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CONFLICT OF INTEREST

IN PUBLIC PROCUREMENT



Kingdom of the Netherlands

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INTRODUCTION

Publicly available data suggest the presence of a monopoly in the public procurement market, with some 50 companies taking approximately one-half of the total public procurement budget each year¹. The Montenegrin public tends to perceive the public procurement system as unlawful, unfair, prone to abuse and non-transparent. Citizens identify both various forms of abuse and connections between political and economic players. They also perceive that some ministers are connected with the companies their ministries work with in the public procurement field. As many as 39% of citizens think that a new minister often or almost always entails a new group of companies that the ministry works with in the public procurement field². The “external” actors, such as the media and the civil society, cannot always establish a direct link between politics and business in public procurement. There are few publicly available data and the politicians - after having invested plenty of time and effort to create a system that leaves room for abuse – are also by definition the ones who know that system the best. That makes them wary of making any “occasional procedural mistakes”. Still, there are examples that illustrate some interesting situations.

According to the official institutional data, there is no conflict of interest in public procurement in Montenegro. Up to two reports of potential conflict of interest get recorded per year; those are forwarded to the Administration for Inspection Affairs – Public Procurement Inspectorate for further action. The Inspectorate finds that no conflict of interest has occurred. The Public Procurement Law requires the contracting authorities to sign conflict of interest declarations ahead of a public procurement procedure, or during a procedure, should conflict of interest occur. On the other hand, the Template for the Declaration of the economic operator participating in a public procurement procedure includes a box concerning conflict of interest on the side of the bidder. All declarations are kept and registered only by the contracting authority, and neither the signed declarations of bidders’ representatives³ (included in the tender) nor the declarations of contracting authority’s representatives are published. The contracting authority keeps the records on identified conflict of interest and subsequent actions; implementation of anti-corruption measures and prevention of conflict of interest in public procurement procedures are subject to inspections, but solely in terms of verification of compliance with the statutory obligations related to recording instances of conflict of interest and excluding relevant bidders from the procedure. Thus, ultimately, it is up to the contracting authority to verify the declarations and act accordingly, although it has no (automated) access to the registries and databases that would be of assistance⁴.

Montenegro, thus, does not have an umbrella institution responsible for identification of conflict of interest in public procurement, running a registry and recording conflict of interest and actions taken in follow-up to reports. The Agency for the Prevention of Corruption, which holds the registries of public officials and their asset records (including any interest they may hold in companies) and is connected with other databases relevant for identification of conflict of interest in public procurement⁵, has no role whatsoever in public procurement control. The mandatory submission of asset declarations, which are then not used for the purpose of substantive review, serves as a shield and a justification that everything is in line with the law. In the words of former Minister Boskovic, stated in one of the articles presented here:

“If I had anything to do with that company, it would be included in the official data, in the registry of ownership and in the records on my asset declarations.”

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1. Fifty companies earn around €250 million from public procurement, Institute Alternative, July 2017, available at: <https://bit.ly/33Uke5N>
 2. Public opinion poll conducted by Ipsos Strategic Marketing for the Institute Alternative in early 2020, Citizens’ Perceptions on Public Procurement, Institute Alternative, March 2020, available at: <https://bit.ly/3u1oE5a>
 3. The authorised representative of the contracting authority, public procurement officer, representative of the Committee for conducting the public procurement procedure, person involved in development of tender document etc.
 4. The Central Register of Commercial Entities, Tax Administration, the Central Population Registry et.
 5. Ibid.

PART I: Case studies from Montenegro

(I) From furniture and cable cars to elite locations on the sea – Gvozdenović

Among the longest-serving ministers of various departments in the Montenegrin governments since the referendum, **Branimir Gvozdenović**, former Vice-President of the Parliament of Montenegro and political director of the Democratic Party of Socialists (DPS), is most often called out for potential conflicts between his public powers and private interests.

Since the referendum, Gvozdenović has been the head of three ministries. First, he was the Minister of Economic Development in the government of Željko Šturanović, and then, after the prime minister's resignation, in 2008 he became the Minister of the Economy in the government of Milo Đukanović. He became the head of the new Ministry of Spatial Planning and Environmental Protection in 2009, where he remained until the end of 2010. After a two-year break, he returned to executive authority in 2012, when, in another Đukanović-led government, he was elected as Minister of Sustainable Development and Tourism. He remained in that position until the end of 2016. From then until the parliamentary elections held in August 2020, in which the DPS lost power, he held the position of Vice-President of the Assembly. In the last parliamentary elections he was second on the DPS list, immediately after the outgoing prime minister, Duško Marković.

A consortium, of which the Montenegrin company Eminent was a member, won a tender run by the Public Works Directorate in 2016 for the construction of a six-seater cable car at the Kolašin 1600 site in the Municipality of Kolašin, while Gvozdenović was still in the charge of Ministry of Sustainable Development and Tourism. Eminent has for years been among the 50 companies sharing most of the “spoils” of public procurement. Its owner is Dr Ratimir Saveljić, and the consortium also included the Austrian company Doppelmayr Seilbahnen GmbH Austria, with subcontractors. The price offered by this consortium was €8,979,740 – higher than what Doppelmayr had offered independently at a failed tender a year earlier.

Coincidentally or not, according to the public procurement report from 2016, during that year the company Eminent was in 7th place on the list of bidders with the largest contracted procurements in that year, amounting to a total value of €10,070,390. In 2015, Eminent had also been on that list with total contracted purchases amounting to €2,066,597. According to data from the Central Register of Business Entities, the company deals with mediation in the sale of various products.

