

LOW VALUE PROCUREMENT IN MONTENEGRO: WITHOUT TRANSPARENCY OR COMPETITION

The subject of this analysis is low value procurement – a new non-transparent and uncompetitive procedure introduced under the amendments to the Public Procurement Law since June 2017. Even though public procurement are recognised as particularly prone to corruption, and the Government promises improvement of transparency and competitiveness of this part of public expenditure through all reports and strategic documents, its acts show the opposite.

By introducing low value procurement, a part of the budget spent through non-transparent procedures doubled. Over 28 million EUR was spent on low value procurement only in the second half of 2017, two times more than in the first half of the year when about 13 million EUR was spent through direct agreement.

Low value procurement is characterised by wide discretion of the contracting authorities, while the Law prescribes only value thresholds of this procurement. The procedures which apply to these procurement are determined by the internal acts of the contracting authorities. Low value procurement is procurement of goods and services the estimated value of which is equal to or less than 15,000 EUR and procurement of works the estimated value of which is equal to or less than 30,000 EUR.

No ministry or municipality adopted an internal act for low value procurement within the deadline foreseen by the Public Procurement Law. Only the municipality of Herceg Novi and Ministry of Interior adopted the internal act a day after the deadline prescribed by the law had expired, while other municipalities and ministries did so even two months later.

Direct agreement – an immediate arrangement between a contracting authority and a bidder, although removed from the Public Procurement Law, is kept in internal acts of the contracting authorities by which low value procurement is regulated. Most ministries and municipalities kept the solution of direct agreement with a bidder of their own choice, without collecting bids, for procurement of value up to 5,000 EUR. Three ministries and one municipality even have increased value of goods, services and works to which direct agreement can be applied. Thus, the Municipality of Bar has envisaged direct agreement for procurement of value up to 7,500 EUR, Ministry for Human and Minority Rights up to 9,000 EUR, Ministry of Transport and Maritime Affairs up to 10,000 EUR, and Ministry of Health which applies the direct agreement for procurement even up to 12,000 EUR is taking a lead in it.

Most ministries and municipalities have not foreseen in their internal acts the obligation of publishing concluded contracts, which additionally endangers transparency. This has been done only by the Ministry of Defence, Ministry of Economy and Ministry of Sustainable Development and Tourism, and the Capital City of Podgorica is the only municipality which has done it.

In order to prevent the share of money spent in direct agreements, away from public eyes, from growing further in the following years, it is necessary to adopt new solutions, at the level of laws and by-laws, which will be equally valid and binding for all contracting authorities. These solutions should go in the direction of reducing space for discretion and arbitrariness of contracting authorities, higher availability and openness of data on low value procurement, and improvement of competitiveness.



INTRODUCTION

Measures for improvement of transparency and control in the system of public procurement are foreseen by the Action Plan for the Chapter 23 – Judiciary and Fundamental Rights¹. Additionally, public procurement is recognised in the Operating Document for the Prevention of Corruption in the Areas Exposed to Special Risk as one of seven fields particularly prone to corruption². An average number of bidders participating in public procurement is foreseen by the Public Finance Management



Reform Programme 2016-2020 as one of the indicators of establishing efficient, transparent and competitive public procurement system in Montenegro³. However, even though the Government is officially dedicated to improvement of transparency, competitiveness and control in the system of public procurement, the practice shows the opposite.

In May 2017 the Government adopted the Bill on Amendments to the Public Procurement Law⁴, without prior consulting the public or the European Commission.⁵ By proposed amendments, direct agreement⁶, which was at the time the least transparent and competitive procedure, was removed from the Law. However, an adequate substitution was found – low value procurement, to which the procedures from Public Procurement Law are not applied, but the procedure determined by the contracting authorities' internal acts, and with respecting public procedure principles⁷. For low value procurement, the Law prescribes only value thresholds – up to 15,000 EUR for goods and services and up to 30,000 EUR for works⁸.

