



REPORT

TAIEX Peer-review Mission on public procurement in MONTENEGRO

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<i>Place of the mission:</i>	Podgorica – Montenegro
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I. OBJECTIVES OF THE MISSION

The objective of this peer-review mission is to provide the European Commission and Montenegro with an assessment of the effectiveness of the public procurement system and its functioning with the particular focus on vulnerable areas in public procurement and oversight system. The assessment was based on studying the legal and institutional provisions as well as a number of concrete cases of the procurement review body's decisions and/or the courts.

Similar missions have been conducted during the course of 2019 in the other countries of the region: Albania, Bosnia and Herzegovina, Serbia, North Macedonia and Kosovo*.

II. EXECUTED AGENDA OF THE MISSION

Public procurement remains the government activity most vulnerable to waste of public money, fraud, and corruption due to the size of the financial flows involved.

Vulnerable sectors are chosen based on the scale of the procurements and where limited information is provided to the European Commission. The peer review mission focused on the following areas:

- Road and rail constructions (i.e. big infrastructure projects in general),
- Water supply or wastewater management sector,
- Urban construction projects,
- Transport,
- Procurement in the health sector.

In Montenegro, the oversight system is limited to the Directorate for Public Procurement Policy (DPPP), the Public Procurement sector of the Administration for Inspection Affairs (Public Procurement Inspectorate – PPI), The State Audit Institution (SAI) and the State Commission for Control of Public Procurement Procedures (State Commission – the SC). The DPPP is responsible for the overall coordination and supervision of the public procurement system. The SC examines all allegations of breaches of the Law on Public Procurement (LPP). The PPI is responsible for the control of specific public procurement procedure. In line with Article 144 of the Constitution of Montenegro, the SAI audits the legality of and performance in the management of state assets and liabilities, budgets and all the financial affairs of the entities whose sources of finance are public or created through the use of state property.

The Experts looked into the correct implementation of the LPP by the DPPP as well as its tasks and internal capacities (e.g. checks on the preparation, planning and announcement of tender, quality of tender documents, choice of procedure, ex-post evaluation of procurement and contract performance, etc.). The Experts also reviewed capacity of the Public Procurement Inspectorate as well as that of the State Audit Institution. In a case of

* The designation Kosovo is without prejudice to positions on status and is in line with UNSCR 1244/1999 and the ICJ Opinion on the Kosovo Declaration of Independence.

the State Commission the Experts assessed methodology of investigation of cases as well as the quality, consistency and effectiveness of enforcement of decisions reached by the SC. The Experts also assessed whether the SC is operational (in terms of members, staff and IT) and whether it has necessary funds and possibility to recruit external experts to deal with specific sectors.

The Experts conducted a study of the country's public procurement structures and procedures and of their effectiveness, using the information provided in advance of the mission. The Experts have been provided with detailed information regarding:

- The national regulatory framework (laws and regulations translated into English);
- SIGMA monitoring reports for Montenegro (Public Procurement section);
- EC Country Reports for Montenegro - Chapter 5 on Public Procurement;
- A translation in English of cases (based on a template provided by the European Commission).

Available, prior assessments of the above mentioned legislation, institutions and policies, were provided to the Experts before the mission and have been taken into consideration in the report. The full list of documents provided prior to the meetings with relevant stakeholders can be found in annex 1.

From 18 November until 22 November 2019 the Experts held meetings in Podgorica with relevant local stakeholders:

- The Directorate for Public Procurement Policy;
- The State Commission for Control of Public Procurement Procedures;
- The Administration for Inspection Affairs;
- Contracting Authorities (including local self-governments)
- The Ministry of Public Administration
- The Administration of Public Works
- State Audit Institution and Audit Authority;
- Agency for Competition Protection ;
- Agency for prevention of Corruption ;
- The Administrative Court;
- Business Associations (three);
- Civil Society (NGO's)(three) ;
- The Union of Municipalities of Montenegro;
- The Ministry of Transport and Maritime Affairs.

The Experts were provided by the stakeholders with a short description of how the public procurement system has evolved in the country in the past (including information on relevant public procurement case-law). The full meeting schedule can be found in annex 2.

The Experts studied concrete cases, in different vulnerable sectors, in order to assess how the public procurement system handles various types of cases. The full list of cases provided to the Experts can be found in annex 3.

Annex 4 presents some statistical data on the State Commission's work available for the Experts.

Based on studied documents, meetings with all relevant stakeholders and case review, the Experts share in this report their findings and propose a number of recommendations. These recommendations focus on structural improvements to be made in the country to overcome the identified shortcomings.