Bidders from Slovenia, who appealed against the decision on the selection of the most favourable bidder, pointed out, among other things, that Saveljić was already engaged in several jobs at the Electrical Company of Montenegro (Elektroprivreda Crne Gore) at that time, stating that one man cannot perform several jobs at once that require eight-hour working days.

It is impossible to prove Gvozdenović's direct connection with Saveljić, but there are a number of coincidences and facts that may indicate that this high-value contract, a couple of years earlier, was intended in advance for contractors from Austria, when the partners from Montenegro were not yet known. Minister Gvozdenović met with Doppelmayr representatives back in 2014 at the International Tourism Fair in Vienna. The Montenegrin team was represented at the meeting by Velibor Goranović from the Department for the Development of Priority Projects of the Ministry of Sustainable Development and Tourism. At that meeting, he presented the Montenegrin tourist and investment potentials, and later he was a member of the Commission for the consideration and valuation of bids, which decided on the selection of the most favourable bidder of the Eminent-Doppelmayr consortium.

Read more: <https://institut-alternativa.org/en/traces-of-ministers-in-suspicious-public-procurement-i/>

(II) Warm and safe – Bošković

From Pljevlja, through Nikšić and Podgorica, to Ulcinj and Budva, the business of two Nikšić companies which deal with the provision of security for property and individuals is connected with the former Minister of Defence and the positions he was in charge of.

"Bošković brought that company to Rudnik," the former manager of the Pljevlja-based company told us during this research.

Former Minister of Defence **Predrag Bošković** is considered to be one of the longest serving ministers, who covered various ministries during the three-decade rule of the DPS. In only the previous eight years, Bošković had been in charge of three departments. From 2012 to 2015 he was the Minister of Labour and Social Welfare. He took over the Ministry of Education in the first half of 2015 and managed that ministry until the elections in 2016. He then took over the post of Minister of Defence and remained there until the change of government after the elections in August 2020.

On behalf of the state, between 2009 and 2012, he headed the Board of Directors of the Coal Mine in Pljevlja. Since then, the business of the Nikšić-based company Vector Security (since 2018 called Vector System Security (VSS)) has been associated with his name. Their founder and owner is Ratko Popović from Nikšić, but Minister Bošković resolutely denies any personal connections with these companies.

Publicly, former workers of the Nikšić-based bankrupt company Bauxite Mines connected Bošković with Popović's company last year, after VSS became the owner of former union-owned land in the centre of Nikšić, with an area of 18,622 square metres. According to the available databases, no direct connection is actually visible, but there are a number of coincidences that, in the end, may not be just coincidences.

As Minister of Defence, he selected this company to provide security for the Army and its property for years. Thus, for years now, Popović's company has been guarding the property of the Valdanos military complex in Ulcinj. The contract for Valdanos's security costs at the beginning of 2018 was worth €65,067 and, at the beginning of 2019, €68,690. For this year (2020), Bošković signed a contract with the same company on 17 January to secure the Valdanos property for €58,776.90 – on average, over €5,000 a month.

At the beginning of 2020, Bošković signed an agreement on the delivery and installation of video surveillance systems at the facilities of the Ministry of Defence and the Army throughout Montenegro, through three parties, for a total of €306,170.64. On 6 April 2020, he signed an agreement for the maintenance of video surveillance, an anti-burglary system and access control for €27,300. Previously, in November 2017, he had signed an agreement on the delivery of video surveillance equipment with VSS worth €14,415 for the needs of the Health Centre of the Security Forces in Podgorica. Also, on 13 March 2018, he had signed an agreement on the maintenance of video surveillance with VSS worth €14,612.85.

As the Minister of Labour and Social Welfare, on 1 May 2014, Bošković signed an agreement with Popović's Vector Security on the provision of physical and technical security services for facilities and persons in the Centre for Accommodation of Asylum Seekers. The value of that agreement over 12 months was €99,011.81 or about €8,251 per month. While performing the function of Minister of Education, in August 2016 he signed an agreement with VSS on the provision of physical security services for the building of the Ministry of Education, the Institute for Education and the Examination Centre, over 12 months, for the amount of €14,962.58. Finally, Vector System Security also provided security for the shareholder's assembly of the company "13. Jul Plantaže" held on 25 September 2020. This brings us to the story of Predrag Bošković's entrepreneurial activities.

Read more at: <https://institut-alternativa.org/en/traces-of-ministers-in-suspicious-public-procurement-ii/>

"If I had connections with that company (VSS – author's note), it would be in the official data, in the register of ownership, as well as in my card for the registration of property," Minister Bošković wrote in his response.