In its 2017 Report on Montenegro, the European Commission notes backsliding in the field of public procurement. This kind of assessment is a result of the amendments to Public

1 /Measures from 2.1.6.1 to 2.1.6.5 of the Action Plan for the Chapter 23, 19 February 2015, available at: <https://bit.ly/2JwYSQ9>

2 /With privatisation, urbanism, education, health care system, local self-government and police. Operating Document for the Prevention of Corruption in the Areas Exposed to Special Risk, Annex of the Action Plan for Chapter 23 – Judiciary and Fundamental Rights, 15 July 2016, available at: <https://bit.ly/2JK1NYQ>

3 /Public Finance Management Reform Programme 2016-2020 (innovated version), Ministry of Finance, June 2017, available at: <https://bit.ly/2LEwJHu>

4 /Press release from the 26th session of the Government of Montenegro, held on 18/05/2017, available at: <https://bit.ly/2kY-PCJR>

5 / Secretly on Public Procurement: Backsliding due to controversial amendments, Ana Đurnić, Institute Alternativa, 23 May 2017, available at: <https://bit.ly/2sQRMP2>

6 /Direct agreement is an immediate arrangement between the contracting authorities and bidders on public procurement conditions. Article 30, Paragraph 1 of the Public Procurement Law (Official Gazette of Montenegro, no. 028/15 from 03/06/2015)

7 /Article 30, Paragraph 1 of the Public Procurement Law (Official Gazette of Montenegro, no. 042/17 from 03/06/2017)

8 /Article 20 of the Public Procurement Law (Official Gazette of Montenegro, no. 042/17 from 03/06/2017)

Procurement Law from June 2017. As one of the specific reasons, the report states the fact that the Law is not applied to low value procurement⁹.

Insufficient regulation of low value procurement and wide discretion of the contracting authorities to independently regulate this procurement, is one of the reasons why Montenegro got the rating three for harmonisation of our legislation with the European¹⁰ in the SIGMA 2017 report on implementation of the European Principles of Public Administration.

The aim of this research is to clarify how introduction of low value procurement and exemption of this procurement from Public Procurement Law reflects on transparency of the public procurement system in Montenegro, and how much transparency and competitiveness of the procedure is endangered by this solution, on account of discretion and arbitrariness of the contracting authorities and persons responsible.

Research is focused on 23 Montenegrin municipalities and 19 ministries¹¹. Research covers the period from introduction of the low value procurement into Montenegrin system in June 2017, to December 2017. For the needs of this research, data on expenditure for low value procurement is used only for the second half of the year 2017, when this procurement was introduced. For the sake of comparison, for the first half of the year 2017, data on expenditure on the basis of direct agreement is used, since according to the degree of transparency, competitiveness and degree of discretion of the contracting authorities, direct agreement is complementary to low value procurement. Data on expenditure for low value procurement is taken from the 2017 Public Procurement Report prepared by the Public Procurement Administration. The review of individual solutions for low value procurement of ministries and municipalities is prepared by analysing the internal acts of these contracting authorities, downloaded from their web sites and obtained on the basis of the request for free access to information.

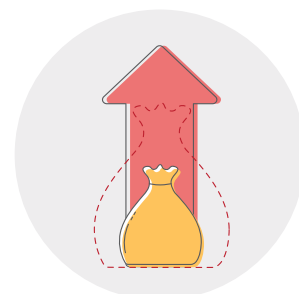
9 /The Report on Montenegro, European Commission, April 2018, p. 54, available at: <https://bit.ly/2sWbFV1>

10 /Monitoring Report: The Principles of Public Administration - Montenegro, SIGMA, p. 146, November 2017, available at: <https://bit.ly/2Bk95PL>

11 /Decree on Organisation of State Administration (Official Gazette of Montenegro, no. 019/17 from 27/03/2017)

TRIPLED NON-TRANSPARENT EXPENDITURE

In Montenegro during 2017, more than a half billion euros - 522 636 960,61 EUR was spent on public procurement¹². A little less than a half of that sum - 247 251 516,24 EUR was spent in the second half of the year, after entering into force of the amendments to the Public Procurement Law¹³. In that period, non-transparent expenditure for public procurement almost tripled.