III. RESULTS OF THE MISSION

Observations

The government of the Republic of Montenegro has realized the importance of public procurement function and its role in the modern economic society of the country long ago. The current Law on Public Procurement was adopted in 2011 and became applicable in 2012. Numerous amendments to the Law on Public Procurement had special significance for the improvement of the public procurement system in Montenegro, especially in terms of increasing the transparency of public procurement procedures, ensuring the protection of competition and equal treatment of bidders. The Directorate for Public Procurement Policy maintains public Procurement Portal. Since its establishment, the system has continuously evolved, with the extensive help of EU supported projects and other donors and international institutions (SIGMA, etc.).

Contracting authorities have spent 535.11 million euro in 2018, which represents a share of 11.58% in GDP. There were 3711 contracts above the national thresholds on the total value of more than 428 million euro. Transparency of published contracts is relatively high, 79% of procedures are open procedures, 0.44% restricted procedures, 0.21% - negotiated procedure with prior publication of contract notice, 0.02% - design contest, 16% low value procurement and only 4.33% is a share of negotiated procedure without prior publication and urgent procurement¹. The average number of bids in a public procurement procedure is 3.14.

For low-value procurements, a total of 94 922 contracts were concluded in the amount of 70,69 million euro, there were 1,918 concluded contracts on urgent procurement, the contracted value of which was 13,90 million euro.

There are 624 contracting authorities in Montenegro (data of 2018), at a central and local level. 465 (74.5%) of them are State authorities and the rest companies governed by private law funded by the State and local self-government and public utility companies.

Main observation is that the public procurement system is mainly fulfilling its socio-economic role in the system of public finance. Like in every country, also in the EU countries,

¹ Data source: Working note prepared by Directorate for Public Procurement Policy

there is a room for improvement and challenges to address, explained hereunder in recommendations.

Major formal and non-governmental institutions are well established, and the system is functioning rather well, including execution and monitoring of procurement procedures.

The Directorate for Public Procurement Policy

The Directorate for Public Procurement Policy is a part of Ministry of Finance and according to the law, a body which drafts proposals for LPP, monitors the application of the law, organizes and carries out professional training and education for the staff of contracting authorities as well as organizes related examination and certification, adopts bylaws, monitors the conducting of public procurement procedures, controls the use of negotiated procedure issues permits to apply it, prepares, publishes and updates the list of contracting authorities and the list of public procurement officers, publishes and updates the list of domestic economic operators, publishes public procurement notifications, plans, and other public procurement information, prepares reports on public procurement and provides professional assistance to contracting authorities. The most important roles are therefore monitoring, advisory and legislative roles.

DPPP is in general seen as a recognizable and well-perceived authority by all main stakeholders, whose activities significantly influence the public procurement system in Montenegro. DPPP has been also leading major debates on the procurement system and has been the leader of the process of changes in the legislation. During 2019 DPPP worked on the new law on public procurement with the aim to improve public procurement system in Montenegro by harmonization with the EU directives. This work was done in line with the Strategy for Development of the Public Procurement System in Montenegro for the period 2016 – 2020. Draft LPP was adopted by the Government and at the time of the mission was pending in the Parliament for final approval. The Experts were informed that similar situation was in relation to new Public Private Partnership Law. However, the Experts did not have possibility to be familiar with PPP Law.

During the period from June 2018 until May 2019, the DPPP organized of 9 (nine) one-day or two-day workshops, attended by 305 representatives of contracting authorities and bidders, whereby 145 certificates on completed training program were issued. The training was organized in Podgorica and Berane. During above mentioned period, 55 candidates passed the examination².

Training programmes usually are funded by the State budget with some exemptions were external donors (WB, EIB, EBRD, SIGMA, etc.) provide assistance or organize themselves specific training events.

Due to the lack of legislative framework, the DPPP is not competent for international investment contracts (agreements) nor does it keep the reporting statistics on this subject.

² Data source: Report from Montenegro for the annual meeting of the Internal Market and Competition Subcommittee (in the context of the Stabilisation and Association Agreement EU-Montenegro), where public procurement issues are discussed. June 2019

During the mission the Experts were not informed about any investment programme funded by third countries (e.g. China, Russia, etc.)

The State Commission for Control of Public Procurement Procedures

INTERNAL PROCEDURES

Efficiency of the SC.

SC is an autonomous and independent legal entity. They are accountable for their work to the Parliament to which they submit an annual report. In accordance with the Law on Public Procurement, the SC is competent, among other things, to:

- consider and decide on appeals filed in public procurement procedures;
- examine in the appellate procedure the correctness of the application of this Law and proposes and takes measures for the elimination of irregularities in public procurement procedures;
- decide on the requests of the procuring entities for the continuation of the public procurement procedure when an appeal has been filed in accordance with this Law;
- decide on the requirements regarding the costs of the procedure;
- etc.

