



BALKAN TENDER WATCH

POLICY BRIEF

Public Procurement in Montenegro under Non-Transparency

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The value of public procurement in Montenegro reached the sum of half a billion euros in 2017.

Montenegro did not yet adopt a new law on public procurement, which would fully comply with the legal framework of the European Union, and is also significantly late with the beginning of application of the electronic procurement system, and in mid-2017, the Government suddenly changed its existing law, making a step backwards in fulfilling the obligations of the European Agenda.

Amendments to the Public Procurement Law have undermined the overall transparency and competition of public procurement procedures as well as control mechanisms, so the European Commission has expressed its concern in the latest Montenegro Progress Report and assessed that the impact of anti-corruption measures is limited and that the overall procurement system remains cause for concern.

For years, Montenegro has no concrete results in the fight against corruption in public procurement, and its procurement system chronically suffers from numerous legal, personnel and technical shortcomings.

Legislative amendments are a step backwards

Although in just three years the value of public procurement in Montenegro has been increased by 37.4 percent or around 195 million euros, this was not followed by a greater degree of transparency and competition of the overall public procurement system. On the contrary, *ad hoc* legislative amendments adopted in mid-2017 represent a step backwards and do not provide for better control mechanisms of public procurement procedures, which are highly susceptible to corruption.

The new Law abolishes shopping method and direct agreement and introduces small value procurement, to which the Public Procurement Law does not apply. For them, the financial threshold has been significantly raised, so the contracting authorities are no longer obliged to carry out public procurement procedures for procurement of goods and services up to EUR 15 000, while for the works that threshold has been raised to EUR 30,000. The earlier threshold for direct negotiations was EUR 5,000.

The new solution is very indicative, given the fact that the Montenegrin market is very small and underdeveloped, and in practice opens up a huge space for potential misuse by the contracting authorities, which may split items of procurement to smaller values in order to avoid tenders, and it certainly favors direct negotiation and the situation of favoring individual bidders, thus disrupting competition.

Amendments to the Public Procurement Law specifically define urgent procurement, which was previously one of the conditions for conducting a negotiated procedure without prior publication of invitations to public competition. Urgent procurement is now defined in a separate article and it can be implemented by the contracting authority in order to eliminate and prevent the danger of unforeseen events on which he could not or cannot influence, remove the consequences of these unforeseen events, threat to health and life of citizens.

However, approval of the Public Procurement Directorate for carrying out urgent procurement is no longer required, which is why contracting authorities are left to assess cases of urgency without passing any

control. Contracting authorities often present even those procurements that are not urgent as being so, in order to avoid carrying out public procurement procedures, which is why it is very unfortunate that the control mechanism of granting approval of the Directorate was excluded from the law.

One of the amendments made allowed the procurement of goods and services related to the use of aircraft by the Government to be exempt from the Law on Public Procurement. These may be different procurements, such as aircraft maintenance, insurance, fuel purchases, flight arrangements, fees, and the like. The Government often did not obtain approvals from the Public Procurement Directorate regarding the use of its aircraft, which opened up the issue of real motives for this legislative change.

Companies which are majority owned by the state or local self-governments, which carry out commercial or industrial activities, are exempt from application of the Public Procurement Law.

In addition, for procurement in the area of defense and security it is envisaged that it will be governed by a special government regulation in the future.

The European Commission: Anti-corruption measures remain limited

The European Commission assessed that the impact of anti-corruption measures remains limited and that checks on the overall public procurement cycle remain a cause for concern and that the control mechanisms of public procurement bodies. This means that the Public Procurement Directorate, the State Commission for the Control of Public Procurement and Public Procurement Inspection, as key institutions in the country's procurement system, should significantly improve their capacity to fight corruption in this area and provide measurable results.

The Public Procurement Directorate states that during 2017 it received only 4 anonymous complaints about suspicions of corruption, which were forwarded to the competent institutions, which is an extremely negligible result.

The Public Procurement Directorate states that it has filed 26 initiatives against reporting entities that did not submit annual public procurement reports and initiated two inspection supervisions, so it seems that its proceedings are not predominantly focused on effective anti-corruption activities.

The fact that the Public Procurement Law does not recognize the need to ex officio check the procurement of the highest value, i.e. those that exceed the amount of half a million, is particularly worrying, thus missing a significant control mechanism.

During 2017, there were 3 public procurement inspectors employed who performed 211 inspection controls, identified 146 irregularities and imposed fines in the amount of 17,750 euros. The established irregularities mostly referred to violations of public procurement procedures, which do not fall into major violations of the Public Procurement Law a limited number of inspectors is certainly a limiting factor in achieving more concrete results when it comes to inspection supervision.

The negative practices with secrets

In 2017, negative practices of certain state bodies or companies to declare public procurements secret had an influence on deterioration of the overall transparency, i.e. the rights of citizens to know how their money was spent.

For example, secret is the reconstruction of the road and construction of tunnels worth EUR 35 million, and secret is the electricity imports by the Montenegrin Electric Enterprise JSC Nikšić, which imports electricity worth tens of millions of euros annually.

Four years ago, Montenegro contracted the largest infrastructure project in the country - construction of one section of the Bar-Boljare highway - worth 809 million euros, which was agreed upon through an international agreement with China.

The state-owned Chinese bank EXIM has approved a loan for construction of Smokovac-Mateševo section, and works are being run by China Road and Bridge Corporation.

The Government of Montenegro simultaneously agreed that the Chinese company award domestic subcontractors 30% of the contracted price, but by mid-2018 it was 50%, i.e. the value of domestic subcontracting was 404 million.

The project of construction of the highway was wrapped in secrecy, as the Government declared most of the information a business secret and its intellectual property.

The section of the highway should be completed by May 2019, but it is estimated that the works will be delayed for another year and that the contracted value will be exceeded by about 100 million.

Recommendations

- Harmonize the Montenegrin Public Procurement Law with the EU Directives
- Establish an effective electronic public procurement system
- Prescribe the principle of rational use of public funds
- Explained in detail all the items from the Public Procurement Plan
- Provide the possibility of changes to the Public Procurement Plan as an exception
- Publish all documents on individual public procurement in the electronic newsletter
- Ensure full application of the Law on Free Access to Information for public procurements
- Improve the Public Procurement Portal for better search and records
- Exemptions from application of the Public Procurement Law should be an exception, not a rule
- Clearly prescribe who initiates the procedure on annulment of procurement when there is a conflict of interest
- Prescribe that the competent authority controls the compliance of technical specifications with the law
- Prescribe that the competent authority issues an approval for urgent procurement
- Extend the list of criminal offenses which are a condition for exclusion from the public procurement procedure
- Prescribe that members of the State Commission for the Control of Public Procurement are elected by the Parliament
- Prescribe mandatory control over public procurements worth over half a million euros
- Significantly increase the number of public procurement inspectors
- Prescribe longer deadlines for keeping the documentation for the public procurement carried out
- Appeal procedure shall not be subject to payment of a special fee.