanctions, while the system enables for covering these practices and presenting them as being within the scope of the law.

As regards the issue of poor reporting, we focused on the functioning of public procurement web-portals, key sections of competent institutions' reports, the reports on the implementation of the Action Plan for Chapter 23: Judiciary and fundamental rights, as well as the reports of the Coordination Body for monitoring the implementation of the Public Procurement Development Strategy 2011-2016. Special attention was devoted to data which highlights contradictions in procurements at the annual level, which we identified in the reports of public authorities and those presented by the Public Procurement Administration. For illustration purposes, we have shown how the media has reported on public procurement, i.e. what topics have raised their interest. Taking into account the issues we encountered during the monitoring process, we have also pointed out examples of vague or unclear legal provisions, inconsistent implementation, and inadequate planning. We devoted a full chapter to ascertaining the extent to which the amendments to the Law, adopted in December 2014, have managed to improve reporting and remove inconsistencies in the Law. We also offer concluding remarks and suggestions for improving reporting and data presentation on public procurement, as well as for potentially more precise wording of legal provisions.

This report is part of the project entitled "Civil Society and Citizens against Corruption in Public Procurement", supported by the Embassy of the Kingdom of the Netherlands, implemented by Institute Alternative in 2015. The data used in the report have been obtained through analysis of official documents, media articles, and by consulting individual reports of the contracting authorities on the implementation of the Law both the national and the local level, which we requested through the free access to information procedure.<sup>2</sup> During the course of the project implementation, we held four meetings with contracting authorities, bidders, civil society representatives, and other stakeholders expressing interest in this issue. Key information, findings, and recommendations from those events have been used in the drafting of this report.

<sup>1</sup> See: Institute Alternative, 2010, Public "Procurements in Montenegro – Transparency and liability," November 2010, available at: <http://institut-alternativa.org/javne-nabavke-u-crnoj-gori-transparentnost-i-odgovornost/?lang=en>

<sup>2</sup> A detailed methodology is presented in the Annex.

# 1. Reporting on public procurement – Multiple levels of non-transparency

Non-transparency of public procurement procedures and of the processes of realisation of concluded agreements are due to, among other things: contradictory information available at public procurement portals; inaccessibility of data for which there is no legal obligation to be published, such as public procurement reports of individual contracting authorities; as well as poor reporting by competent institutions, primarily the Public Procurement Administration and the coordination body for oversight in this area. In addition to the participants in this process, the need for strengthening the annual reporting and data collection on public procurement has been stressed by the European Commission in its 2014 Progress Report on Montenegro.<sup>3</sup>

## 1.1 The portal – Painful transparency

The requirement to publish procurement-related documents<sup>4</sup> at the Public Procurement Portal has not led to a simplification of public procurement procedures or to the improvement of information provision to stakeholders.<sup>5</sup> This can in part be explained by the poor quality of the portal/search engine, which may be due to flawed software design, delivery of information by contracting authorities in non-machine-readable formats, or due to the intent of its makers to prevent quick and simple access to and search of data. The Public Procurement Administration has announced updates to the portal following the introduction of the requirement to publish tender documents,<sup>6</sup> but apart from the option to search without registering there have been no further improvements thus far. Until the obligatory registration requirement was removed, the Administration had classified every visitor who was not a public procurement employee as a bidder. This fact made searching the bidders almost impossible, as it contained information of about single party that ever visited the portal. In addition, it contained 471 non-valid addresses.<sup>7</sup>

**471**

non-valid addresses at the Public Procurement Administration's list of bidders

The problems in finding precise information at the web-portal are numerous. The data can be searched by subject, contracting authority, and type of document, but not by bidder/service provider or contract registration number. Furthermore, dates of contract conclusion and contract publication often do not match, and are sometimes very far apart; search of a desired page is not possible, meaning that each time the user wishes to resume the search they need to start from the beginning in order to come to the page they visited the previous time.

Furthermore, the information is not sorted into categories but by publication date. Even though there is an advanced search option, the data found by using that option and by manual search (opening every page and every available/published piece of information) do not match. In addition, the file naming is inconsistent, which leads to the situation that the cumulative results found through advanced search are very unreliable.

Let us see how the portal works in practice by looking at the examples of published public procurement contracts and their annexes.

*The manual search of 18.685 datasets/publications, which were made available at the portal for the year 2014, shows a total number of 5.318 published contracts and 28 annexes. The advanced search shows only 7 annexes for 2014. However, this is not to say that 28 is necessarily the correct number. Namely, the Public Procurement Administration does not keep record nor it publishes the information on the number of annexes concluded per anum in its report, nor the total number of adopted amendments to base public procurement contracts. In response to our request for free access to information sent in January 2015, the Public Procurement Administration has noted that the number of annexes concluded in the past three years is shown on the public procurement portal, which, as we have seen, is an imprecise, incomplete, and unreliable piece of information. Furthermore, it is interesting that some contracts and annexes published on the website lack basic elements, such as date, stamp, or parties' signatures, i.e. they look like simple text documents. This means that in practice the actual total amount from a business deal concluded in this way*

<sup>3</sup> Progress Report on Montenegro for 2014, p. 27.

<sup>4</sup> The documents that are published include the following: public procurement plan; decision on candidates' competencies; decision on the selection of the best bid; decision on the termination of the public procurement procedure; decision on the annulment of the public procurement procedure; public procurement contracts; amendments to the plans, tender documents, decisions, and contracts.

<sup>5</sup> See: <http://portal.ujn.gov.me/delta2015/login.jsp>.

<sup>6</sup> May 2015.

<sup>7</sup> Check-up performed during the January 2015 survey of service contractors.

*could be notably higher, i.e. there could be cases of breaking the law in respect to the allowed changes in the amounts stated in the contract provisions.*

In addition to inadequate records and suspicious conclusion of annexes to public procurement contract,<sup>8</sup> the Law does not prescribe the obligation to publish annual public procurement reports, and consequently the reports are not available at the portal. Of all the public authorities we sent the free access to information requests, only the Capital City of Podgorica and the Environmental Protection Agency informed us that the reports are available at their websites.<sup>9</sup> The search we performed afterwards has shown that there are other cases, albeit rare, of publication of annual reports on public procurement. However, these are isolated cases, as the Law does not prescribe an obligation to publish these reports.

Finding, searching, and generating datasets of available information is difficult, which, coupled with limited scope of data that is being published, paints a clear picture of this online platform's shortcomings. With the entry into force of the amendments to the Law on Public Procurement in May 2015, the new website was also launched, which only publishes data from May 2015 onwards. It is now possible to search without registering, but all other issues have remained unaddressed.

## 1.2 Same assessments, different forms

In addition to the public procurement web-portal, one can learn about the progress made in this area by reading the annual reports on public procurement drafted by the Public Procurement Administration, the reports of the Coordination body for implementing the Public Procurement System Development Strategy 2011-2015, and the reports on the implementation of the Action Plan for Chapter 23: Judiciary and fundamental rights.<sup>10</sup> In practice, progress can be monitored annually by looking at the reports published by the Public Procurement Administration in June, given that all other reports take it into account and mainly just reiterate its assessments. Moreover, even though the Coordination Body is obliged to prepare quarterly reports, it has thus far drafted only three reports – an annual report for 2013, and two quarterly reports in 2014. The analysis of the latest report, which covers Q4 of 2014, allows for a conclusion that the problems are just being noted and that only general recommendations instead of more concrete ones are being passed, and that the timeframe is set casually – “in the time to come.”<sup>11</sup> Apart from this, the report itself repeats the assessments, even exact sentences, and issues that have been noted year after year in annual reports on public procurement, which practically means that the system is not improving and that this body in charge of monitoring the development of the system is failing in its mission to formulate guidelines and recommendations. The Coordination Body's report also notes the assessment of the European Commission that their annual reporting and data collection should be strengthened. The Body also notes that it should contribute to improvements in this area by adopting guidelines and comments, but it has not suggested how this should be achieved. From the Action Plan adjacent to the report it cannot be concluded what was done in Q4 last year, given that no deadlines have been set, that the measures for further action are merely descriptive, and that the majority of measures in the document are simply listed without any information regarding their realisation. The report, for the most part, just gives an overview of realised activities for the previous year instead of the year and the quarter it is supposed to cover. The Coordination Body members receive monthly remuneration for their work.