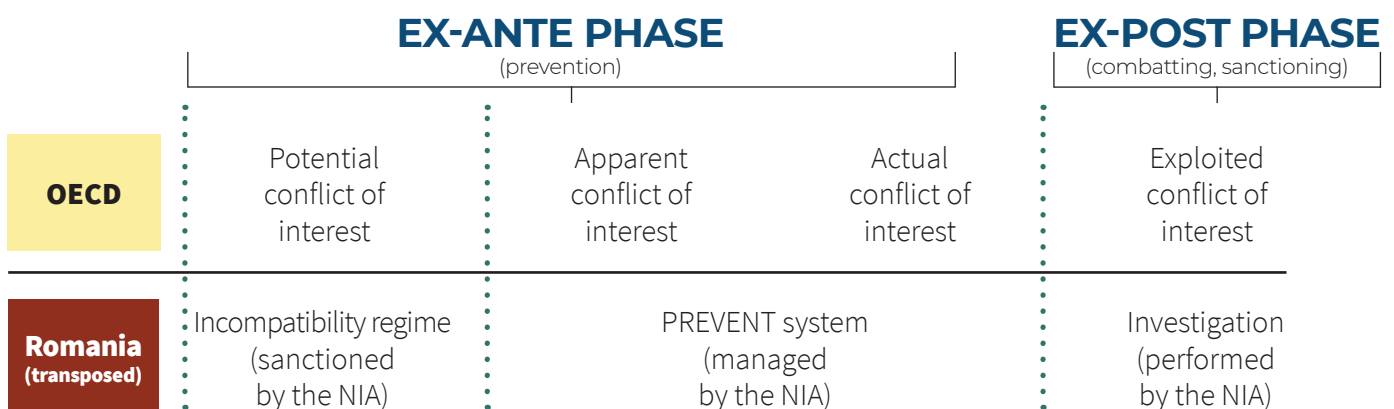
PART II: A snapshot of the rules and practices of the EU and WB countries

Example 1: Romania

● Author: **Silviu POPA**

Several European Commission Reports on CVM⁶ from 2012–2015 show that, despite Romania’s intensive efforts to identify and sanction exploited conflicts of interest (within the ex-post phase), more action was needed in terms of prevention. And the need to identify and resolve a conflict of interest before it actually takes place has arisen because of the length of time it takes to cancel contracts signed in breach of conflict of interest, but also because the procedure of resetting the process is quite cumbersome. In other words, the lack of a preventive mechanism affected the dissuasive force of the National Integrity Agency’s (ANI) work in tackling conflicts of interest in a €15 billion market – the total value of public procurement in Romania – as well as entailing a loss for the public finances.

In less than two years, the ANI managed to build an electronic system (PREVENT system) that automatically crosschecks relevant data from various databases and registries in order to detect potential familial links in public procurement procedures, links between contracting authorities and bidders that could determine the existence of a possible conflict of interest⁷. Within the same period, the Romanian authorities adopted the legislation that accompanied PREVENT to enable it to function.



Snapshot of Romanian Col prevention in public procurement legislation/the place of the “PREVENT” system in the architecture

6 The European Commission periodically assesses the progress of Romania and Bulgaria in several areas related to judicial reform, the fight against corruption and (in case of Bulgaria) of organised crime. More information about the mechanism, as well as reports are available at the link: https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/assistance-bulgaria-and-romania-under-cvm/cooperation-and-verification-mechanism-bulgaria-and-romania_en.

7. An administrative conflict of interests is defined by the Romanian legislation as being a situation where a person in a public office/dignitary has a personal material interest which could influence the objective exercising of their official duties as per the Constitution and other regulatory provisions for all public officials.

How does the PREVENT system work?

- » In every public procurement procedure launched through the SICAP (electronic system for public procurement), designated persons within the contracting authority must fill out an INTEGRITY FORM with data pertaining to decisional factors and evaluation committees within the authority, relevant data and information on the bidders and so forth;
- » Every integrity form filled out by the contracting authorities then falls under the analysis of PREVENT;
- » Data from the integrity form is automatically crosschecked with relevant data from the REGISTRY OF COMPANIES and the PERSONAL ID REGISTRY;
- » If a potential familial link is identified (and thus, an apparent conflict of interest), PREVENT will issue a red flag, called an INTEGRITY WARNING;
- » The head of the contracting authority who receives the integrity warning then undertakes all the necessary steps to resolve the conflict of interest, such as replacing the member on the decision-making/assessment committee or excluding the bidder/candidate/associate bidder/subcontractor/third-party sponsor, etc.;
- » Failure to resolve an apparent conflict of interest, and thus the signing of a contract which breaches integrity legislation, will automatically trigger an investigation of an exploited conflict of interest, performed by an ANI inspector.

Example 2: North Macedonia

● Author: **German FILKOV**

Following the numerous lawsuits that were launched for abuses in public procurement after the change of government in 2017 and on the recommendations of the civil sector, the new Law on Public Procurement (which came into force in April 2019) included several provisions to prevent corruption and conflicts of interest.

The members and chairperson of the Public Procurement Commission, their deputies and the responsible person in the institution must sign statements declaring the non-existence of conflicts of interest, and in the event of any conflict, they must withdraw from the decision-making process and new persons are appointed. A novelty is that the members and the president of the State Commission for Public Procurement Appeals may be exempted from working on a specific case. The employment and engagement of, business cooperation with and acquisition of ownership by a person from the contracting authority in a tender-awarded company is prohibited, if the person has participated in the procurement procedure with that company and if its share is greater than 5% of the value of all contracts of the contracting authority. Illegal influence by the responsible individuals and management over those responsible for public procurement in the institutions is also prohibited. Those participating in the preparation of the tender documentation must not be bidders in the public procurement procedure.

The Law on Public Procurement further refers to application of the Law on the Prevention of Conflicts of Interest to resolve conflicts in the public procurement procedures. That law, which in the meantime has been annexed to the Law on the Prevention of Corruption and Conflicts of Interest, defines a conflict of interest as a situation in which an official has a private interest that affects or may affect the impartial performance of his public powers or official duties.