The SC has a president and six members who perform a professional function, and they are appointed by the Government on the basis of a public tender for a period of five years and can be reappointed. SC has a Service that performs professional and administrative-technical tasks necessary for its work. Total foreseen 25 job positions.

The President of the SC represents the SC and manages its work. The SC decides on appeals and other issues within its competence by a majority vote of the total number of members.

Sessions of the SC are not public. The manner of work of the SC is regulated in more detail by the Rules of Procedure.

Experts were not informed about specific regulation of internal decision-making procedures within the SC. All cases and appeals are reviewed by a panel consisting of **all seven members of the SC**. During discussions the Experts were informed that the only reason for it is the will of members of the SC.

According to data received ~~by the Experts~~, approximately 8% of SC decisions are challenged before Administrative Court. Large number of challenged decisions are overruled (approximately 30%).

The common remark made by CA and other stakeholders in the system is that SC review period takes more than 2-3 months. However, the Experts were informed by the SC that average review time is 21 day from complaint submission. It seems that there are cases were review continues for long time because of complexity of the public procurement procedure, repetitive complaints and the reason that SC decision is challenged before the Administrative Court.

Apart from this, interested parties are generally not invited for the hearing, which reduces transparency.

Application of the other PP principles.

There is no budget attributed to the involvement of external experts from particular sectors. The SC concentrates only on legal issues of particular case or appeal avoiding to argue on technical issues where the SC has no capacity. However, during the discussion, the SC informed that there is no need for external experts as any procurement issue is a purely legal one. Still, it is not clear how for example complaints on competitive technical specifications and qualifications in specific industries (sectors) might be solved only from the legal point of view without having competences in such industry within a review panel. That means that application of the principles set by the LPP such as the principle of cost-effective and efficient use of public funds, the principle of ensuring competition among the bidders, the principle of equality of bidders as well as the principle of transparency of public procurement procedure might not always be a general consideration of the panel.

Consistency of decisions.

During discussions, the Experts were not informed how the SC decisions are made consistent if there are cases where the SC's panel reviews whole package of bid documentation *ex officio* even if there is complaint just on particular issue and there are other cases where the panel concentrates on review of a particular issue within the procedure or bid documentation. The Experts have not received any explanation of the principles applied there.

STAFF CAPACITIES OF THE STATE COMMISSION FOR CONTROL OF PUBLIC PROCUREMENT PROCEDURES (STATE COMMISSION)

Out of total foreseen 25 job positions, the State Commission has had 24 employees on 1 May 2019, that is, the president and 6 members of the State Commission and 17 employees in its Technical Department. Thus, at the moment first version of this report was being prepared, only one job position has been vacant.

The Administration for Inspection Affairs

The Experts have met the Director and representatives of the Department of the Protection of the Market Economy, Games of Chance and Public Procurement. Since last year the Public Procurement Sector employs 8 public procurement inspectors (including Chief inspector), two of them are on long-term leave.

Only 2 of public procurement inspectors are certified in PP, Chief inspector is a qualified trainer in PP. The need for additional training was expressed by participants.

Public procurement inspectors operate in accordance with the articles 147, 148, 149 of the LPP in force as well as the law governing inspection control.

Public procurement inspector may perform the inspection control over actions and decisions taken by the contracting authorities or physical persons until the expiry of the time limit laid down for the lodging of appeals. The inspector shall not perform control over

actions and decisions of the contracting authority against which an appeal has been lodged to the State Commission. Inspection of conclusion and implementation of the public procurement contract is included in inspectorate's tasks.

The SC requests public procurement inspectors to control how the SC decisions are implemented.

There are 370 inspections performed since January until the end of November 2019, 349 of those were regular (planned) actions, 14 initiated by outside sources. As a result of these inspections, 252 irregularities were recognized, 216 orders to eliminate procedures were issued, 52 fines were imposed on physical and legal persons.

There is no mandatory ex-ante control to be performed by the Inspectorate.

There is no overlapping with the State Audit Institution in their tasks. State Audit Institution concentrates on financial or performance audit including public procurement performance. They issue recommendations to particular institutions. The Administration for Inspection Affairs concentrates on a particular PP procedure and may impose fines including criminal charges if there is a case.

Public procurement inspectors control documentation, payments, and on-spot control. During control procedure, experts in a particular field may be involved; there is budget available for such a purpose.

Inspectorate cooperates with the Ministry of Finance, following their recommendations.

Inspectorate uses the information published in the Public Procurement Portal for the risk assessment.