**3**

reports by the Coordination Body established in February 2013 and is tasked to prepare quarterly information

On the other hand, the Action Plan for Chapter 23 encompasses five measures related to public procurement. These set out activities intended to strengthen the control and oversight system for assigned contracts, the measures related to regular publication of annual reports in the area of healthcare system, and measures aimed at establishing transparent procedures on public procurement in local governments. However, this plan does not contribute to making reporting more precise because it relies upon the cumulative annual report and fails to provide additional information where the “nature” of the measures would normally command it.

*An example of imprecise and incorrect reporting is the measure related to the establishment of transparent public procurement procedures in municipalities. Namely, the indicator for measurement was the number*

<sup>8</sup> A proof that this issue has not been satisfactorily regulated by the law also comes from the views of public procurement officers, who in responding to our questionnaire were unable to give precise answers to the question whether annexes are published or not.

<sup>9</sup> A detailed overview of the institutions to which we sent free access to information requests can be found in the annex to this report.

<sup>10</sup> As well as by looking at reports of the Inspections Directorate, the State Commission for the Control of Public Procurement Procedures, and the State Audit Institution, which will be discussed below.

<sup>11</sup> See: Report of the Coordination body for implementing the Public Procurement System Development Strategy for Q4 of 2014.

*of public procurement services established in local governments, i.e. the number of people employed in those positions. It is not true that such services were established in all local governments as the report has stipulated, because an officer in charge of public procurement does not mean there is a public procurement service. The report equates the two, and furthermore it fails to specify how many municipalities actually have services and how many have just one employee performing these tasks.<sup>12</sup>*

After the plan was amended in December 2014, the measures<sup>13</sup> which have not been incorporated in the amendments to the Law on Public Procurement have been removed. In addition, no dedicated report has been drafted for the area of healthcare system, even though this is a commitment spelled out in the Action Plan.

Even though their purported objective is to provide additional information on the system development and progress made in adopting reforms in the area of public procurement, the report on the implementation of the Public Procurement System Development Strategy 2011-2015 and the Action Plan for Chapter 23 have failed to improve reporting in this area. Reports on the implementation of the Strategy are not prepared regularly. In addition, these reports contain descriptive assessments, without offering recommendations for improvement, and providing an overview of activities implemented in the previous year instead of the quarter they are supposed to assess. Even though they put forth an obligation to conduct additional activities, the reports on the Action Plan for Chapter 23 do not provide regular and comprehensive information on this topic.

### 1.3 Incorrect information by competent authorities

The Public Procurement Administration is required by the Law to draft annual reports on public procurements of all contracting authorities by the end of May for the previous year. The Administration has on several occasions in its previous reports stated that it does not have a mechanism for checking the data submitted by the contracting authorities, whereas the State Audit Institution (SAI) has pointed to incorrect information and violation of the law by some parties subject to the Law.<sup>14</sup> We assessed the degree to which the information provided in 2014 by individual parties subject to the law diverged from the ones published by the Public Procurement Administration in its annual report by looking at a sample of 51 contracting authorities.<sup>15</sup>

The data on the total public procurement budget execution of all contracting authorities for 2014 does not match those published by the Public Procurement Administration. The contracting authorities have cited this information for the purpose of presenting the percentage of participation of direct agreements in the overall public procurement budget execution, which must not be more than 10% of the total budget spent for the public procurement for the previous year. However, the contracting authorities' interpretation of this legal provision varies, and in this particular case the percentage was calculated in relation to the 2013 and 2014 budget execution, and at the end of the reports they state by default that this was just the 2014 budget execution. The overall budget execution for public procurements is the sum of the amounts allocated for procurements through open procedures, the shopping method, and direct agreements during one year. The Public Procurement Administration, therefore, amends the overall amount, but it does not state irregularities in its report, and errors get repeated year after year. The individual annual reports of contracting authorities do not contain relevant and correct data regarding the overall budget execution, and consequently they do not show percentages of participation of direct agreements in the overall public procurement expenditure. Of a total of 51 reports that have analysed, we noted irregularities in the reports of 24 authorities.<sup>16</sup>

However, not even the Public Procurement Administration's data is always precise. Namely, we have noted individual cases in which none of the reports - the ones of contracting authorities nor the Public Procurement Administration's Report contain correct data. These were the cases of the Ministry of Interior, Ministry of Economy, Ministry of Agriculture and Rural Development and Ministry of Human and Minority Rights.

**24/51**  
public procurement  
reports contain  
irregularities

Therefore, the total budget execution for these four ministries, and consequently the percentage of direct agreements, did not match the numbers spelled out in the forms from the ministries' reports, and Public

<sup>12</sup> See more in: "Procurement in Montenegrin municipalities," Institute Alternative and Centre for Civic Education, Podgorica, 2013.

<sup>13</sup> The so-called white- and black-lists of bidders, and the provision according to which the appointment of the chairperson and members of the State Commission for the Control of Public Procurement Procedures is now done by the Parliament and no longer by the Government.

<sup>14</sup> See more in: "Procurement in Montenegrin municipalities," pp. 12-13.

<sup>15</sup> Individual parties to the Law on Public Procurement submit their reports to the Public Procurement Administration by the end of February of the following for the previous year. These reports contain three parts, the so-called forms A, B, and C, which contain information on open procedures, the shopping method, and direct agreements concluded during one year. The Institute Alternative had access to 56 reports of state authorities and local self-governments. The overview of these authorities and the methodology we used is explained in Annex 1.

<sup>16</sup> Fifteen state authorities and nine municipalities.



Procurement Administration report.<sup>17</sup> In the case of the Ministry of Finance, the Administration-published numbers do not match the sum of forms A, B, and C, i.e. the amounts of open procedures, the shopping method, and direct agreements. However, the numbers did match with the numbers in the Ministry's report.<sup>18</sup>

When it comes to local governments, the comparison of data on direct agreements and public procurement plans could only be compared for a limited number of contracting authorities, as the Public Procurement Administration only cites institutions covered by the Law with the highest percentage of direct agreements, and the biggest discrepancy between the planned and executed budget for public procurement. It should be noted that the Public Procurement Administration usually cites contracting authorities arbitrarily, given that our case studies have shown that some of them that have never been mentioned in the context of direct agreements should actually be at the top of the list. Out of the 51 reports we analysed, the Public Procurement Administration has noted a high percentage of direct agreements. Out of 10 reports,<sup>19</sup> in five cases the contracting authorities reported differently than the Public Procurement Administration did on the use of direct agreements.<sup>20</sup>

Looking at the Public Procurement Administration's 2014 report on public procurement published in June, we found serious discrepancies regarding the data cited in individual reports of the authorities, which we were given insight into based on the free access to information requests. The numbers differ for the overall budget execution, the percentage of direct agreements in the overall spending, and the amount of planned budget. The Public Procurement Administration usually makes corrections to the information submitted by the authorities, but our analysis has found that they also often provide incorrect data, as was the case for reports on five authorities.

