

CORRUPTION IN PUBLIC PROCUREMENT – CRIMINAL (NON) LIABILITY

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Corruption in public procurement represents one of the highest risk areas for damage to the state budget and can occur at all stages of the public procurement process.

In a 2010 analysis entitled “Public procurement in Montenegro – Transparency and liability”, we stated that “the Police Directorate independently filed only three criminal charges over a period of three years on reasonable suspicion that criminal acts of abuse of official position in public procurement procedures were committed. According to available information, no final court verdicts for criminal acts in the field of public procurement have been issued so far.” In the analysis, we also recommended that “the Police Directorate and the State Prosecutor’s Office should approach the issue of identification and prosecution of criminal acts in the field of public procurement with particular attention.”¹

Fourteen years later, through conversations with state prosecutors, police officers, control institutions; and through collected information on cases, indictments, and verdicts, we analysed changes that occurred in the meantime.

1 Institute Alternative, *Public Procurement in Montenegro – Transparency and Liability*; available at: <https://media.institut-alternativa.org/2012/09/institute-alternative-public-procurements-in-montenegro-transparency-and-liability.pdf>



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No Convictions for Corruption in Public Procurement

In the period subject to this analysis, January 2016 to July 2023, public procurement contracts worth over EUR 3.5 billion were concluded in Montenegro. This amount is roughly equivalent to one annual budget of Montenegro, worth EUR 3.48 billion in 2024.

The Police Directorate handled 31 cases connected to public procurement, but only filed one criminal complaint with the prosecution. The “Granica” case, assigned to the Basic State Prosecutor's Office in Podgorica, is still ongoing. The Agency for Prevention of Corruption (APC) filed five criminal complaints. Three of them are pending, and the APC received a notice from the prosecutor's office arguing that there was no grounds for suspicion of a criminal offence or any other offence prosecutable ex officio.² Seven cases were formed on the back of APC files, five of which are under the jurisdiction of the Special State Prosecutor's Office, and one case each under the jurisdiction of the Basic State Prosecutor's Office in Podgorica and Herceg Novi, respectively.³

In the aforementioned period, in addition to complaints filed by the APC, other entities filed five criminal complaints with the Special State Prosecutor's Office. Of these complaints, four were dismissed, and the fifth was referred to the Basic Prosecutor's Office in Bar, which subsequently dismissed it. The Special State Prosecutor's Office initiated one case, concerning the procurement of the “Prizna” ferry. This case is currently in progress, with evidence being gathered through international legal assistance, which affects the duration and efficiency of the process.⁴

According to available data⁵, two acquittals related to public procurement were issued in the analysed period. The Basic Court in Podgorica issued an acquittal for a 2013 procurement case involving attempted abuse of official position.⁶ In another

2 Response of the Agency for Prevention of Corruption to Institute Alternative's inquiry.

3 The Supreme State Prosecutor's Office data, submitted to Insitute Alternative on 5th June 2023.

4 Statement of Special State Prosecutor's Office at IA panel discussion.

5 Based on the responses to requests for free access to information, in 11 courts there were no judgments and cases related to criminal offences in connection with public procurement (BC Cetinje, Danilovgrad, Herceg Novi, Kolašin, Žabljak, Nikšić, Bar, Berane, Plav, Pljevlja, Rožaje). The Basic Court in Kotor and Ulcinj did not provide an answer to our inquiry. The High Court in Bijelo Polje directed us to the court's website, where all verdicts are published, while the High Court in Podgorica did not respond to our inquiry.

6 The High Court acted in this case and confirmed the acquittal of the Basic Court in Podgorica. Basic Court in Podgorica, K2/2015, available at <https://sudovi.me/ospg/odluka/316585> (another judgment in the same case – Higher Court in Podgorica Kž 354/2018, available at <https://sudovi.me/vspg/decision/526258>)

case, the High Court in Podgorica acquitted the former mayor of Nikšić, having decided that there was no evidence of abuse of official position.⁷

What underlies the lack of criminal liability?

Key factors include the limitations of criminal legislation, a shortage of personnel and specialisation, the complex nature of the criminal offence, limited sources of information, and inability to meet the required standard of proof.

The structure of the Department for Combating Corruption, Economic Crime, and Conducting Financial Investigations provides for 60 positions⁸, of which less than 50 percent are filled.⁹ Police officers state that, previously, “the wrong personnel policy was pursued”, and that “the police force does not have staff trained to tackle economic crime or corruption”. They also stress the limitations on hiring new staff, even those who have shown the greatest potential during internship programmes for university graduates. Finally, they highlight that cadets trained at the Police Academy “are not trained in the area of tackling economic crime”.