State Audit Institution

State Audit Institution is an independent institution reporting to the Parliament.

State Audit institution performs financial and/or performance audits of public institutions. Audits cover revenues, spending property management, public procurement, transactions and business activities. Activities of defense and interior security are covered.

The Experts during the very short discussion with SAI, the following irregularities of the PP system were reported since October 2018:

- 1) internal instructions of public institutions on small value procurement are not in line with the Law on Public Procurement, sometimes do not exist at all;
- 2) public procurement planning process of certain public institutions (especially municipalities) is not adequate, authorities act on ad hoc needs, and not all public procurement procedures are included in public procurement plans;
- 3) some public institutions conclude direct agreements and the sum of the invoices of the same procurement subject exceeds thresholds or value defined by the Law on PP as small value procurement;

4) it happens that procurement procedures are organized without the involvement of certified public procurement officer, certain institutions have a lack of capacity to properly plan and implement public procurement procedures;

5) there is certain tendency to split procurements into smaller ones, institutions try to divide the subject of the procurement into small lots having no technical and legal base to do so.

During the meeting, the Experts met the Audit Authority which performs audits on EU funds spending.

There were no system-related deficiencies recognized on EU funded projects' procurement procedures.

Agency for Competition Protection

The Agency for Competition Protection is responsible for detection of the abuse of dominant position of undertakings, cartels and other restrictive agreements, control of mergers, assessment of fulfilments of conditions for individual exemption of the agreements from the prohibition as well as control of state aid.

The Agency's organizational structure consists of the Council of the Agency, that consisted of President and two members, Acting Director of the Agency, 26 employee included Council and members, and Department for general affairs and finance, and two employees outside organisational units.

During discussions 2 cases were mentioned:

1) the case concerning restrictive agreement between two insurance companies on the market of provision of non-life insurance services in Montenegro;

2) procurement for automobile spare parts.

Regarding the first case, it was pointed out that there was a breach of the Competition law. Two biggest competitors (who have ca. 30-40% and ca. 10-20% of market share respectively) applied for the contract together. There was only one bid. The price was higher than in cases of normal competition. The Agency established the existence of a prohibited agreement between two independent legal entities registered to carry out insurance activities on the territory of Montenegro, which have by direct exchange of confidential information, as competitors in the market, negotiated on the conclusion, concluded and executed the agreements prohibited by Article 8 of the Law on protection of competition, and parties are prohibited further application and implementation of agreements in question. The Administrative Court and the Supreme Court supported this decision.

Regarding the second case, there was an analysis done of PP procedures during the previous 5 years to find repetitive bids. The procurements of contracting authorities owning more than 20 cars were analyzed. 105 procedures were analyzed, 90 cases with the same bidders were found.

It was admitted the last case is still under investigation.

The Administrative Court

The Administrative Court checks the legality of decisions of the State Commission.

The Administrative Court consists of 15 judges and the President.

Each case is solved by a panel of 3 judges. Making judgments the court looks for the reasons for discrimination or restrictions of competition.

Procurement cases are treated as urgent ones as there are around 10 000 pending cases for the court, however public procurement cases constitute less than 1% of all cases dealt with by the Administrative Court. Still, it needs 10-11 months on average to review the case.

It was admitted during the discussion that, almost 30% of the SC decisions are overruled.

Members of the Administrative Court has been involved in a regional conference discussing the new Public Procurement Law. The court believes that the new law is comprehensive, but still there is room for improvement.

During discussions such statistics were provided to the Experts:

Procurement cases	2017	2018	2019
Cases received	82	75	53
Cases accepted	32	10	1
Cases rejected	42		
Cases discontinued	6		3
Uncomplete cases	1		
Ruled		33	4

The Agency for Prevention of Corruption (ASK)

There was a very short discussion between the Experts and ASK.

ASK operates on the basis of its regulations. There is a very strict division of competences between all stakeholders in public procurement, every institution collects information and acts according to the Law.

The Experts received information that 6% of reports on corruption are related to public procurement.

Out of procurement related cases, 2 cases are submitted to the State Prosecutors Office, 4 cases are sent to the Administration for Inspection Affairs to check the issue.

There is 1 corruption case in public procurement initiated by ASK. Other cases are initiated by Public procurement inspectors.

NGOs

Business associations

During the mission, the Experts have met the following business associations:

- The Chamber of Commerce,
- The Montenegrin Employers Federation,
- The Pharmaceutical Chamber.

The main issues raised were lengthy procurement procedures themselves, too long review procedures within the SC, the widespread use of lowest price criterion, which does not allow proper assessment of the quality of goods and services, as well as protection of contracting authorities against bidders who want to damage public procurement procedures.