## 1.4 The Public Procurement Administration hides its report

Strangely, the Public Procurement Administration either does not know what the Law stipulates or hides information on public procurement. This was shown in this institution's response to our request for the report on realised public procurement for last year.<sup>21</sup> The Public Procurement Administration and the Statistical Office of Montenegro informed us that reports on individual authorities are made available in the annual public procurement report, which according to Article 118 of the Law needs to be published by the end of May. This, however, does not fit with the facts, as can be concluded by looking at the reports from the previous years.<sup>22</sup> The Public Procurement Administration has also referred us to the annual report on public procurement, even though it is obliged to prepare individual reports on public procurement, which can be observed by looking at this body's budget set by the Law on the Budget for 2014. In addition, during the survey on the opinions of contracting authorities in January 2015, the State Commission for the Control of Public Procurement Procedures has informed us that the Public Procurement Administration makes purchases of goods and services on their behalf.<sup>23</sup> The Agency for the Protection of Personal Data and the Free Access to Information acted on our complaint and annulled the decision of the first instance (by the Public Procurement Administration) for wrongfully establishing the facts and wrongfully applying the substantive law.<sup>24</sup> It acted in a similar fashion vis-à-vis the decision made by the Statistics Office. However, in spite of the Agency's decision, we have yet to receive the reports.<sup>25</sup>

The Public Procurement Administration wrongfully interprets the provision of the Law on Public Procurement related to the obligation to prepare individual reports on the procurements realised by this body, and consequently it does not allow insight to concerned parties into this data even when they have submitted free access to information requests, referring them instead to the overall annual report. This tells us either that the Public Procurement Administration has reasons to hide its report, or that the institution in charge of implementing the Law does not understand its provisions.

17 The Ministry of the Interior states that the overall budget execution has been EUR 10,828,287.06, whereas the Public Procurement Administration cites the amount of EUR 5,486,416.24, and the actual sum of forms A, B, and C is EUR 9,703,457.63; for the Ministry of Economy: EUR 744,851.17 / 305,110.22 / 483,830.91; for the Ministry of Agriculture and Rural Development: EUR 1,405,839.85 / 1,465,207.14 / 1,461,381.29; for the Ministry of Human and Minority Rights: EUR 125,995.28 / 85,358.87 / 108,250.76.

18 The Finance Ministry report states the amount of EUR 5,376,852.28, whereas the Public Procurement Administration cites the amount of EUR 5,564,777.21.

19 The Ministry of Culture, the Ministry of Labour and Social Welfare, the Ministry of Foreign Affairs and European Integration, Hydrological and Meteorological Service. Municipalities of Bar, Danilovgrad, Nikšić, Pljevlja, Žabljak, and Cetinje.

20 The Ministry of Labour and Social Welfare, the Ministry of Foreign Affairs and European Integration, the Municipalities of Danilovgrad, Pljevlja, and Žabljak.

21 In their responses to our request of 2 March 2015 for access to annual reports on realised public procurements, the Public Procurement Administration and the Statistics Office adopted decisions showing erroneous state of affairs.

22 Available at: Official website of the Public Procurement Administration: <http://www.ujn.gov.me/category/izvjestaji/>.

23 The response by the State Commission for the Control of Public Procurement Procedures to the questionnaire sent by Institute Alternative, January 2015.

24 The Decision of the Agency for the Protection of Personal Data and Free Access to Information regarding the complaint by Institute Alternative of 27 July 2015.

25 By the time this report was finished in September 2015.

## 1.5 The issues underlined by competent institutions' reports

In order to highlight the reporting on the work of the competent institutions in this area as regards the systemic issues, institutional capacities, and the control of procedures and contracts, we analysed the cases of the Inspections Directorate – the Public Procurement Inspection, and the State Commission for the Control of Public Procurement Procedures.

The preparation of semi-annual reports on the work of the public procurement inspection service is a novel practice and a notable progress in the reporting in this area, given that thus far only an overall report of the Inspections Directorate was being drafted. This could in a way be connected with the new competencies of this inspections service which are related to the control of procedures and contracts. However, the report for the first half of 2015 does not provide sufficient information to that effect given that since 4 May 2015, when the newest amendments to the Law have entered into force and introduced this novelty, until the conclusion of this report "not a single public procurement procedure was entirely brought to a close".

The report points to a small number of requests and initiatives sent to the public procurement inspection – as little as six in 2014. This shows the low visibility of the public procurement inspection and points to a lack of trust in this type of control. The available statistics does not make it clear how many public procurement procedures have been subjected to inspection control. When it comes to offences, the inspection has issued fines worth EUR 7,000. The report however does not specify who was fined, whether it was the legal persons or individuals working in them. The report also does not specify whether the fined entities have paid the fines into the budget or not.

The State Commission, on the other hand, publishes a regular annual report wherein it largely focuses on decision-making regarding complaints, which in fact is a central responsibility of the Commission. Even though from early 2012 by the end of 2014 the Commission has worked on eight cases containing elements of conflict of interest, the report does not specify whether it has acted on them in a proper manner:

*The procedures from 2012 and 2013 are related to the Public Enterprise "Water and Waste Management of Tivat," "Montenegro Electricity Transmission System" (CGES), and the Podgorica Construction and Development Agency, whereas in 2014 there were five cases related to "Airports of Montenegro" AD Podgorica, Ministry of Information Society and Telecommunication, CGES, EPCG, and the Ministry of Interior. In its report, the Commission has claimed that in one case it "could not ascertain that the complaint was valid," as it has annulled the decision on another basis and returned the case to the contracting authority for a renewed procedure and decision-making. In the second case, it noted that the complaints were "unfounded" and it provided detailed justification for this. In the third case, the Commission noted that the contracting authority has taken own measures to remove any conflict of interest (following a complaint by the bidder), but it was unclear what was the basis for this case's appearance before the Commission, and it was unclear what decision has been reached. Such conduct by the Commission is problematic, given that it is obliged to look into all complaints, especially those related to conflict of interest.*

The greatest number of complaints dealt with by the State Commission was related to the most common public procurement procedures – the open procedure and the shopping method – as well as the procedures in which the key criterion was the lowest or most favourable offer in economic terms. The most common reasons for dismissal of 144 complaints were inadmissibility (72) and inaccuracy (58). In the decisions where the Commission has identified serious breaches of the Law (11 bases), which the Commission is tasked with *ex officio*, the bases for dismissal have mostly been omissions in examination, assessment, comparison, and valuation of submitted offers (285 cases), "whereas in 82 cases the Commission has found tender and other documents needed for public bidding to be incongruous with the Law." The statistics kept by the Commission does not classify public procurement procedures yearly, and it is therefore unclear whether the Commission work indicators cover the period of one or two years.<sup>26</sup>

Control procedures for the public procurement cases worth over EUR 500,000 show some worrying facts. Out of 64 cases decided upon by the State Commission in 2014, just over one half (37) were found to be fully in line with the Law on Public Procurement. On the other hand, the Commission has found that six cases were conducted in breach of the Law and it had annulled them completely, while it partially annulled 21 procedures and asked the contracting authorities in question for a renewed decision-making procedure. Of those

<sup>26</sup> E.g. the complaints communicated to the Commission in January and February against the public procurement procedures launched last year.

21 cases, the contracting authorities have submitted the documents to the Commission in only nine cases. It should be borne in mind that this competency has been stripped from the State Commission by the new Law.

Furthermore, the State Commission noted in its report that in early 2015 it had solved the long-standing working issue of the lack of appropriate software for detailed analysis of the cases. However, the report does not make it clear whether it is now possible to network this new software with the databases of other institutions (such as the State Audit Institution, the Commission for the Prevention of the Conflict of Interest, the State Election Commission, the Tax Directorate, etc.), which, as the Commission has noted, "would greatly contribute to a more efficient review of the data relevant for anti-corruption activity and the prevention of conflicts of interest in public procurement procedures."<sup>27</sup>

In spite the progress made in the form and dynamics of reporting, the semi-annual report on the work of the Public Procurement Inspection still fails to provide a clear image on oversight in this area. The reports of the State Commission for the Control of Public Procurement Procedures, in spite of being very detailed, fail to answer some questions relevant for its work, such as the (in)activity as regards complaints and networking data with those of other institutions.