The issue of conflicts of interest in public procurement is left to be managed at the level of the contracting authorities, which in turn do not have established internal procedures, nor do they have the practice of resolving issues related to this. On the other hand, the State Commission for the Prevention of Corruption, which is responsible for dealing with cases of conflict of interest, acts only on reports received and on its

own initiative when the issue receives public attention.

In practice, not only in public procurement, but in the country in general, there is a low level of recognition of conflicts of interest and even less knowledge of their successful management. There are cases when statements of the non-existence of conflicts of interest are signed at the beginning of the tender procedure when the bidders are not yet known and it is not known whether there is any conflict of interest. Also, several court cases for abuses in public procurement indicate inconsistencies related to conflicts of interest, in terms of the formal signing of statements and non-reporting of the existence of a conflict of interest. Conflicts of interest between the engaged external experts and the judges of the Administrative Court, which decides on lawsuits connected to public procurement, remain unregulated.

There is a need for a deeper treatment of the issue of conflicts of interest in the training of public procurement entities, beyond the existing law. Training is also needed for the members of the public procurement commissions and for the responsible individuals at the contracting authorities. Statements of the existence or non-existence of conflicts of interest should be made public on the website of the contracting authorities.

Example 3: Bosnia and Herzegovina

Author: **Aleksandra MARTINOVIĆ**

Absence of adequate policies and practices in conflict-of-interest prevention and management in general, and in particular in the field of public procurement, constitutes a major factor contributing to the image of state capture of Bosnia and Herzegovina and its institutions, and consequently of the public procurement system in Bosnia and Herzegovina.

The current Public Procurement Law (PPL) of B&H came into force in November 2015;⁸ it served the purpose of harmonisation with the EU Directives from 2004, so that the segment of EU public procurement reforms from 2014, related to integrity, remained to be subsequently transposed into the B&H legislation.

Article 52 of the PPPL – Disqualification on the basis of conflict of interest or corruption contains the most important provisions on conflict of interest, along with several other articles of the same Law. The PPL provides that, in the event that a request or tender that the contracting authority receives in the course of a public procurement procedure causes or may cause conflict of interest in line with the applicable regulations on conflict of interest in B&H, the contracting authority shall act in line with the B&H regulations. The references made in the PPL to the provisions of the regulations on conflict of interest at different levels of government is problematic, as B&H does not have laws that are mutually aligned and address conflict of interest in a uniform manner, the regulations on conflict of interest are numerous, complicated, inconsistent and inefficient, and the laws are not applied at some administrative levels, so the implementation of the mentioned provisions of the PPL cannot be ensured.

Furthermore, the PPL explicitly forbids concluding contracts with bidders if the head of the contracting authority or a member of its management or supervisory board has managerial functions in the bidder or holds an interest, shares or other rights that give them more than a 20% share in management or equity. Despite the very high threshold of 20%, this provision is problematic in a number of aspects: the prohibition against conclusion of contract does not cover related and other persons that could influence the outcome of the public procurement procedure, or subcontractors; it does not provide for the nullity of the contract concluded in a conflict-of-interest situation, which represents an international standard and an integral segment in handling conflict of interest⁹.

In addition, Articles 52 and 53 of the PPL stipulate preliminary (technical) consultations and ban the contracting authorities from using advice coming from any person that may have any direct or indirect interest in the outcome of the contract award procedure if that is likely to impact real competition for the contract in question¹⁰. However, there is no strict provision on

8. Public Procurement Law of B&H, Official Journal of B&H 39/14.

9. For instance, article 82 of the PPL of Croatia stipulates the nullity of the public procurement contracts concluded contrary to the provisions of the laws regulating conflict of interest.

the transparency of preliminary consultations, another standard that should be applied at least in relation to large-value procurements. In practice, then, these provisions actually help open the door to conflict of interest and corruption.

The Instructions for development of model tender document and tenders¹¹ require the tender document to include a list of economic operators, drawn up on the basis of the contracting authority's internal regulation, that have been excluded from the procurement procedure due to the presence of conflict of interest, pursuant to Article 52 of the Law. The contracting authority is also required to insert a condition in the contract prohibiting the bidder that has been awarded the contract from hiring, for the purpose of contract execution, any physical or legal person that participated in the development of tender document or acted as a member or expert hired by the Procurement Committee, for at least six months following contract conclusion, i.e. commencement of contract performance¹².

The Rulebook on the establishment and operation of the Procurement Committee¹³ - with such committees being mandatory for practically all procurement procedures except direct contracting (up to €3,000) – precludes the appointment into such committees of the persons that could be in direct or indirect conflict of interest in relation to the specific procurement procedure or the responsible persons making or approving the decisions related to a public procurement procedure. Before the Committee commences its operation, each member, secretary and external expert co-opted from outside the contracting authority is required to sign a declaration of impartiality, confidentiality and absence of conflict of interest, stating that they are familiar with Article 52 of the PPL; they are also required to declare any potential conflict of interest at any point during the procedure and ask to be recused from the Committee.

With the exception of the tender documents for completed procedures, none of the above information are proactively available on the single Public Procurement Portal of B&H; they could potentially be accessed on the basis of one of the freedom of information acts applicable at different administrative levels of B&H. Examples of good practices have been identified at lower administrative levels; the regulations on public procurement procedure review, online database of procurements that include also texts of contracts, and online databases on staff, appointees, assets etc., through interoperability, would facilitate more adequate control, including social scrutiny of the integrity of individuals and procurement procedures.

Integrity, i.e. conflict of interest prevention and management among officials/staff in the crucial institutions in the public procurement system in B&H (Agency for Public Procurement and the Procurement Review Body), is also predominantly regulated by other regulations, apart from the PPL, with numerous gaps in both the legal framework and practice.