Aside from staffing capacities, police officers identify other key challenges, including the “long delay in receiving feedback from the prosecutor's office regarding information provided by the police”, and “inconsistent practises among state prosecutors”. Police officers also note that in cases where they had good cooperation with state prosecutors, they still lacked the mechanisms to gather legally relevant evidence for a specific criminal offence, even when it was clear that “the tender was rigged”.

Three cases of possible corruption in public procurement in 2021 and 2022, which were not concluded with appropriate prosecutorial decisions until May 2024 are examples of lengthy prosecutorial procedures in cases of abuse in public procurement.¹⁰

When it comes to public procurement, the Special State Prosecutor's Office is responsible for criminal prosecution only if there are grounds for suspicion that the offenders are high-ranking public officials or if the offences involve organised crime, specifically when criminal offences related to public procurement are committed within a criminal organisation. All other cases involving criminal offences related to public procurement fall under the jurisdiction of the Basic or Higher State Prosecutor's Offices, depending on the severity of the legally prescribed punishment or when their jurisdiction is determined by a specific law. “Criminal

7 High Court in Podgorica, judgement K-S21/2016 available at <https://sudovi.me/vspg/odluka/317480>

8 Rulebook on Internal Organisation and Systematisation of the Ministry of the Interior 040/22-1176, dated 8/8/2022

9 Statement of the Police Administration representatives at IA panel discussion.

10 Criminal reports forwarded to the prosecution by the Agency for Prevention of Corruption.



offences related to public procurement are such **that it is difficult for the state prosecutor to become aware of them ex officio**. If the authorities responsible for overseeing the process (the Directorate for Inspection Affairs, the Commission for Protection of Rights in Public Procurement Procedures) do not report **improper** actions, it is hard to expect the prosecution to get involved in the case unless citizens or the media expose corrupt activities”, the prosecution emphasises.¹¹

During the observed period, the Directorate for Inspection Affairs, specifically the Public Procurement Inspection, did not file any criminal complaints, even though the law specifies that the inspection is obligated to report to the state prosecutor if there is suspicion during the conduct of inspection oversight that a criminal offence has been committed in the public procurement process. The Inspection states that the reason for not filing criminal complaints is that they only oversee the process within the scope of their authority and cannot monitor every phase of the procurement process for all subjects under their supervision, making it difficult to identify corrupt activities and refer them for further action. They underlined that all irregularities identified by the inspection were addressed through fines, and that any criminal complaints would have been dismissed because the offences in question are classified as misdemeanours.

The State Audit Institution has submitted audit reports to the state prosecutor's office that include indications of illegalities in public procurement procedures, but it has not filed criminal complaints. In June 2021, the Special State Prosecutor's Office dismissed a criminal complaint related to the purchase of 31 mechanical ventilators, of which, according to media reports, at least 17 were not functional and could not be used during the COVID pandemic. The State Audit Institution later raised concerns about this procurement in a report published a year later.¹²

Both the police and the prosecution stress that an additional challenge in this type of criminal offence is the "code of silence" among those involved in such agreements, as everyone has vested interests in the matter.

The police and the prosecution highlight the importance of whistleblowers, NGOs, and the media, as timely reporting and obtaining information about possible corruption are prerequisites for establishing grounds for suspicion and, consequently, obtaining authorisation to implement covert surveillance measures (such as wiretapping and room monitoring) necessary for gathering evidence.

¹¹ Statement of the prosecution's representative at IA panel discussion.

¹² State Audit Institution, Report on the Audit Success "*Efficiency of the Management of Donations for the Suppression of the Coronavirus*", March 2022, available at: <https://dri.co.me/doc/Izvještaj%20o%20reviziji%20uspjeha%20Efikasnost%20upravljanja%20sredstvima%20donacija%20za%20suzbijanje%20korona%20virusa.pdf>

Public procurement cases have mostly been prosecuted under the criminal offences of abuse of official position or negligent work in the service. Discussions have revealed that, in practice, there are differences in how individual state prosecutors interpret the necessity of proving that damage to the budget has occurred. Some prosecutors believe that for an indictment to be made, it is essential to prove that damage has occurred; i.e., if something was procured in violation of the Public Procurement Law but was purchased at a fair market price, there is no element of the criminal offence because the budget was not harmed.

However, there is another interpretation among prosecutors, which holds that it is not necessary to prove that damage occurred, considering that some criminal offences, which result in damage, may remain incomplete or attempted. For such offences, it is sufficient that the prohibited action was undertaken with the intent to cause damage as the prohibited consequence. Moreover, in offences against official duty, the consequence may include not only damage but also a benefit for another person or the offender, or a serious violation of another's rights. Therefore, it is not valid to claim that criminal prosecution cannot be initiated if no damage has occurred.