## 1.6 Media reports on procurement: Tenders are "falling"

The media usually report on high-cost procurements, tenders that are deemed rigged, and tenders that get annulled. In 2014, the media reported on the annulled tenders of the EPCG worth EUR 1,4 million (December), which was originally advertised in October 2012;<sup>28</sup> the annulled tender of the Public Works Directorate (2,9 million); Airports of Montenegro (300 thousand); Clinical Centre of Montenegro (65 thousand); and Montekarigo. The media have brought attention to the fact that the tourist company Budvanska Rivijera is as of May 2015 and the entry into force of the new provisions no longer exempt from the application of the provisions of the Law on Public Procurement.<sup>29</sup>

Given that the amendments to the Law were being drafted over the course of 2014, the print media have covered this subject selectively, focusing mostly on the positions of the bidders, the civil society, and MPs. The topics that were usually highlighted were the appointment of the State Commission by the Parliament, fines for contracting authorities who breach the Law, black- and white-lists of bidders, and the need to strengthen the control of contract implementation. Finally, the media also looked into the realisation of recommendations made by the State Audit Institution, noting that only one out of four recommendations from the Report on the Final Budget Audit for 2013 got fulfilled.<sup>30</sup>

The media cover public procurement selectively and mostly in the context of annulment of major tenders in instances of suspected corruption, i.e. rigging.

<sup>27</sup> The Report on the Work of the State Commission for the Control of Public Procurement Procedures for 2014, June 2015, p. 17.

<sup>28</sup> "EPCG tender worth EUR 1.4 million annulled," Daily Vijesti, 6 December 2014, available at: <http://www.vijesti.me/vijesti/ponisten-tender-epcg-od-14-miliona-eura-808650>.

<sup>29</sup> "Budvanska Rivijera too will have to abide by the law," Daily Vijesti, 9 May 2014, available at: <http://www.vijesti.me/ekonomija/i-budvanska-rivijera-ce-morati-po-zakonu-207641>.

<sup>30</sup> "The institutions love shopping," Daily Vijesti, 21 October 2014, available at: <http://www.vijesti.me/vijesti/institucije-vole-soping-801282>.

In its reports, the State Audit Institution continuously stresses the need to appoint public procurement officers, the need to respect the legal limit set for direct agreements, as well as the need to refrain from separating procurements of items that would naturally create a single purchase.

## 2. Implementation of the Law – Ignorance or deliberate elusion?

Even though the Law on Public Procurement has been in force since 2012, there are still numerous irregularities and discrepancies in its implementation among the contracting authorities. These could be overcome by more precisely defining the provisions of the Law, or, alternatively, by developing an additional methodology for dealing with contentious issues or practical problems. For the sake of this report and in line with the information available to us, we analysed practices of uneven implementation of legal provisions such as the percentage of direct agreements in overall expenditure, issues in applying the Law due to unclear provisions, and the issues of inadequate planning.

### 2.1 Unequal implementation of legal provisions

The analysis of individual reports by institutions subject to the Law on Public Procurement shows that 28 out of 51 have exceeded the direct agreements limit, as well as that the Public Procurement Administration has, by showing data for 59 contracting authorities out of a total of 621, actually published just sample data:

*A total of 13 municipalities have disregarded the limit of spending no more than 10% of the overall budget for concluding direct agreements. The frontrunners were the municipalities of Andrijevica (90.98%), Nikšić (46.24%), Mojkovac (28%), Žabljak (24.28%), and Cetinje (22.61%).<sup>31</sup> A total of 15 state authorities have breached the limit set by the Law,<sup>32</sup> spearheaded by the Directorate for Youth and Sports, who made all purchases last year by using the direct agreement method. An extremely large percentage was also spent by the Hydrological and Meteorological Service (41.24%), the National Archives (38.15%), the Intellectual Property Directorate (35.62%), and the Ministry of Foreign Affairs and European Integration (33.81%).*

**100%**

usage of direct agreement in the Directorate for Youth and Sports

By doing so, the Public Procurement Administration is hiding numerous irregularities, especially when it comes to institutions that spend large portions of their procurement budget through the direct agreement method, such as the Directorate for Youth and Sports. The case of Municipality of Andrijevica is very interesting. Namely, they presented the percentage of 3.39% of the overall budget of the Municipality, which is around 1.23 million EUR, in order to meet the legal requirement for using the direct agreement method. However, their total executed budget amounted to 46.1 thousand EUR, meaning that the direct agreement method was used for 90.98% of all purchases.

However, in spite of making corrections to the stated amount of the overall executed budget, the Public Procurement Administration did not list Andrijevica among the top spenders on direct agreements. This example shows that the Administration has calculated direct agreements correctly with regards to the budget execution in 2014, i.e. the reporting year, whereas the contracting authorities oftentimes calculate them with regards to the budget for the year before the reporting year. An additional problem is that a number of contracting authorities made calculations of the participation of direct agreements in the planned budget for 2014, or, as in the case of Andrijevica, as percentage of the overall budget. It additionally raises concerns that the practice of arbitrary calculations varies from one department to the other and that the interpretations of these practices by the Public Procurement Administration are not helpful in solving the ambiguities. The provisions concerning direct agreements have been changed during the work on amendments to the Law on Public Procurement, but this issue has not been clarified.

Regardless of the fact that this least transparent procedure of public procurement is repeatedly used, for which the Law prescribes a fine, the Public Procurement Administration does not keep any records on whether the abusers of this institute have suffered any consequences for their malpractices. The public procurement officers we interviewed earlier this year for the purposes of this paper have warned about the fact that they are often not informed about whether the contracting authorities have been called to account for the overstepping of authority in this respect. They noted that they often do not have access to the direct agreements

<sup>31</sup> See: "Municipalities Are Breaking The Law While Contracting Goods," Institute Alternative, May 2015, available at: <http://institut-alternativa.org/opstine-ugovaraju-robe-i-usluge-mimo-zakona/?lang=en>.

<sup>32</sup> "Direct agreement represents an immediate arrangement between a contracting authority and a bidder regarding the terms of a public procurement. The total annual value of public procurement of a contracting authority conducted by direct agreement may not exceed: - 10% of its total annual executed public procurement budget in the previous year, provided that the budget of that contracting authority does not exceed EUR 200,000; - 9% of its total annual executed public procurement budget in the previous year, provided that the budget of that contracting authority amounts from EUR 200,000 to EUR 500,000; - 8% of its total annual executed public procurement budget in the previous year, provided that the budget of that contracting authority amounts from EUR 500,000 to 800,000; - 7% of its total annual executed public procurement budget in the previous year, provided that the budget of that contracting authority exceeds EUR 800,000." – Article 30 of the Law on Public Procurement, "Official Gazette of Montenegro," 42/11 i 57/14.

## O

criminal charges in 2014 for suspicions of corruption, conflict of interest, and breach of anti-corruption rules.

records and therefore cannot identify these practices as they are taking place without their knowledge. However, their views are divided on whether direct agreements should (12) or should not (15) be published.