The Proposed Law Amending the PPL¹⁴ envisages additional harmonisation with the relevant provisions of Directive 2014/23/EU. It introduces the concept of irregular tender and the conflict-of-interest definition that is in line with the acquis; it requires minutes to be drafted on preliminary consultations, lowers the threshold related to interest in an economic operator (0.5%), includes the related persons covered by the PPL provisions, provides for the nullity of a contract concluded in a conflict-of-interest situation and adoption of a Rulebook on e-submission of tenders. Following the model of the Montenegrin regulations applicable at the time, it envisaged also inspection supervision over the implementation of the PPL, including supervision over the implementation of the provisions on conflict of interest, but the final version of the Proposed Law did not include that section or the proposed provisions on the introduction of the criminal offence of abuse in public procurement.

In addition to adoption of amendments to the PPL and their consistent implementation in practice, what lies ahead for Bosnia and Herzegovina is development of a new PPL, since the need for further harmonisation with the EU directives exceeds the scope of amendments (up to 50% of the provisions of the current Law). Meanwhile the principles of equal treatment and non-discrimination and active and fair competition, as the core of the B&H PPL, remain mainly in the domain of theory. This is illustrated by one of the major procurement system performance indicators: the average number of tenders received by the Agency for Public Procurement of B&H in 2019 was 2.16, while the average number of admissible tenders was only 1.96. Adoption and implementation of the regulations on beneficial ownership, the prospect of which are still not certain, may additionally relativise these figures.

10. Article 53 (Required information), paragraph 5 of the PPL.

11. Instructions for developing model tender documents and tenders, Official Journal of B&H 90/14, 20/15).

12. PPL, Article 72 (Contracts), paragraph 6.

13. Rulebook on the establishment and operation of the Procurement Committee (Official Journal of B&H 103/14).

14. It was drafted already in 2017, in the course of active collaboration with the civil society, but it only entered the Parliamentary procedure during the COVID-19 crisis, mainly due to the EU insistence and the conditioning of international financial institutions.

Example 4: Croatia

● Authors: **Dubravka KLIŠMANIĆ i Vjekoslav BRATIĆ**

Public procurement is an important policy instrument aimed at transparent and effective public spending, prevention of manipulation, irregularities, favouritism and potential conflict of interest, as well as achieving the best value for money. The policy and the legislative framework on public procurement in Croatia, in particular the Public Procurement Law, changed under the influence of the European Union. The Law was amended on several occasions due to the need to harmonise with the EU acquis, simplify the public procurement procedures, strengthen the remedies as control of legality of the procedures, ensure legal and effective spending of public resources, enhance transparency by means of publication of Procurement Plans and registry of contracts concluded by contracting authorities, enhance the flexibility of the procedures, reduce the administrative burden through the use of means of electronic communication and the European Single Procurement Document and introduction of mandatory tender selection on the basis of the criterion of most economically advantageous tender, good practices with regard to the conduct of participants etc.

The currently applicable 2016 Public Procurement Law has considerably expanded some situations of the conflict of interest between a contracting authority and economic operators, which now covers the situations where representatives of the contracting authority or procurement service provider acting on behalf of the contracting authority are involved in the public procurement procedure or may influence the outcome of the procedure and/or possess either direct or indirect, financial, economic or any other personal interest that could be considered to threaten their impartiality and independence in the procedure.

The contracting authority is required to implement appropriate measures to effectively prevent, identify and eliminate conflict of interest related to a public procurement procedure in order to prevent distortion of competition and ensure equal treatment of all economic operators. In order to comply with the legal provisions, representatives of the contracting authority (head or member of its managing, governing or supervisory body, member of the Procurement Committee, another person involved or with potential to influence the contracting authority's decision in the public procurement procedure) are required to sign a declaration of (no) conflict of interest and to update such declaration promptly in case of any changes. The contracting authority is also required to post on its webpages the list of economic operators that its head or member of managing, governing or supervisory body or persons related to them are in conflict-of-interest situation with, or statement that no such economic operators exist, and include that information in the bidding document.

The contracting authorities are thus imposed an obligation in the course of prevention and identification of real conflict of interest that should not rely only on the declaration, but also on the ethics and moral integrity of the individuals involved in the public procurement procedure. Awareness-raising on conflict-of-interest risks is necessary also in view of verification of the declarations provided, to ensure the integrity of the public procurement procedure. The declarations, therefore, protect those working at the contracting authority from being accused, during any of the later stages, of failing to declare conflict of interest, and serve as an appropriate basis for their recusal from the public procurement procedure.

Personal interest, however, is a wide area, and the provisions from the Law do not specify how such situations are to be recognised. Conflict of interest in public procurement is also partially subject to the Law on the Prevention of Conflict of Interest, which regulates prevention of conflict between private and public interest in the course of performance of official duties by public officials. In addition, the penalty provisions of the Law do not envisage misdemeanour liability in case of a contracting authority failing to act in relation to conflict of interest, thus ruling out the competence of the Directorate for Trade and Public Procurement Policy and the possibility of bills of indictment. Conflict of interest should be handled properly in order not to breach the principles of the primary sources of EU law. In addition to the current provisions shifting the responsibility largely onto the contracting authority, they also cover the responsibility of the bidder. Thus, the provisions of the Law do not require exclusion of a bidder who has been found to be in a conflict of interest, but allow that bidder to prove that the conflict-of-interest situation has no influence on the contracting authority's actions and that it does not threaten market competition. The European Court caselaw suggests that exclusion of the economic operators who are in a conflict-of-interest situation from the public procurement procedure must be a measure of last resort, when other measures are not feasible. The situation where a representative of the contracting authority was in an actual conflict of interest in a public procurement procedure on which a decision was made, may be subject to the provisions of the Criminal Code, if the criminal offence brought significant financial gain or caused significant damage.