The Montenegrin Employers Federation raised the issue of corruption and an increase of irregularities in procurement. Unfortunately no reports or data were provided to the Experts.

Civil society organizations

During the mission the Experts have met civil society organizations:

- NGO MANS,
- NGO Institute Alternativa,
- NGO Association of experts in public procurement.

During the discussions about the new Public Procurement Draft Law, NGO MANS and NGO Institute Alternativa were focused on process and procedures of its drafting. They were involved in early stages however, the Experts were informed by the NGOs that the Ministry of Finance did not react properly on the latest NGO's comments and NGOs have no information about the content of the last version of the draft law.

Both NGOs also emphasized the issue of low-value procurement. NGOs' opinion is that low value procurement is under-regulated. The Experts conducted discussion on certain aspects of a public procurement system in general e.g. cost-effectiveness.

NGO MANS noted that sometimes there is no rationale under the procurement of certain goods or services, there is no clear purpose of planning of purchase of these goods and services. According to their view, State Audit Institution performs well however audit of public procurement is a very small part of SAI business.

NGO Association of experts in public procurement expressed need to strengthen procurement officers' capacities, they need to be trained on specific issues as well as on the new procurement law, which comes into force very soon. There is a need for training on procurement planning, market surveys, drafting proper technical specifications. Association

expressed concerns about the capacities of contracting authorities, as there are cases where institutions are understaffed.

The Experts and representatives of NGOs agreed that it is important to centralize all information on public procurement in Procurement Portal or electronic procurement system.

The Ministry of Public Administration

The Ministry of Public Administration is responsible for e-governance and audit of electronic systems in the public sector of Montenegro. It makes it the most important contracting authority in terms of ITC purchases.

Certified procurement officers conduct the procurement in accordance with the public procurement law. Procurement officers, representatives from the legal department and IT department participate in the Procurement committee.

The usual way to draft technical specifications is functional specification, which is not a case in the region where specifications based on technical descriptions are widely used.

Many electronic systems are financed by the EU or other international donors. Still, there are 22 procurement procedures planned for 2020 on the amount of 4 million euro from the State budget. Out of them, 1,5 million euro are Microsoft licenses for whole public administration. Low-value procurement is used for maintenance jobs within the Ministry.

There were no complaints during 2017 and 2018. In 2019 there are two complaints.

The average number of bids per procedure is 2-3 which is satisfactory.

The Experts were satisfied with the competence and confidence of people they met from the Ministry.

The Administration of Public Works

The Administration of Public Works (PWA) is contracting authority, conducting centralized procurement of works, financed from the capital budget of Montenegro as well as from IPA and EBRD projects.

There were 234 public procurement procedures until the end of November 2019 on works all over Montenegro. The total amount in 2019 is around 63 million euro.

PWA is organized in 5 sectors:

1. Project preparation;
2. Procurement;
3. Implementation and building supervision;
4. Legal affairs;

5. Financial sector.

It is planned to introduce the internal audit sector.

Public procurement committees always include representatives from an entity that acts as a beneficiary. Beneficiary is informed about all actions undertaken by the PWA.

Criteria used – most economically advantageous tender (MEAT) or lowest price.

To illustrate the building market in Montenegro PWA showed an example of water system project from 2019, where 10 bids were submitted.

During the discussion there were two general problems pointed out – lack of legal flexibility in a case where additional (unforeseen) works are needed and lack of workforce for building companies because of the emigration of younger people.

The Ministry for Transport and Maritime Affairs, Directorate for road transport, MONTEPUT, Road Authority, Rail infrastructure of Montenegro

Transport Administration is an autonomous authority that is responsible for the construction, maintenance and management of State-owned roads. The funds planned in the annual Budget Law of Montenegro are as follows: 36,9 million euro in 2019 and 37,3 million euro in 2020. In addition, a significant amount of funds is provided by credit funds through multi-year arrangements with EBRD and EIB in total amount of around 200 million.

Directorate for road transport is an organizational unit within Ministry for Transport and Maritime Affairs. Directorate creates strategic policy and undertakes activities on its implementation in relation to the state roads area, directly monitors implementation of projects which are a part of indicative enlargement of the T-ENT networks in the Western Balkans region.

MONTEPUT –a Limited Liability Company, founded by the State and 100% state-owned. It manages the project of construction of the highway Bar-Boljare, as well as maintenance of the Sozina tunnel. Funding of its activities comes from its own revenues in the amount of around 9 million euro per year.