However, as regards criminal liability complaints, the Public Procurement Administration receives next to none each year. Not a single complaint was submitted in 2014 for suspicion of corruption or conflict of interest. In the report on the breaches of anti-corruption practices not a single breach was identified.<sup>33</sup> There are different interpretations of this state of affairs. Some believe there is no corruption at all, i.e. that the number of complaints is negligible due to the fact that legal mechanisms in force limit the possibilities for corruption. On the other hand, there are views that there are so few complaints because of the lack of enthusiasm among those tasked with processing the complaints, because of their inability to prove malpractice, and because of fear of consequences. Some of the responses we heard are quoted below:

*"The injured parties have no interest in launching criminal complaints,"*  
*"I believe criminal complaints are not being launched for fear of 'retribution' in future calls, when the plaintiffs might again bid to the contracting authorities whose officers they intend to report on suspicion of corruption, as there is public perception that public procurement officers and the Commission cannot break the law independently without the acceptance and participation of head of authority or director."*

In our interviews with public procurement officers, the 40 of them who answered these questions had different understanding of which institution is tasked with keeping records on contracting authorities that broke the Law on Public Procurement. Namely, 20 believed it was the duty of the Public Procurement Administration, four thought it was the Inspections Directorate, two believed it was the contracting authority in question, two believed it was the state authority above the contracting authority, and 13 responded that they did not know.<sup>34</sup> It is clear that neither the reports of the Public Procurement Administration, the Inspections Directorate, nor the contracting authorities provide this information. Additionally, the public has no full access to the records of contracting authorities who were held to account, even in the instances where official reports point to malpractice.

Contracting authorities have different interpretations of the legal provision related to the use of the institute of direct agreement, and they calculate it either as part of the budget for the reporting year, as part of the overall budget of the institution, or as part of the planned public procurement budget. The Public Procurement Administration does not help ensure consistent interpretation and it makes corrections along the way without noting errors. Ambiguities have not been solved even after the latest round of amendments to the Law, as a more precise definition of provisions related to direct agreement has not been introduced.

## 2.2 Imprecise legal norms

In addition to uneven implementation of legal provisions, additional problem is caused by imprecise and unclear norms that potentially open room to corruption. Representatives of bidders who took part in our panel discussions and meetings related to this topic recognised at least one such provision which is open to broad interpretation and manipulation, and that is abnormally low price.<sup>35</sup> Namely, the provision in question states that in cases when the most favourable offer is cheaper by 30% or more than the average of all other eligible offers, an explanation must be requested from the service provider of that offer. The Law further prescribes the framework for submission of explanations by bidders, regardless of the fact that the explanations, which are often fictitious, are what in practice makes room for corruption. It is also the opinion of the bidders we interviewed that the abnormally low price as defined by the Law is very susceptible to precise mathematical calculations making it possible to keep the rigged offers within legal boundaries.

Another issue that was recognised was related to imprecise terminology definitions in the text of the Law. An example that was cited was the term "equivalence," defined by the Law as identical or better technical fea-

<sup>33</sup> Public Procurement Report for 2013, Public Procurement Authority, May 2014, p. 35.

<sup>34</sup> See: "Public Procurement - control and corruption: views of contracting authorities", Institute Alternative, April 2015, available at: <http://institut-alternativa.org/narucioci-razlicito-o-korupciji/?lang=en>

<sup>35</sup> "The explanation referred to in paragraph 1 of this Article may refer to, in particular: 1) austerity measures in construction method, technical solutions or production process; 2) exceptionally favourable conditions available to bidder for execution of the contract; 3) originality of the goods, works or services offered by the bidder; 4) compliance with the rules referring to protection upon employment and working conditions, applied at the place of performance of works, provision of services or delivery of goods; 5) possibility that the bidder receives state aid (subsidies)." – Article 85 of the Law on Public Procurement, "Official Gazette of Montenegro," 42/11 i 57/14.



tures of the product or service than those listed in the technical specification of the subject of procurement. The bidders thought that this term, as well as many others in the Law, is subject to broad interpretation and that it causes problems in public procurement procedures, regardless of the fact that its definition has been somewhat improved by new legal solutions.<sup>36</sup>

Lastly, our interviewees noted the issue with the application of the legal provision on the shopping method, i.e. the submission of offers with stated VAT amounts. In practice, the problems arise with procurements of specific services where the companies exempt from paying VAT should also be allowed to bid.<sup>37</sup> However, in accordance with legal provisions, those service providers which are exempt from VAT are unable submit a "full" offer that would state the VAT amount, and for this fact the contracting authorities dismiss their offers as invalid. Such legal provisions affect competition and open room to potential misuse.

Bidders believe that imprecisely formulated legal norms contribute to misuse and open room to corruption, as well as that such imprecisions have been devised on purpose in order to create divergent interpretations. A good example in their view are the provisions related to abnormally low prices of goods and services offered, and the legal requirement to submit offers with included VAT when it comes to procurement through the shopping method.

## 2.3 Inadequate planning

Poor planning of public procurement budgets is an issue we have drawn attention to on numerous occasions in our research reports, which has also been underlined by official reports of competent institutions in this area, as well as the public procurement officers. No improvement has been made in 2014 in this respect. All municipalities excluding Kotor and Podgorica have amended their plans in the course of the year. The most amendments were made by the Municipality of Bijelo Polje (as many as 16) and the Municipality of Bar which amended its initial plan seven times.

In spite of frequent changes and amendments to the plans throughout the year (for instance, the Municipality of Cetinje adopted its final amendments in December), all local self-governments have experienced notable discrepancies between their 2014 budget execution and budget plans for public procurement.

The issue of unrealistic budget planning for public procurement is pervasive also within state authorities. According to the data from available public procurement reports, only three institutions can boast of having spent the same amount they have planned in 2014. These are the Ministry of Foreign Affairs and European Integration, the Ministry of Labour and Social Welfare, and the Bureau of Metrology. However, a look at these institutions' reports and the comparison of procurements done through the open procedure, the shopping method, and the direct agreement tells us that realisation is often different than the original plans. The biggest discrepancies were noted in the Municipality of Budva (99.274.140 planned, 1.219.262,07 realised), the Capital City of Podgorica (3.354.530,00 planned, 1.633.940,52 realised), and the Ministry of Sustainable Development and Tourism (90.607.564,32 planned, 23.278.015,51 realised).

**16**

is the number of times the Municipality of Bijelo Polje amended its public procurement plan in 2014

Sixteen state authorities<sup>38</sup> have amended their plans over the course of 2014. The Ministry of Finance has amended its public procurement plan nine times, the last of which took place in December and raised the cost of the budget by almost half a million, even though these funds were not spent in the end. The spending plans for two authorities were not made available at all: the Directorate for Youth and Sports and Social and Child Care Bureau, which is additionally problematic bearing in mind that the Directorate has done all of its public procurements in 2014 through direct agreements, without any public calls.

<sup>36</sup> The term "equivalent" is used in the sense that: "Where the contracting authority is unable to give a description of the subject of the contract in the tender documents using characteristics or specifications which are sufficiently intelligible to bidders, the indication of elements such as trademarks, patents, type or manufacturer must be accompanied by the words 'or equivalent.'" – Article 51 of the Law, whereas "equivalence shall mean that the offered product or service has identical or better technical features compared to the products of another manufacturer listed in the technical specification of the subject of procurement," – Article 4 of the Law.

<sup>37</sup> Article 42 of the Law on Value Added Tax, "Official Gazette of the Republic Montenegro", no. 65/01, 04/06 and "Official Gazette of Montenegro", no. 16/07, 09/15

<sup>38</sup> The Ministry of Interior, Ministry of Defence, Ministry of Sustainable Development and Tourism, Ministry of Transport and Maritime Affairs, Ministry for Information Society and Telecommunication, Ministry of Labour and Social Welfare, Human Resources Management Authority, Administration for Prevention of Money Laundering and Financing of Terrorism, Inspection Directorate, Secretariat for Development Projects, Hydrological and Meteorological Service, Bureau for Education Services, Bureau of Metrology, State Archive, Environmental Protection Agency.