The State Commission for Supervision of Public Procurement Procedures (DKOM) is one of the most relevant bodies for the provision of remedies in the public procurement procedures in Croatia¹⁵. In addition to remedies, DKOM ensures implementation of public procurement policy, lawful and effective spending of public resources, development of good practices in the conduct of participants in the procedures, and identifies particularly important breaches of the law. As it regulates conflict of interest in public procurement procedures, the misdemeanour and penalty provisions, and the amounts of fees in complaints procedures, DKOM's responsibilities with regard to the anticorruption measures implemented by the Republic of Croatia has been reinforced.

The practice in public procurement to date has identified the need to avoid situations where public procurement is the chief reason for financial corrections, that the remedy bodies must avoid excessive legal formalism i.e particularly strict interpretation of the procedural rules and laws, as it can have a negative impact on the effective spending of public funds, that the opinions and views of intermediary bodies must not be contradictory, but consistent, clear and unambiguous, that complaint procedures must not be overly lengthy, that court redress must be appropriate etc. Also, caution should be exercised with regard to possible expansion of the right to lodge a complaint, in order to avoid abuse of remedies at the stage of publication of tender documents in the Electronic Public Procurement Journal, as the economic operators in the Republic of Croatia that are registered for a wide range of activities and often have only a few employees and act as "professional complainants" have launched the practice of complaining against the documents in the procedures of large estimated values in order to acquire financial gain.

DKOM's decisions from 2019 and 2020 suggest that the claims of the presence of conflict of interest in public procurement procedures are declined and the decisions in the procedures where the contracting authority failed to demonstrate conflict of interest i.e. excluded a bidder from the procedure without good grounds, are annulled. Such application of the law confirms that, although conflict of interest may indicate unlawfulness in public procurement procedure, it is very important to understand the complexity of the mechanisms for conflict-of-interest prevention. Conflict of interest management is implemented in practice through the declarations that comply with the prescribed form. It is important to stress here that SAFU, the most influential intermediate body monitoring the EU-funded public procurements, applies the legal provisions on conflict of interest much more rigorously; thus, in 2019 and 2020, in the ex-ante reviews of procurement procedures, it identified several cases of conflict of interest that resulted in 100% financial corrections in line with the Rules on financial corrections, and reports to the State Prosecution Service. Thus, concluding a public procurement contract with an economic operator while failing to timely identify a conflict-of-interest situation or while detecting a conflict-of-interest situation but failing to implement appropriate measures to protect market competition, transparency and equal treatment of all economic operators, i.e. appropriate mitigation measures, leads to irregularities and application of 100% financial corrections of the grant amount for the procurement in question. The latest practice of SAFU confirms that the statutory provisions on conflict of interest are being applied also in simple procurement procedures.

It is important to note that conflict of interest risks exist at all stages of public procurement, from the development of tender document to contract performance. The most frequent risks relate to splitting the value of the procurement with the intention to avoid implementation of the prescribed procurement procedure, or prescription of conditions and technical specifications that favour a specific economic operator. Conflict of interest management should be taken into account already when planning procurement, conducting market analysis, developing the tender document, drafting technical specifications and conditions for selection, and applying the criteria for the selection of the best tender, while special attention should be paid to contract performance. SAFU's actions follow this direction, as they check all the stages of public procurement in order to reduce the risks of corruption; often, in the attempt to reach that goal, they lead to excessive legal formalism when deciding on the financial corrections.

15. DKOM is an independent and autonomous body established in 2003. Its members are proposed by the Government and appointed by the Parliament for a 5-year term. This body, inter alia, decides on the legality of the procedure, action, omission of action and decision in public procurement procedures. It reports to the Parliament. Its report includes a description of the situation in the field of public procurement in the Republic of Croatia in the past year. In addition to DKOM, there is the High Administrative Court, the Directorate for Trade and Public Procurement Policy of the Ministry of Economy and Sustainable Development, which is in charge of improvement and coordination of the entire public procurement system, the Economy Sector, Division for Public-Private Partnerships and Concessions within the Ministry of Finance, the Agency for Public-Private Partnerships, and indirectly also the Central Financing and Contracting Agency (SAFU), which is formally not a part of the institutional setup but has a strong influence in the system of monitoring the public procurements provided by the EC, as it aims to conduct ex-post regularity control of conducted public procurement procedures pursuant to the EU acquis and the PPL. Its work is monitored by the MoF, Ministry of Regional Development and EU Funds, European Commission and Agency for Audit of European Union Programmes Implementation System (ARPA).

CONCLUSION AND RECOMMENDATIONS

Each of the four models from European Union Member States and Western Balkans presented here contains ideas for improvement of the system for the prevention and handling of conflict of interest in public procurement. The discussion on these ideas should be organised in two directions – that of prevention, in terms of prevention of conclusion of public procurement contracts that involve conflict of interest, and that of enforcement, in terms of identification of existing conflicts of interest, actions against responsible persons, termination of the contracts concluded in the presence of conflict of interest and damages and/or restoration wherever possible.