Rail infrastructure of Montenegro is a joint stock company with majority of state-owned capital. In the capacity of a manager of railway infrastructure, as a public asset in general use and owned by the state of Montenegro, Railway Infrastructure builds and invests in railway infrastructure, takes care of its modernization and maintenance, provides access and allocates infrastructure capacity to all interested railway carriers, which meet legal requirements, determines amounts of fees for the use of infrastructure capacities, prepares and publishes the railway guide, organizes and regulates railway traffic. It employs 750 people, with an annual budget of 6.5 million euro.

During discussions, the Experts were informed that Ministry and subordinated institutions do not stimulate procurement officers adequately and that there is a need for improving their status, as well as the need for professional education, especially in part related to

complex arrangements, such as public-private partnership, which also rely on public procurement process.

The Ministry of Tourism and Sustainable Development, Directorate for communal services, PROCON, VODACOM

During discussions with representatives of PROCON and VODACOM, the Experts were informed that these institutions mainly act as centralized procurement bodies, using international donors' (EBRD and other donors) funding and applying international procurement procedures.

The common view was expressed that international procedures are less formalistic, more flexible, having in mind that donors have many tools in hands to discontinue procurement in a case of suspicious behavior of the beneficiary. Procurement according to national legislation is mostly used for low-value procurement for the internal needs of institutions.

Representatives of PROCON and VODACOM raised the issue on the difference between substantial and non-substantial mistakes. They expressed idea that this difference should be defined in order to find out bottlenecks in the procurement process.

The Experts were informed that there are more complaints on procurement procedures according to national legislation in comparison with those according to international procedures. Due to the absence of any statistics or other data, there was no common ground found to explain the reasons for such behavior of bidders.

The Local self – government (Capital city – Podgorica) units and public utility companies

The Capital City of Podgorica operates as a central procurement unit for 30 subordinated local government units and public utility companies. It produces a consolidated public procurement plan, drafts technical specifications to satisfy each unit's needs, makes market research and organizes procurement procedures, concludes contracts, manages contract execution and controls deliveries.

The Experts were informed that such procurement centralization saves around 300 000 euro per year on a total procurement budget of approximately 4 million euro.

According to provided information, there are 40 public procurement procedures per year organized by four procurement officers (three of them are certified officers) with assistance by legal and technical services. By the end of November 2019, 95% of the actual procurement plan was realized.

Deadline for submission of bids is usually 37 days (except 22 days in emergency cases) and this is followed by 10 to 15 days for evaluation.

During discussion representatives of Capital City - Podgorica informed that they have very good cooperation with the Ministry of Finance however they face some problems with the current Public procurement Law as such:

- procurement procedures for medium size (15 000 to 50 000 euro) contracts are too long (meaning bids submission deadlines);
- there is no legal flexibility in cases of unforeseen amendments to the contract ;
- it is very time consuming in certain cases to ask permission from the Ministry of Finance to apply negotiated procedure, especially in emergency cases. Ministry of Finance do not always go deep enough into the problem, therefore, it issue permissions based on formal approach.

The Union of Municipalities of Montenegro

The Union of Municipalities of Montenegro (UMM) participate in working group on the Public Procurement Draft Law. It also participates in a working group on negotiations on Chapter 5.

It was presented to the Experts as representative of local governments and procuring entity itself.

During the discussion, the Experts were informed that the work of the Ministry of Finance on a new draft law is well appreciated. The UMM is proud on a fact that their proposals were accepted. Still, there are serious concerns about existing public procurement legislation. Points were raised about lengthy procurement procedures, causing delays in infrastructure projects because of too many ungrounded complaints and appeals brought to the SC. It is necessary to strengthen the role of the Ministry of Finance as policy-making and advisory body, to shorten deadlines for the SC for reviewing complaints. The SC has to take responsibility for delays. The UMM is also concerned about the consistency of decisions issued by the SC.

State Commission decisions were not translated into English and were not at the disposal of the Experts.

Local self-governing units and public utility companies

The Municipality of Budva informed about the reconstruction of Bečići river bed and walls project. Three bidders submitted their bids, there were good references about those bidders' previous experience. The procurement committee consisted of 3 engineers and an architect. Committee decided to apply to the Inspectorate in order to check all decisions and actions taken by the committee. The inspection took 10-day time, there were no irregularities found. As a result, bidders realized that there is no legal ground to complain. There were no complaints about public procurement the previous year.

The case was presented because the two previous mayors were imprisoned due to illegal actions in public procurement.

There were three main problems raised by the beneficiary side during the discussion. According to them procedures are too complicated in a case of medium value procurement, there are no qualitative deliveries if the lowest price is the only evaluation criteria, unfortunately the SC decides on formal reasons instead of reviewing the substance of complaints.