Contracting authorities have resumed the practice of irrational annual planning of goods and services, which is corroborated by the fact that as little as three institutions we looked at had spent the same amount they had planned to spend, but even in those institutions we found some discrepancies when we inquired further. This is the case because there are no clear guidelines that would enable for a more realistic and purposeful planning.

## 2.4 Lack of understanding of the Law by state authorities' senior management

The public procurement officers we interviewed for the purposes of this paper noted that the lack of understanding of the Law among the heads of authorities makes the implementation more difficult.

*"There are pressures on officers to conduct a public procurement procedure for a purchase that has already been made. This has been reduced since the obligation to publish calls for the shopping method purchases on the Public Procurement Administration's website was introduced,"*

*"Public procurement officers often must inform the institution management about what the legal provisions state, sometimes even in writing."<sup>39</sup>*

The public procurement officers are often charged with tasks that should belong to the Commission for Opening and Evaluating the Offers. This Commission's incompetence is observable in the fact that it only performs the formality of opening and closing the offers, whereas all the tasks are done by the public procurement officer(s), as we have been told by interviewees.

An additional problem is posed by a large number of urgent and unforeseen purchases for which it is difficult to obtain the competent authority's consent as regards the fulfilment of criteria for implementation, which in turn leads the contracting authorities to resort to direct agreements. The difficulty of such procedures has thus far been the fact that they were being concluded by the head of state authority and not the public procurement officer, who is only tasked with record-keeping, which could lead to data mismatch. This has been successfully solved by new legal provisions.<sup>40</sup>

The issue of insufficient awareness of legal provisions on public procurement among heads of authorities has been pointed out by public procurement officers tasked with implementing them. The pressure on the officers to conduct a procedure for an already concluded purchase, and direct contracting of goods and services not made accessible to the officers are some of the breaches of the Law that arise from lack of understanding of legal provisions among public authorities' management.

<sup>39</sup> Some of the responses given by public procurement officers in the IA questionnaire.

<sup>40</sup> See more in Chapter 4 below.

### 3. Do new legal provisions put an end to uncertainties and improve reporting?

On 16 December 2014, the Parliament of Montenegro passed the amendments to the Law on Public Procurement, one year behind schedule. The amendments entered into force in early May 2015 and they are related to the obligation of publishing tender documents at the public procurement portal,<sup>41</sup> introduction of the clause that public procurement contracts that involve a conflict of interest are null and void, and the possibility of implementing a framework agreement after an open, limited, and negotiated procedure. Amendments were also introduced to the conduct of shopping method purchases,<sup>42</sup> whereas from the entry into force of amendments onwards it is the public procurement officers that are tasked to conduct direct agreements as well. The new legal provisions also define differently the composition of the Commission for Opening and Evaluating the Offers, which can now include public procurement officers. Proof of meeting the tender requirements no longer need to be officially certified prior to submission, which reduces cost of bidding and improves competitiveness. Lastly, the Commission for the Control of Public Procurement Procedures is no longer in charge of checking the contracts worth more than EUR 500.000, which is now done by the Inspections Directorate, who will also be tasked with performing control of public procurement contracts and procedures.<sup>43</sup> This solution is questionable most notably because of the severely limited capacity of the Inspections Directorate (two inspectors for three positions). An additional problem is that the Action Plan for Chapter 23 has set December 2016 as the deadline for hiring the third inspector. This means that the initial deadline will be exceeded by three years. It is also doubtful whether it is the best possible solution to task the Inspections Directorate with controlling both the public procurement procedures and contract implementation. An interim solution could be to increase the role of the State Audit Institution when it comes to public procurement contract implementation.

The European Commission has identified the control of public procurement contract implementation as one of the central preconditions for moving forward in the accession process. The public procurement officers we interviewed believe the following solutions would be the most suitable in this respect: establishment of public procurement services, where an officer would be tasked to monitor contract implementation; prescribing written procedures for contract implementation control, with clearly spelled out tasks, responsibilities, and requirement to submit reports on control of contract implementation procedures by the contracting authority; strengthening of internal audit; periodic submission of contracts and any annexes to the State Audit Institution.<sup>44</sup>

The most common problems noted by public procurement officers are: the ability to file a complaint at every stage of the procedure (3) and annulment of the decision on the selection of the most favourable offer by the State Commission due to inadequately prepared tender documents. There are also opinions that bylaws are not in line with the Law on Public Procurement.

The public procurement officers view favourably the new provision on publishing tender documents at the public procurement web-portal, as well as the re-introduced obligation to publish tenders in a daily newspaper. They also commended the introduction of the possibility to submit proof of eligibility without requiring official certification of documents, as well as the provision stating that contracts that are concluded in contravention of anti-corruption rules are automatically null and void. The officers also believe that the criteria for the selection of the best offer have been improved. Three officers believe that the amendments do not offer any improvement, whereas four believe that implementation will show whether there have been improvements.

The largest number of recommendations for improvement are related to calls for reducing the length of the procedure, the deadlines for submitting complaints, and the time for deciding on complaints. An interesting suggestion that has been put forth is to turn the decisions of the State Commission for the Control of Public Procurement Procedures into precedents. The public procurement officers have, inter alia, proposed that at least one half of the members of the Commission for Opening and Evaluating the Offers should sit professional

41 The documents are not published for the second phase of the restricted public procurement procedure, negotiated procedures with or without prior publication of contract notice.

42 The Law prescribes the public procurement procedure by shopping method may be conducted once a year at most for the same subject of public procurement and that the same rules apply for its implementation as for the open procedure. The sole criterion for the shopping method is the lowest offered price.

43 Article 148 of the Law.

44 Responses by public procurement officers to the IA questionnaire.



examination for work on public procurement. Lastly, there are some recommendations requiring financial incentives for public procurement officers and members of the Commission for Opening and Evaluating the Offers due to the high accountability of their work.

The amendments to the Law on Public Procurement have reintroduced the obligation to publish public procurement calls in a print newspaper.

*“Contracting authority shall publish the notification on public procurement procedure referred to in Article 54 paragraph 1 of this Law in one daily print media which is issued and distributed in the entire territory of Montenegro and available on the Internet, within 3 days from the day of publishing the tender documents on the public procurement web portal. (...) A public procurement procedure initiated or conducted without advertising of notifications referred to in paragraph 1 of this Article shall be null and void.”<sup>45</sup>*

An obligation on advertising thus defined opens room for potential misuse, as it leaves it to the covered parties, i.e. the contracting authorities, to choose a print media of their liking in which to publish the calls for bidding or participation in public procurement procedures. This is especially problematic bearing in mind that during earlier application of this provision the state authorities have almost exclusively published their calls in *Pobjeda*, a daily newspaper whose majority of shares was owned by the state, a practice which continued even after *Pobjeda*'s privatisation alongside other types of advertising. This constitutes a breach of the principle of fair competition. Such practice by public authorities also affects negatively the visibility of the calls, given that they do not publish the calls in newspapers with the widest circulation in the country. Moreover, new legal provisions add additional exclusions from the application of the Law, such as for “services of advertising notifications on public procurement procedures in the media.”<sup>46</sup>

The new legal amendments in the area of public procurement have continued with the process of harmonisation with the EU *acquis communautaire*, and they have also introduced important novelties related to publishing of tender documents, the composition of the Commission for Opening and Evaluating the Offers, as well as the control of procedures and contracts. However, these new solutions have again missed the opportunity to solve the important issues related to limiting the threat of corruption and improving transparency, such as e.g. the requirement to publish individual public procurement reports.

<sup>45</sup> Article 62 of the Law.