A New Development in Criminal Legislation

In December 2023, a new criminal offence, "abuse related to public procurement," was introduced into the Criminal Code of Montenegro at the initiative of non-governmental organisations. The rationale behind the proposed amendment stated that the areas of public procurement, privatisation, and bankruptcy "carry a high risk of corruption and abuses that harm public funds. In cases of abuse in public procurement and privatisation procedures, damage to public funds can result from the actions of bidders and/or the actions of the contracting authority. However, the existing criminal offences do not provide a sufficient basis for criminal proceedings and the sanctioning of individuals who commit such abuses, particularly public officials on the side of the contracting authority, who manage public funds and whose actions therefore constitute corruption in the public sector."¹³

The new criminal offence prescribes penalties for individuals who "submit a bid based on false information, collude unlawfully with other bidders, or undertake other illegal actions with the intent to influence the contracting authority's decisions in public procurement." It also penalises individuals who, as part of the contracting authority, by exploiting their position or authority, exceeding their authority, or failing to perform their duties, violate laws or other regulations on public procurement, thereby causing damage to public funds. The offence also

¹³ Law on Amendments to the Criminal Code of Montenegro, available at:

<https://zakoni.skupstina.me/zakoni/web/dokumenta/zakoni-i-drugi-akti/99/3257-18428-23-1-23-9.pdf>



includes actions where an individual “adapts public procurement conditions to suit a specific entity or enters into a contract with a bidder whose offer contradicts the terms of the tender documentation.” Additionally, penalties are imposed on individuals who, “by exploiting their position or authority, exceeding their authority, or failing to perform their duties, assign, accept, or contract work for their own business or for the business of a person with whom there is a conflict of interest.” If any of these offences are committed in connection with a public procurement procedure, the value of which exceeds EUR 100.000, the offender will be punished with a prison sentence ranging from one to ten years.

The criminal offence of abuse related to public procurement in the Criminal Code of Montenegro is almost equivalent to that in Serbia's criminal legislation, with four articles being identical. However, compared to the Serbian law, Montenegro has additionally recognised criminal offences related to the adaptation of public procurement conditions, exploitation of position for contracting work in situations of conflict of interest, and causing damage to the financial interests of the EU. In the region, specific criminal offences related to public procurement are also recognised in the criminal codes of North Macedonia and Kosovo.

With the introduction of this new criminal offence, one of the actions constituting the offence that involves abuse of position retains the requirement that damage must be caused to public funds.

Following the implementation of amendments to the Criminal Code of Montenegro, state prosecutors have not proposed any training related to the offence of “abuse related to public procurement,” so such training has not been included in the training programme of the Centre for Judicial and Prosecutorial Training for 2024.

Although it is still too early to fully assess the impact, new data reflect the aforementioned obstacles to prosecuting corruption. Between June 2023 and March 31, 2024, the police dealt with two cases, but no criminal charges were filed. Moreover, records of the Supreme State Prosecutor's Office do not show any criminal charges related to the new offence.¹⁴

14 The response of the Ministry of the Interior and the the Supreme State Prosecutor's Office to the request for free access to information from Institute Alternative.

Looking ahead

The introduction of the new criminal offence will not necessarily lead to better results in prosecuting corruption in public procurement.

From the description of the new offence, which pertains to the phases before and during the contracting of public procurement, it is clear that abuses during the execution phase of a public procurement contract will continue to be prosecuted under criminal offences against official duty, primarily the offence of abuse of official position.

The challenge posed by the "code of silence", which restricts the ability to detect offences at the time they are committed, remains a significant issue. According to the Public Procurement Law, authorised persons of the contracting authority include the procurement officer, members of the procurement commission, individuals involved in preparing the tender documentation, and those involved in procurement planning. Thus, several officials are directly involved in the process. Additionally, on the side of the bidders, particularly in larger procurements and among bigger companies participating in tenders, it is likely that multiple individuals are involved in preparing the offer and related communications. This means that multiple individuals at different functional and hierarchical levels on both sides of the tendering procedure may have knowledge that a criminal offence is being planned or carried out. Consequently, each of these individuals could potentially be a source of information for the police or state prosecutor. Within this group of individuals, there may be potential sources of information for further action by the police and prosecutor's office. The motivation to report to the competent authorities can stem from the high integrity of officials or responsible persons, or from the awareness of the possibility of receiving a reward. Therefore, it is necessary to further work on enhancing the integrity of responsible officials and employees, as well as establishing effective mechanisms to reward individuals whose information can lead to appropriate criminal proceedings.