Representatives of the Municipality of Bijelo Pole informed about work with municipal bodies. Public procurement is centralized within the municipality.

Municipality faces difficulties with the existing definition of procuring authority –the LPP does not provide exemption in cases of so called “in-house” contracts. In order to provide utilities services to local population the municipality established specialized municipal body. However according to the LPP this specially established municipal body has to participate in tenders organized by the municipality in order to provide those utility services to the local population instead of being commanded to do so directly by the municipality.

The Ministry of Health

The Ministry of Health (MoH) has 33 health institutions and 10 hospitals subordinated to it. There are 2 central purchasing institutions – Health Insurance Fund purchasing medical devices and MONTEFARM purchasing medicine drugs.

Implementing the strategic approach of the MoH on for purchases of medical devices 5-year strategy is approved.

The MoH actively uses the public procurement portal of the Ministry of Finance to monitor the performance of subordinated institutions.

The Clinical Centre of Montenegro

There are 3000 people employed by the Clinical Centre of Montenegro (CCM), 10 million euro is invested in medical equipment, there are two new clinics under construction with the estimated cost of around 10 million euro.

There are 24 employees and 5 procurement officers who work on procurement. The annual procurement plan envisages 20 million euro to cover the needs of the CCM. There are 100 public procurement procedures over the national thresholds. It is a very small market for specific items in Montenegro, still, all purchases are done on prices lower than in the market. Regarding low-value purchases, there were 4,5 million euro spent under the threshold in 2018.

There are very few complaints and no court case on public procurement procedures managed by the CCM.

The CCM is familiar with the new draft Public Procurement Law. It was suggested to have better regulation of urgent cases than that in current procurement law. Another problem faced by the CCM is service, especially post-guaranty service, of medical equipment. Law does not provide the possibility to conclude long-term (up to 4 years) contracts therefore it

happens that producers escape from responsibility on guarantee and post-guarantee service.

The Health Insurance Fund

The Health Insurance Fund (HIF) provides centralized procurement of medical devices, supplies, fuel and heating oil for the entire health system of Montenegro.

	2018	2019
Total value (euro)	16 350 000	11 140 000
Medical devices (euro)	3 500 000	
Number of open tenders	45	32
No of complaints	3	5

HIF employs five persons in procurement department, two of them are procurement officers.

The main problem HIF faces is possible length of procurement procedures.

The Experts were informed about the case of procurement of 17 ultrasonic devices for Montenegro health care institutions from 2017. There were several complaints submitted to the State Commission, there was appeal to the Administrative Court, which supported HIF position. As the Experts were informed, that until the end of the mission the State Commission took four decisions and there is no result of this procedure in two years. It is not possible to cancel this procedure. It means that 17 ultrasonic devices for Montenegro hospitals still are not delivered.

IV RECOMMENDATIONS

As the Experts mission took place at the time when the draft Law on Public Procurement is in the stage before its final approval in the Parliament it is extremely difficult for the Experts to provide very detailed recommendations, because main issues faced by the Experts during the mission are going to be resolved when the new law will be adopted.

It should also be mentioned that Montenegrin Public Procurement System looks as one of the most stable systems in the region. This can be said due to the fact that mission to Montenegro was the last mission for the Experts in 2019 within the region, and the Experts visited all neighboring countries in Western Balkans. Many issues faced in neighboring countries, are already solved in Montenegro e.g. establishment of entities that in practice acts as “central procuring entities” in works and health sectors. Montenegro is not focused only on public procurement procedure, but also looking beyond formal procedures e.g. involvement of Agency for Competition Protection. Contracting Authorities are also open

for more advanced forms of procurement, such as the use of MEAT criteria. To implement PPP/concession project the size of the project must be significant, and the procuring experts must be knowledgeable.

However, there is some space for improvement of the existing and new coming legislation. The key recommendations are presented hereunder.

4.1. Introduce more flexibility into national legislation

During the meetings with the stakeholders various cases were discussed – on in-house procurement (the case of the Municipality of Bijelo Pole), possibility to cancel the procedure for reasons which go beyond the existing legislation (the case described by the representatives of HIF), possibility to amend concluded contracts (cases of the Administration of Public Works and other stakeholders), defragmentation of procurement (request of the State Audit Institution) and other issues. There were common request to introduce more flexibility into legislation in order to legally react to various situations arising in daily life.

Therefore, the Experts recommend to continue the alignment process of Montenegro legislation with EU Public Procurement directives giving more flexibility in application of different procedures e.g.:

- 4.1.1. giving possibility to Contracting Authorities to make substantial changes in contracts during contract performance time. However substantial changes have to be limited with the specific regulation in a way how it is provided by the EU Directives.
- 4.1.2. giving possibility to Contracting Authorities to cancel the procurement procedure in any stage of the procedure if grounded by financial, legal, technical, public security, public health or environmental reasons. Reasons should be justified in writing and available on request. The justification should be part of Cancellation Notice published on e-portal.