<sup>46</sup> Article 3 of the Law.

## 4. Conclusions and recommendations

The general public is not informed timely or in great detail about the state of play in the area of public procurement, which is due to poor dynamics, form, and content of reporting. The public procurement portal, as the basic tool for publishing invitations to public tenders, public procurement plans, concluded contracts and their annexes, is not sufficiently developed and reliable. The portal offers different cumulative information and offers various search criteria available in different page views. Furthermore, the portal does not contain some very important information such as the public procurement reports submitted by contracting authorities. Certain contracts and annexes are published without some basic elements, as simple documents containing no date, seal, or signature by the contracting parties. The changes in the basic terms of the agreements open enormous space for corruption and must therefore be controlled and approved by the Public Procurement Administration, and it is therefore necessary to inform the general public in detail about the concluded annexes to agreements on public procurement. Moreover, during our inquiry in January, the public procurement officers were unable to give precise answers to the question about whether the annexes are published at all, nor did they know the answer to the question on who keeps the records of breaches in public procurement procedures, or they provided contradictory answers. To sum, the problems are many and they largely limit the transparency and oversight in this area.

Furthermore, the reports by competent institutions and the bodies active in this area are neither precise nor reliable. The Coordination Body tasked with monitoring this area has thus far drafted only three reports since its establishment in February 2013, disregarding its obligation to publish quarterly reports, a task for which its members receive remuneration. In addition, the contents of the drafted reports give just a general overview of annual fulfilment of measures, without any information about deadlines, activities undertaken over the course of the reporting period, or concrete suggestions or recommendations for improvements. The same can be said about the reports on the realisation of the Action Plan for Chapter 23, especially bearing in mind that the reporting in this area relies on the annual reports on public procurement. The Public Procurement Administration makes corrections in its annual report to the data submitted by contracting authorities, but in doing so it does not note their mistakes and omissions, and for this reason they persist year after year. The Administration itself also makes mistakes when it comes to final budgets for public procurement. We found mistakes in Administration's reporting for five contracting authorities whose reports we consulted. The Administration does not allow insight into its annual public procurement report, which is contrary to the Law and further undermines transparency.

In spite of the new form and dynamics of reporting on the work of the Public Procurement Inspection, the work of this body is still not sufficiently communicated to the concerned public, especially in the light of the new competencies related to the control of all public procurement procedures and contracts. In this context, there is also a problem of limited capacities of this inspection body given its broad scope of duties, namely the fact that only two inspectors work there. In addition, the Public Procurement Inspection needs to be allowed to make its name, given the limited results it has made thus far and the still present lack of trust in this kind of oversight evident in the fact that in 2014 it received just six complaints.

The problem of lack of capacity is also present in the work of the State Commission for the Control of Public Procurement Procedures, regardless of the fact that the scope of its tasks has been reduced following the abolition of the obligatory control of purchases worth more than EUR 500.000. The most common issues cited by the State Commission as reasons for annulment of the decision on the selection of the most favourable bid are: inadequately prepared tender documents, amendments to the documents within a short period of time before the public opening of the bids, nonalignment between the call and the tender documents, and limited competition. Even though the Commission's reports underline the issues faced by this body, it is still unclear whether some planned activities have been realised or not, such as data networking with other institutions.

Imprecise wording of legal provisions often contribute to poor reporting and open room for corruption and abuse. Divergent interpretations of the provision on direct agreements affect, among other things, the keeping of records about the contracting authorities that have overstepped the annual limit for using direct agreements in public procurement, and therefore this provision needs to be defined more precisely. With the view to a greater transparency and limiting the proliferation of breaches of the Law, all direct agreements should be published on the websites of contracting authorities, which, in case of local self-governments, would be in line with Article 138 of the Law on Local Self-government which envisages the obligation of "publishing decisions on tendered affairs and services and contracts concluded with legal entities and persons

and normative acts and other enactments related to the disposal of municipal property on internet-site of a local self-government unit." An additionally 'blow' to transparency comes from the fact that the Law does not make it obligatory for the contracting authorities to publish annual public procurement reports.

The new legal provisions that have entered into force in May 2015 do not help improve reporting, and therefore the public procurement reports on direct agreements, for instance, are still kept away from the public eye.

### **How can reporting be improved?**

The following data should be published within annual public procurement reports:

- the number of annexes concluded annually;
- names of contracting authorities that have broken the Law on Public Procurement in the course of the year, explaining the type of breach;

The following data should be published within the quarterly reports on the realisation of Action Plan for Chapter 23:

- the overall number of published public procurement agreements on websites of each municipality (having in mind that this is set as one of the indicators, but the manner in which the reporting on this measure will be performed has not been spelled out precisely);
- the overall number of agreements concluded over the course of the reporting period (as this information should be readily available at the public procurement portal);
- the overview of a total number of public procurement services established in local self-government units, as well as the number of appointed public procurement officers in other municipalities;

The following data should be published at the websites of contracting authorities:

- individual reports on implemented procurements for all parties covered by this Law;
- direct agreements, immediately upon their conclusion;

A bylaw should prescribe a technical upgrade to the public procurement portal, and introduce the following measures as obligatory:

- data sorting according to document type: annexes, plans, calls, agreements, tender documents;
- publication of public procurement reports on the portal;
- a standardised form filled out and submitted for publication on the portal by contracting authorities for the tender documents, plans, contracts, and annexes;
- a unified naming policy for documents in order to ensure automatic sorting and with the view to enabling concerned parties to view relevant cumulative data;
- automatic generation of data from public procurement reports such as total value and forms A, B, and C.

### **How to prevent divergent interpretations of the Law on Public Procurement?**

The Law on Public Procurement should be amended so as to specify the following:

- framework for submitting the rationale in cases of abnormally low prices, in order to prevent calculations;
- year for which direct agreements are being calculated;
- allowing the bidders who due to the nature of their work are exempt from VAT to participate in public procurement procedures;
- methodology for joint planning of public procurements by the Public Procurement Administration and the contracting authorities.

### **How to improve the work and capacities of competent institutions?**

- Hold public procurement trainings for heads of state authorities;
- Specify in the text of the Law the number of civil servants in each state authority that need to pass the professional examination for performing public procurement tasks;

- Increase the number of inspectors at the Public Procurement Inspection in order for this institution to be able to perform its duties successfully, and especially the tasks related to control of agreements;
- Open a special hotline at the Inspection for complaints, citizen initiatives, and legal persons' initiatives on suspected corruption instances;
- Make the work of the Public Procurement Inspection more visible to the general public;
- Ensure networking of the State Commission for the Control of Public Procurement Procedures software with databases in other state authorities;
- Provide working conditions for employing more officers at the State Commission for the Control of Public Procurement Procedures.