With regard to the preventative mechanisms, it would help to consider the Croatian model, in particular in terms of enhanced transparency of declarations and other mechanisms aimed at conflict-of-interest prevention. This primarily refers to the obligations of publishing the declaration of (no) conflict of interest of all the persons involved in the public procurement procedure in the Electronic Public Procurement Journal, and of drafting, publishing and regularly updating the lists of economic operators that heads of contracting authorities are not allowed to conclude contracts with due to the presence of certain private interests; besides Croatia, these exist also in Bosnia and Herzegovina.

For the conflict-of-interest prevention measures not to lead to excessive exclusion of economic operators from public procurement procedures, the model of North Macedonia deserves to be considered, in terms of defining the acceptable percentage of the value of public procurement contracts with the bidder in whom a person from the contracting authority has some private interest. The percentage would have to be proportionate to the total Montenegrin public procurement budget, but it would also have to be specially adjusted to various specific types of contracting authorities, including those with smaller procurement budgets. Development of an IT solution that would facilitate detection of potential (apparent) conflict of interest and prevention of its occurrence, following the PREVENT model from Romania, should also be considered.

The Romanian model is important for both the preventative and the enforcement segment, as it enables collection of evidence of an existing-actual conflict of interest that may be useful in the procedure against the responsible persons, their sanctioning and award of damages and/or restoration where possible. Control, therefore, largely relies on databases and the level to which they are linked. Continuity of operation and collection of large quantities of data over a longer period of time are of significance for the operation of these controls. That enables identification of “patterns” in behaviour, monitoring of developments and changes in ownership structure of bidders and of any developments related to the contracting authorities and their heads changing their positions.

The technical preconditions for setting up such a system of control is already to a large extent present in Montenegro. The Montenegrin Agency for the Prevention of Corruption holds a database of asset records, and the Population Registry and Central Registry of Commercial Entities are also in place and the Agency is connected to them. The Electronic Public Procurement Journal has been established and has been operational since 1 January 2021.

Through the cooperation between the Agency for the Prevention of Corruption and the Ministry of Finance and Social Welfare, which runs the Electronic Public Procurement Journal, and with involvement of other public procurement system actors and with consent of the decision-makers and political entities represented in the Parliament, with amendments to the legal framework and provision of technical preconditions and resources, such a system could come to life in Montenegro.

APPENDIX 1: EXAMPLE FROM ROMANIA, INTEGRITY FORM¹⁶

SECTION I DATA CONCERNING THE PROCUREMENT PROCEDURE, DECISION-MAKER, ASSESSMENT COMMITTEE, CO-OPTED CONSULTANTS AND EXPERTS

I. DATA CONCERNING THE PROCUREMENT PROCEDURE

1. Name of the procurement procedure
2. Procedure code/ Number of announcement/ participation invitation
3. Source for procurement funding: National/ own budget/ European funds
4. Contracting authority¹⁷: identification – name, tax code, legal representative, contact person and contact information
5. Type of contracting authority
 - public entity/authority
 - private legal entity
6. Category/ subcategory of contracting authority – only for the case where the contracting authority is a public entity / authority
7. Date of posting in SEAP¹⁸
8. Name of procurement procedure
9. Type of announcement
 - participation announcement
 - participation invitation
 - announcement of competing solutions, or
 - leasing announcement
10. Type of procurement procedure
 - open bid
 - request for offer
 - negotiation without participation announcement
 - competitive dialog, etc.
11. Type of contract
 - supply
 - services, or
 - works
12. Estimated value
13. Data concerning the European-funded project the procurement procedure is part of - which EU Fund
 - program name
 - axis
 - domain of intervention and - SMIS Code
14. How the procedure will unfold
 - online
 - offline

16. Some information will be downloaded into the form automatically / generated automatically by SEAP, other information shall be typed in separately.

17. According to the data in the SEAP authorization certificate of the contracting authority (tax code, AC name, address, person in charge of legal representation, e-mail, contact person, etc.)

18. Automatically downloaded from SEAP.

15. Date the offers will be opened¹⁹
16. Date the procedure report will be released²⁰
17. Date the contract will be awarded²¹

II. DATA CONCERNING THE DECISION-MAKER²²

1. Surname
2. First name
3. Sex
4. Citizenship
5. CNP (Personal Numeric Code)
6. Domicile address
7. Town/City
8. County
9. Is under obligation to file asset and interests disclosure statements under Law no. 176/ 2010 as subsequently amended: YES / NO.
10. Category/ subcategory of position – only for the case where the decision-maker is under the obligation to file asset and interests disclosure statements under Law no 176/ 2010 as subsequently amended.
11. Do labor relations exist with any of the bidders²³? YES / NO
12. List of bidders – only if labor relations exist with any of the bidders²⁴
13. Are they a member of any association or foundation? YES / NO
14. Name of the association / foundation – only if they a member of any association / foundation.
15. Signs Procedure Report? YES / NO
16. Signs Procurement Contract? YES / NO
17. Active/Inactive

III. DATA CONCERNING CONSULTANTS USED IN DEVELOPING THE PROCUREMENT DOCUMENTATION: ECONOMIC OPERATOR, INDIVIDUAL OR LEGAL ENTITY, AS THE CASE MAY BE, OR N/A

1. Capacity of the consultant: private legal entity or individual (consultant co-opted from another public entity).
2. Name of the consultant: name of economic operator or name of employer
3. Consultant identification information – economic operator
 - Tax Code
 - Head office address
 - Town/City
 - County
4. Consultant identification information – individual (employee)

19. Shall be filled in by the contracting authority on the date of filling in the Offers Opening Report, in the case of online procedures. For offline procedures this field will be automatically downloaded from the participation invitation / announcement.