The new criminal offence also provides the possibility for individuals who participate in an agreement, and voluntarily disclose that the bid was based on false information or an illegal agreement with other bidders, or that other actions were taken with the intention of influencing the decision of the contracting authority before the public procurement contract was concluded, may be exempted from punishment.¹⁵

¹⁵ Paragraph 7, Article 272c of the Criminal Code of Montenegro.



Sources of information about potential corruption can include other bidders dissatisfied with the decision of the contracting authority, as well as independent institutions responsible for oversight and control, such as public procurement inspection bodies, internal auditors, and the State Audit Institution.

Furthermore, officials responsible for the internal financial control system (in accordance with the Law on Management and Internal Financial Control) may also come into contact with information relevant to uncovering this criminal offence. Internal auditors are required, in cases of suspected fraud, to halt the audit process and immediately notify the head of the internal audit unit, who must then promptly inform the head of the entity in writing.¹⁶

This is particularly important for the contract execution phase, as the Law on Public Procurement specifies rules and responsibilities up to the point of concluding the public procurement contract. The provision of the Law that regulates “Control and Reporting on the Implementation of the Public Procurement Contract” stipulates the obligation of the contracting authority to “monitor the execution of the concluded public procurement contract” and to “prepare a report on the implementation of the contract within 30 days from the date of realisation of the contract, and publish this report in the electronic public procurement system (CEJN).” Unfortunately, the report form established in the Rulebook issued by the Ministry of Finance¹⁷ does not include detailed information on the actual execution of the contract, save for general information contained in the contract. A review of CEJN suggests that the obligation to publish reports is implemented inconsistently. If mandatory data and accompanying documentation were made a required part of this (publicly accessible) report, it could reasonably be expected that a wider network of stakeholders (NGOs, media, citizens) could contribute to recognising indications that the contract was not executed in accordance with its terms.

In 2023 and 2024, Institute Alternative proposed that the Law on the Prevention of Corruption should oblige individuals directly involved in the public procurement process to submit annual reports on their income and assets. This could serve as an additional indicator for the Agency for Prevention of Corruption, and any discrepancy between legally acquired and reported property could be an indication for further investigation in public procurement cases involving that individual. The Government, or rather the Parliament of Montenegro, did not adopt this proposal.

Extensive literature is available on indicators of corruption in public procurement for each phase of the process (planning, preparation of tender documentation, contracting, contract amendments, contract execution). The State Prosecutor’s Office

¹⁶ Law on Management and Internal Financial Controls, Article 26.

¹⁷ Rulebook on Report Forms in Public Procurement Procedures, the Official Gazette of Montenegro, No. 060/20 dated June 21, 2022.

also has access to the experiences of public prosecutors and courts in the Republic of Serbia, experiences from the Office for Combating Corruption and Organised Crime, as well as courts in the Republic of Croatia. The European Public Prosecutor is establishing practices for handling cases of corruption in public procurement.¹⁸

Finally, it is important to note that prosecutors have the option to apply measures of covert surveillance when prosecuting criminal offences related to abuse in public procurement. Measures can be authorised when there is a reasonable suspicion that criminal offences with elements of organised crime have been committed, such as bribery, offering bribes, unlawful influence, abuse of official position, as well as abuse of authority in business and fraud in service, resulting in a prison sentence of eight years or more; as well as in relation to criminal offences such as disclosure of secret information, breach of procedural confidentiality, and falsification of official documents¹⁹. Given the nature of abuses in public procurement, and provided that information about the grounds for suspicion reaches the prosecution in a timely manner, it is likely that some of these offences may overlap with the criminal offence of abuse concerning public procurement.

To significantly improve the effectiveness in prosecuting corruption in public procurement, it is essential that the police and prosecution strategically prioritise these criminal offences, which requires a systematic approach regarding staffing, training, specialisation, teamwork, and institutional cooperation. Proactive collaboration among all independent oversight institutions is equally important, as well as the highest level of guarantees and rewards for sources of information within the system.

18 European Public Prosecutor's Office, *Czechia: Ten arrested in probe into corruption ring involving medical supplies to hospitals*, February 2024, available at: <https://www.eppo.europa.eu/en/media/news/czechia-ten-arrested-probe-corruption-ring-involving-medical-supplies-to-hospitals>

19 Criminal Procedure Law, Article 158, Paragraph 2-4.



About Institute Alternative

Institute Alternative was founded in 2007 in Podgorica with the mission of strengthening democratic processes and good governance in Montenegro, through research and analysis of public policy options, as well as monitoring the work of public administration.

We function as a research centre (think tank) and work on good governance, transparency and accountability through three main program strands: I) public administration reform; II) accountable public finances; III) rule of law.

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