## 5. Literature

- Action Plan for Chapter 23: Judiciary and fundamental rights
- Annual report on the implementation of the Public Procurement Administration Integrity Plan for 2014, January 2015
- Daily Vijesti, 2014 "The institutions love shopping," Daily Vijesti, 21 October 2014, available at: <http://www.vijesti.me/vijesti/institucije-vole-soping-801282>
- Daily Vijesti, 2014, "Budvanska Rivijera too will have to abide by the law," Daily Vijesti, 9 May 2014, available at: <http://www.vijesti.me/ekonomija/i-budvanska-rivijera-ce-morati-po-zakonu-207641>
- Daily Vijesti, 2014, "EPCG tender worth EUR 1.4million annulled," 6 December 2014, available at: <http://www.vijesti.me/vijesti/ponisten-tender-epcg-od-14-miliona-eura-808650>
- Decision of the Agency for the Protection of Personal Data and Free Access to Information regarding the complaint by Institute Alternative of 27 July 2015
- European Commission, Progress Report on Montenegro for 2014
- Fourth Report on the Implementation of the Action Plan for Chapter 23, July 2015
- Information on the non-implementation of the decisions of the State Commission for the Control of Public Procurement Procedures, June 2015
- Inspections Directorate, 2015, Report on the inspection oversight in the area of public procurement for the period January-June 2015, July 2015
- Institute Alternative and Centre for Civic Education, 2013, "Procurement in Montenegrin municipalities," Podgorica, 2013
- Institute Alternative, 2010, Public "Procurements in Montenegro – Transparency and liability," November 2010, available at: <http://institut-alternativa.org/javne-nabavke-u-crnoj-gori-transparentnost-i-odgovornost/?lang=en>
- Institute Alternative, 2015, "Public Procurement - control and corruption: views of contracting authorities," April 2015, available at: <http://institut-alternativa.org/narucio-ci-razlicito-o-korupciji/?lang=en>
- Institute Alternative, 2015, "Municipalities Are Breaking The Law While Contracting Goods," Institute Alternative, May 2015, available at: <http://institut-alternativa.org/opstine-ugovaraju-robe-i-usluge-mimo-zakona/?lang=en>
- Law on Public Procurement, "Official Gazette of Montenegro," 42/11 i 57/14
- Law on Value Added Tax, "Official Gazette of the Republic Montenegro", no. 65/01, 04/06 and "Official Gazette of Montenegro", no. 16/07, 09/15
- Official website of the Public Procurement Administration: <http://www.ujn.gov.me/category/izvjestaji/>
- Public Procurement Administration, 2014, "Public Procurement Report for 2013," May 2014
- Public Procurement Administration, 2014, Report on Public Procurement in Montenegro for 2013, Podgorica, May 2014, available at: <http://www.ujn.gov.me/wp-content/uploads/2014/06/Izvjestaj2013.pdf>
- Public Procurement Administration, 2015, Report on Public Procurement in Montenegro for 2014, Podgorica, May 2015, available at: <http://www.ujn.gov.me/2015/06/godisnji-izvjestaj-o-javnim-nabavkama-u-crnoj-gori-za-2014-godinu/>
- Report for 2013 of the Coordination body for implementing the Public Procurement System Development Strategy
- Report on Public Procurement of the state administration bodies and local self-governments in 2014, February 2015
- Report of the Coordination body for implementing the Public Procurement System Development Strategy for Q1 2014
- Report of the Coordination body for implementing the Public Procurement System Development Strategy for Q4 2014
- Report of the State Commission for the Control of Public Procurement Procedures on its work in 2014, June 2015
- Report on the Work of the State Commission for the Control of Public Procurement Procedures for 2014, June 2015
- Reports on Public Procurement for state authorities and local self-governments for 2014, February 2015.
- Response by the State Commission for the Control of Public Procurement Procedures to the questionnaire sent by Institute Alternative, January 2015.

## 6. Annexes

### 6.1 Methodology

For the purposes of this project, we interviewed public procurement officers in local and state authorities and we held four meetings with contracting authorities, bidders, and representatives of the civil sector, as well as other participants in the public procurement procedures, i.e. representatives of competent authorities in the area of public procurement.

In January and February 2015 we conducted an opinion poll about the views of contracting authorities as regards the corruption risks in public procurement procedures. The opinions were collected and analysed on the basis of 20 open questions. Following the collection and analysis, the Institute Alternative research team held a meeting with 25 public procurement officers on 20 February 2015.

The target group of this research paper was public procurement officers of state authorities and local self-governments whose contact details were available on the Public Procurement Administration's website (92+30).<sup>47</sup> The research did not cover officers from public services and companies established by the state or local self-governments. Given that we could not find e-mail addresses for 18 institutions, we sent the questionnaire to 104 addresses, five of which turned out to be invalid. This number also included "authorities within ministries,"<sup>48</sup> and also civil servants from the State Commission for the Control of Public Procurement Procedures and the Bar Regional Misdemeanour Authority, who informed us that procurements on their behalf are contracted by either authorities they belong to or the Public Procurement Administration. We received 40 responses in total, exactly 50% of all the valid addresses.

The 2014 public procurement data for state authorities were obtained on the basis of free access to information requests sent to the 33 state authorities<sup>49</sup> that are parties to the Law on Public Procurement. We did not include data for the Hydrocarbon Administration as we were unable to obtain contact details for this newly established authority. The ministries of economy and education did not submit their annual reports on public procurement for as long as three months after we have submitted the request,<sup>50</sup> thereby breaking the Law on Free Access to Information. We submitted complaints against these bodies for administrative silence, and we submitted complaints against the Public Procurement Administration and the Statistics Office for the erroneous fact finding. The Agency for the Protection of Personal Data has in all four instances decided in the favour of Institute Alternative.

<sup>47</sup> See: <http://www.ujn.gov.me/lista-za-2013-godinu/>.

<sup>48</sup> Twenty-one in total.

<sup>49</sup> According to the Decree on the Organisation and Manner of Work of the State Administration, "Official Gazette of Montenegro," no. 5/2012, 25/2012, 44/2012 – another regulation, 61/2012, 20/2013, 17/2014 i 6/2015

<sup>50</sup> IA has sent free access to information requests to the state authorities on 2 March 2015.

State authorities whose reports we were granted access to:

Ministry of Interior
Ministry of Justice
Ministry of Defence
Ministry of Finance
Ministry of Health
Ministry of Foreign Affairs and European Integration
Ministry of Science
Ministry of Culture
Ministry of Economy
Ministry of Transport and Maritime Affairs
Ministry of Agriculture and Rural Development
Ministry of Sustainable Development and Tourism
Ministry for Human and Minority Rights
Ministry for Information Society and Telecommunication
Ministry of Labour and Social Welfare
Human Resources Management Authority
Administration for Prevention of Money Laundering and Financing of Terrorism
Inspection Directorate
Directorate for Youth and Sports
Secretariat for Legislation
Secretariat for Development Projects
Hydrological and Meteorological Service
Bureau for Education Services
Intellectual Property Office
Bureau of Metrology
State Archive
Bureau for Social and Child Care
Directorate for Protection of Confidential Data
Environmental Protection Agency

## About Institute Alternative

Institute Alternative (IA) is a non-governmental organization, established in September 2007 by a group of citizens with experience in civil society, public administration and business sector.

*Our **mission** is to contribute to strengthening of democracy and good governance through research and policy analysis as well as monitoring of public institutions performance.*

*Our **objectives** are to increase the quality of work, accountability and transparency, efficiency of public institutions and public officials; to encourage open, public, constructive and well-argument discussions on important policy issues; raising public awareness about important policy issues, strengthening the capacity of all sectors in the state and society for the development of public policies.*

*The **values** we follow in our work are dedication to our mission, independence, constant learning, networking, cooperation and teamwork.*

We function as a think tank or a research centre, focusing on the overarching areas of good governance, transparency and accountability. Our research and advocacy activities are structured within five main programme strands: public administration, accountable public finance, parliamentary programme, and security and defence. On the basis of our five programmes, we monitor the process of accession negotiations with the EU, actively participating in working groups on chapters 23 and 32. Our flagship project is the Public Policy School, which we are organising since 2012. Since 2013, the IA has been licensed by the Science Ministry as a scientific and research institute.

Managing of the organization is divided between the Assembly and the Managing Board. President of the Managing Board is Stevo Muk. Research Coordinator is Dr Jovana Marović.

*See more about us at:*

[www.institut-alternativa.org](http://www.institut-alternativa.org)

[www.mojgrad.me](http://www.mojgrad.me)

[www.mojauprava.me](http://www.mojauprava.me)

[www.mojnovac.me](http://www.mojnovac.me)