In the second half of 2017, 39,142 contracts for low value procurement were concluded, of the overall value of 28 222 374,19 EUR. Therefore, 11,41% of the public money for public procurement was spent through this non-transparent procedure. On the other hand, in the first half of the year, the involvement of the direct agreement was represented in the overall expenditure for public procurement in the amount of 4,65% or 12 794 673,03 EUR.

Table 1: Share of the direct agreement in public procurement in the period from 1st January to 30th June 2017¹⁴

Overall budget for public procurement	Budget for direct agreement	Percentage
275 385 444.22 €	12 794 673.03 €	4,65%

Table 1: Share of the low value procurement in public procurement in the period from 30th June to 31st December 2017¹⁵

Overall budget for public procurement	Budget for low value procurement	Percentage
275 385 444.22 €	12 794 673.03 €	4,65%

12 / Public Procurement Report for 2017, Public Procurement Administration, May 2018, available at: http://www.gov.me/sjednice_vlade_2016/81

13 / Ibid.

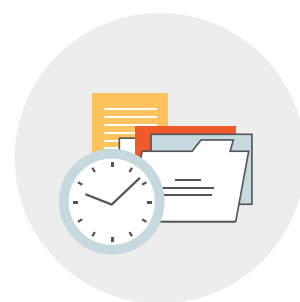
14 / Ibid.

15 / Ibid.

Apart from the fact that the share of non-transparent procedures in public procurement has increased, these numbers are at the same time an indicator of the potential abuse – dividing of higher value procurement in order to apply non-transparent procedure. This is also concluded by the Public Procurement Administration in their report¹⁶. Public Procurement Law forbids dividing of procurement in order to conduct less transparent procedures¹⁷ and prescribes misdemeanour liability and penalties for a contracting authority which commits it.¹⁸

BELATED INTERNAL ACTS

No ministry or municipality adopted an internal act for low value procurement within the deadline prescribed by the Law. The deadline for adoption of these acts was 30 days from the date of entry into force of the Law – 30th July 2017. Except for the Municipality of Herceg Novi and Ministry of Interior which adopted this act a day after the expiry of the deadline, most ministries and municipalities did it in September and October.



It is especially interesting that Ministry of Finance, which was responsible for prescribing the form and content of this act for all other contracting authorities, is taking the lead in missing the deadline¹⁹. Ministry of Finance prepared this document within the deadline prescribed by law – the Rulebook on the Content of the Act and the Templates for Implementation of Low Value Procurement²⁰. However, this ministry adopted its internal act after all the others – on 7th November 2017 – more than three months after the expiry of the legal deadline.²¹

16 / „This information shows us that the division of the procurement subjects to small ones is evident in order to achieve applicability of the rulebook on low value and urgent procurement.“, Public Procurement Report for 2017, Public Procurement Administration, May 2018, p. 59 available at: http://www.gov.me/sjednice_vlade_2016/81

17 / “The Contracting Authority shall comply with the conditions and methods of public procurement prescribed by this Law according to the established values and it may not, during the budget or financial year, divide the subject of public procurement which represents a whole, in purpose of avoiding application of this Law and the prescribed public procurement procedure“, Article 44, Paragraph 4 of the Public Procurement Law, (Official Gazette of Montenegro, no. 042/11 from 15/08/2011, 057/14 from 26/12/2014, 028/15 from 03/06/2015, 042/17 from 30/06/2017)

18 / Article 149, Paragraph 1, Item 7 of the Public Procurement Law, (Official Gazette of Montenegro, no. 042/11 from 15/08/2011, 057/14 from 26/12/2014, 028/15 from 03/06/2015, 042/17 from 30/06/2017)

19 / Article 30, Paragraph 4, Public Procurement Law, (Official Gazette of Montenegro, no. 042/11 from 15/08/2011, 057/14 from 26/12/2014, 028/15 from 03/06/2015, 042/17 from 30/06/2017)

20 / Official Gazette of Montenegro, no. 049/17 from 27/07/2017, 054/17 from 24/08/2017

21 / Rulebook on acting in low value procurement procedure, Ministry of Finance, 7 November 2017, available at: <https://bit.ly/2MfrT4w>

Most ministries and municipalities in their internal acts have not foreseen the obligation of publishing the concluded contracts, which additionally endangers transparency. Only the Ministry of Defence, Ministry of Economy and Ministry of Sustainable Development and Tourism have done that, and the Capital City of Podgorica has been the only municipality to do it.