20. Shall be filled in by the contracting authority on the date the Procedure Report is approved / signed.

21. Shall be filled in by the contracting authority on the date the public procurement contract is signed.

22. Can take multiple entries. Shall be filled in according to specific award procedures.

23. Shall be filled in by the contracting authority after the offers are opened, when the full list is known with all economic operators that took part in the public procurement procedure.

24. In case the decision-maker states that they are in a labor relationship with any of the bidders it will be necessary to state which one of the bidders in the public procurement procedure they are in that relationship with.

- surname
- first name
- sex
- citizenship
- CNP (Personal Numeric Code)
- address
- town/city
- county

IV. DATA CONCERNING THE ASSESSMENT COMMITTEE²⁵

- 1.** Surname
- 2.** First name
- 3.** Sex
- 4.** Citizenship
- 5.** CNP (Personal Numeric Code)
- 6.** Domicile address
- 7.** Town/City
- 8.** County
- 9.** Is under the obligation to file asset and interests disclosure statements under no. 176/ 2010 as subsequently amended?
 - yes
 - no
- 10.** Category/ subcategory of position – only in case the decision-maker is under the obligation to file asset and interests disclosure statements under Law no. 176/ 2010 as subsequently amended.
- 11.** Capacity in assessment committee
 - Voting chairperson of the committee
 - Non-voting chairperson of the committee - Member
 - Reserve member
- 12.** Do labor relationships exist with any of the bidders²⁶?
 - yes
 - no
- 13.** List of bidders—only if labor relationships exist with any of the bidders²⁷.
- 14.** Is a member of any association / foundation?
 - yes
 - no
- 15.** Name of association / foundation – only if they are a member of any association / foundation.
- 16.** Participant in Offer Opening Procedure?
 - yes
 - no
- 17.** Signs Procedure Report?
 - yes
 - no

25. Shall be filled in no later than the date the offers are opened.

26. Shall be filled in by the contracting authority on the date the offers are opened and all bidders are known.

27. In case the member of the assessment committee states that they are in a labor relationship with any of the bidders it will be necessary to state which one of the bidders in the public procurement procedure they are in that relationship.

18. Signs Procurement Contract?

- yes
- no

19. Active/Inactive**V. CO-OPTED EXPERT**²⁸**a)** Identification of employer

- Name
- Tax Code
- Head office address
- Town/City
- County

b) Identification of expert

- surname
- first name
- sex
- citizenship
- CNP (Personal Numeric Code)

c) Capacity in assessment committee

- voting
- non-voting

SECTION II²⁹ **DATA CONCERNING BIDDERS/CANDIDATES**³⁰**1.** Capacity of economic operator

- Single bidder
- Leader of consortium
- Associate
- Subcontractor
- Third-party sponsor

2. Identification of economic operator

- name of economic operator
- Tax Code
- Address
- Town/City
- Country

3. Data concerning bidder

- Economic operators constituting one bidder
- Economic operator representing the bidder

28. Shall be filled in, if the case warrants it, after the date the offers are opened and no later than the date the award report is released, as under the Law.

29. Shall be filled in as required in Art. 6 para. (2) in this Law.

30. Multiple entries are possible for each offer.

4. Winning bidder³¹

- yes
- no

5. Has the contract been awarded to them³²

- yes
- no

6. Active/Inactive

SECTION III³³ STEPS TO REMOVE THE POTENTIAL CONFLICT OF INTERESTS, ORDERED ON THE BASIS OF AN INTEGRITY WARNING

- 1.** The integrity warning issued: identification number (code of integrity warning)
- 2.** Steps ordered – description

31. Shall be filled in on the date the Procedure Report is approved, based on the Procedure Report.
32. Shall be filled in on the date the contract is signed.
33. Shall be filled in after the offers are opened.

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 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. The areas of our work and influence are structured around the following five main programmes: public administration; accountable public finance; parliamentary programme; security and defence, and social policy.

On the basis of our five programmes, we monitor the process of accession negotiations with the EU, actively participating in working groups Public procurement (5), Judiciary and Fundamental rights (23) and Financial control (32). Our flagship project is the Public Policy School, which is organized since 2012, and in 2018 we organized the first Open Budget School.

So far we cooperated with over 40 organizations within regional networks in the Western Balkans and with over 100 organizations in Montenegro. Institute is actively engaged in regional networks: Think for Europe (TEN), Pointpulse, SELDI, WeBER, UNCAC Coalition, Global BTAP, PASOS and The Southeast Europe Coalition on Whistleblower Protection.

The results of our research are summarized in 127 studies, reports and analyses, and the decisionmakers were addressed 1036 recommendations. Over four thousand times we communicated our proposals and recommendation to the media for better quality public policies.

We started three internet pages. My town is a pioneer endeavour of visualization of budgetary data of local self-administrations. My Administration followed, which serves as an address for all those citizens that have encountered a problem when interacting with public administration and its service delivery system. The newest internet portal, My Money, provided national budget data visualization.

Institute Alternative regularly publishes information about finances, projects and donors that support the work of the organization. For this reason, the Institute have five-stars rating third year in a row, according to a survey conducted by the international non-profit organization Transparify, which evaluates transparency for over 200 research centers.

President of the Managing Board is Stevo Muk, and our organization currently has ten members.

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