DIRECT AGREEMENT REMOVED FROM THE LAW, BUT KEPT IN INTERNAL ACTS

Even though removed from the Public Procurement Law, direct agreement – immediate arrangement between bidders and contracting authorities is kept through internal acts of contracting authorities on low value procurement. By-law prepared by the Ministry of Finance envisages this possibility, but it does not define the value of procurement to which it can be applied²². Thus, the contracting authorities are left with an absolute discretion to independently define value threshold of the procurement to which direct agreement will be applied.



The previous Public Procurement Law prescribed that for procurement of estimated value up to 5,000 EUR the direct agreement can be concluded. For concluding direct agreement, it was not necessary to provide competitiveness by collecting bids. The contracting authority could procure goods, works and services from a bidder of its own choice, by direct acceptance and paying the receipt or invoice, as long as the value of procurement does not exceed 5,000

EUR. As a restriction, the Law prescribed a maximum percentage share of this direct agreement in the overall budget for public procurement²³.

22 / „The Contracting Authority may define estimated value of the low value procurement for goods, services and works which will be implemented by direct acceptance of pro forma invoice or concluding contract depending on the subject of procurement (e.g. with successive procurement, intellectual services and similar) or other relevant documents.“ Rulebook on Content of the Act and the Forms for Implementation of Low Value Procurement, Ministry of Finance (Official Gazette of Montenegro, no. 054/17 from 24/08/2017)

23 / Overall annual value of public procurement by applying direct agreement cannot exceed:

- 10% of executed budget for the public procurement of the contracting authority in the previous year, if the budget for public procurement amounts to 200.000 EUR;
- 9% of executed budget for the public procurement of the contracting authority in the previous year, if the budget for public procurement amounts from 200.000 to 500.000 EUR;
- 8% of executed budget for the public procurement of the contracting authority in the previous year, if the budget for public procurement amounts from 500.000 to 800.000 EUR;
- 7% of executed budget for the public procurement of the contracting authority in the previous year, if the budget for public procurement amounts to 800.000 EUR. Article 30, Paragraph 2 of the Public Procurement Law, (Official Gazette of Montenegro, no. 042/11 from 15/08/2011, 057/14 from 26/12/2014, 028/15 from 03/06/2015).

All the ministries and municipalities, however, envisaged by their internal acts the possibility of applying direct agreement, although the Rulebook of the Ministry of Finance did not prescribe it as binding, but only as a possibility. However, percentage restriction from the previous Public Procurement Law did not find its place in internal acts of the contracting authorities, which means that this mechanism can be used unlimitedly, by which a step backwards in relation to the previous legal solution is made.

Having in mind that the contracting authorities are given an absolute discretion for defining value of procurement up to which the direct agreement can be applied, some contracting authorities took advantage of it to expand the room for application of non-transparent procedures. Thus, three ministries increased significantly value threshold up to which direct agreement can be concluded. Ministry for Human and Minority Rights increased value for application of direct agreement to 9,000 EUR, Ministry of Transport and Maritime Affairs doubled this value to 10,000, and the Ministry of Health increased the value even up to 12,000 EUR. Seven ministries kept the value threshold of 5,000 EUR²⁴, while half of the ministries decreased this value threshold by their internal act to 3,000 EUR or 4,000 EUR.²⁵

When it comes to municipalities, threshold for application of direct agreement was increased only by municipality of Bar to 7,500 EUR, while most municipalities decreased this threshold to 3,000 EUR²⁶. Threshold up to 5,000 EUR was kept by five municipalities²⁷.

CONTROLLED COMPETITIVENESS

For low value procurement, the value of which exceeds the one predicted for direct agreement, solutions of contracting authorities for providing competitiveness differ. Most ministries and municipalities have chosen controlled competitiveness – sending requests for collecting bids to addresses of bidders at their sole discretion.



Only four ministries have envisaged the possibility of publishing calls for collecting bids on their web sites, which ensures the possibility for all interested

24 / Ministry of Interior, Ministry of Education, Ministry of Public Administration, Ministry of Labour and Social Welfare and Ministry of European Affairs

25 / Ministry of Sport, Ministry of Foreign Affairs, Ministry of Defence, Ministry of Justice, Ministry of Science, Ministry of Economy and Ministry of Sustainable Development and Tourism which reduced this sum to 3,000 EUR and Ministry of Culture to 4,000 EUR.

26 / The municipalities of Ulcinj, Gusinje, Plav, Mojkovac, Kotor, Žabljak, Tivat, Nikšić, Kolašin, Budva, Andrijevica, Šavnik and Berane.

27 / Municipalities of Plužine, Danilovgrad, Bijelo Polje, Rožaje, Cetinje and Petnjica.

As low value procurement is exempt from the Public Procurement Law, data on this procurement is not published at the Public Procurement Portal, which additionally reduces the transparency of this part of public expenditure.

bidders to submit a bid²⁸. However, in acts of these ministries this is envisaged only as a possibility, not as an obligation, so there is no guarantee that, in practice, the competitiveness will be provided in this way.

Other ministries have chosen controlled competitiveness in their acts – sending requests for collecting bids to at least three addresses of bidders of their own choice. The Ministry of Economy, Ministry of Defence, and Ministry of Sustainable Development and Tourism have foreseen additional possibility to deliver request for collecting bids to less than three addresses of bidders without a special explanation, due to specificity of goods, services and works. Only the Ministry of Justice has foreseen the obligation of written rationale if the request for collecting bids is addressed to only one bidder.

When municipalities are concerned, three of them have foreseen sending requests for collecting bids to addresses of at least two bidders – municipalities of Tivat, Šavnik and Bar, while other municipalities have chosen to collect at least three bids. Due to specificity of procurement subject, municipalities of Berane, Danilovgrad and Cetinje have foreseen the possibility of collecting less than three bids, while only the municipality of Berane has foreseen the obligation of providing special rationale for that. The possibility of publishing calls for collecting bids on their web site has been foreseen by 12 municipalities²⁹, while other municipalities have chosen to send calls for proposals to bidders “via fax, e-mail or in any other provable way.”

Bidders without the right to protection

By exemption of low value procurement from the Public Procurement Law, bidders participating in these procedures are disabled from filing complaints due to possible irregularities. The Commission for Control of Public Procurement Procedures is competent for acting upon complaints for public procurement procedures filed by bidders, but its competences do not refer to low value procurement.

28 / Ministry of Agriculture and Rural Development, Ministry of Defence, Ministry of Foreign Affairs and Ministry of European Affairs.

29 / Municipalities Šavnik, Budva, Podgorica, Kolašin, Žabljak, Cetinje, Kotor, Mojkovac, Petnjica, Plav, Gusinje and Ulcinj.

CONCLUSION

By adopting the Law on Amendments to the Public Procurement Law in June 2017 an irreparable damage was done in the public procurement system in Montenegro. By introducing low value procurement and allowing contracting authorities to independently arrange procedures for them, preconditions were made for spending almost 30 million EUR of public money uncompetitively and non-transparently in only six months.

By adopting new legal solutions in the forthcoming period, which should go in the direction of improving transparency and competitiveness, low marks from the reports of SIGMA and the European Commission can be improved. However, money spent by contracting authorities and money which is yet to be spent through low value procurement until entering into force of new legal solutions cannot be returned into the state budget or retrospectively controlled.

In order to prevent share of money spent by direct agreements away from the public eyes from growing further in the following years, it is necessary to adopt new solutions, at the level of laws and by-laws, which will be uniform and binding for all contracting authorities. These solutions should go in the direction of reducing the room for discretion and arbitrariness of contracting authorities, higher availability and openness of data on low value procurement and improvement of competitiveness.

RECOMMENDATIONS



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