4.2. Improve training system.

The Experts recommend:

- 4.2.1 Introduce continuous education in the procurement officers training system. Education should include advanced courses for those who already have their certificate. Advanced courses could focus on the project cycle, contract management and the use of MEAT criteria in procurement procedures. For example, in European countries, we have seen systems where the officer has the obligation to collect a certain amount of 'public procurement points' over the period of three years. A list of courses, conferences and educations indicate when and how many points can be collected.
- 4.2.2. Involve other education centers (e.g. commercial schools for procurement) in the training system to make education more accessible to a wider audience

- 4.2.3. Enhance the training to other areas like market research, better contract managements, or in depth training on the use of quality criteria in public procurement.
- 4.2.4. Make certain administrative arrangements in order to inform procurement officer community on feedback from the SC and/or court decisions.
- 4.2.5. The Ministry of Finance should promote a greater use of the MEAT criteria and should support the contracting authorities with issuing operational tools (guidelines) identifying good examples to share and organize awareness raising events and trainings about this topic.
- 4.2.6. Trainings should be organized for all interested stakeholders starting from Contracting authorities, bidders and ending with the SC Board members and staff as well as judges.

4.3. Regulation of low value procurement

The issue of low value procurement was raised by NGOs (publication - Low Value Procurement in Montenegro: Without Transparency or Competition, Institute Alternative, May 2018). NGOs perception is that low value procurement is insufficiently regulated, there are many direct contracts below the low-value procurement thresholds.

In general, the Experts can agree with these positions, however there are certain limitations in it. Firstly, one should take into consideration that there are high direct costs for the government to run public procurement system. These costs are salaries and social security contributions for the people employed by the system, e.g. procurement officers, regulating and controlling institutions (relevant staff of the Ministry of Finance and procurement inspectors), State Commission, partially Administrative Court. One should add costs of electronic procurement system, costs of centralized procurement institutions and other direct and indirect costs. On the other hand, government should run cost-effective systems in order to save public money.

Other aspect is that government should support and pay for transparency, equal treatment and non-discrimination of bidders to protect contracting entities from people misbehavior and prevent corrupt practices. Therefore, some break-even point should be found where costs of procedures are lower than savings from the running of this system. Usually this break-even point is above 10 000 € procurement (as an example – France has 30 000, Estonia – 30 000, Latvia – 10 000).

Taking into consideration above mentioned situation the Experts recommend:

- 4.3.1. to keep existing threshold for low-value procurement (e.g. 15 000 – 30.0000 €);
- 4.3.2. that the Ministry of Finance should consider issuing **simple** regulation on low value procurement **stating that all public procurement principles should be followed** below the threshold, ensuring that there is no artificial fragmentation of the subject-matter of procurement, withdrawing low-value procurement from review system (except appeals to the court), ensuring transparency with requirement of reporting on any public procedure.

4.4. Improvement of complaints review system and work of the SC

The Experts recommend the following:

- 4.4.1. to prepare an analysis of irregularities in the SC decisions paying special attention to systemic ones if such exist;
- 4.4.2. to reconsider the regulation of the procedures of the SC in order to increase transparency and mutual understanding between parties during complaints review proceedings, e.g., the regulation should include rules how to organize public hearings during the review of the case:
- 4.4.3. decisions should be made taking into consideration all aspects of procurement including legal, economical, technical, environmental, public health, and state security aspects;
- 4.4.4. additional funding necessary to cover costs of external experts covering economical, technical, environmental, public health aspects;
- 4.4.5. to make detailed analysis of functions of the SC those of the Public Procurement Inspectorate in order to avoid duplication in tasks if any.

4.5 Electronic procurement

The Experts recommend to continue work on establishment of the centralized electronic public procurement system. We see such a system as the central information and statistics base on public procurement, where any interested person may find information on on-going procurement procedures (except low-value ones), public procurement plans, results of previous procurement procedures. The system should serve for the needs of contracting authorities with functionalities collecting bids, providing electronic opening of submitted bids and electronic evaluation of them as well as informing bidders about results of the particular procurement procedures. From the bidders' point of view, the electronic procurement system has to be the central point of information ensuring transparency in public procurement.

4.6. Ex-ante control

The Experts noticed that there is no institution (with one exemption) responsible for providing planned ex-ante control of procurement documentation before the contract notice is published.

State Audit Authority conducts ex-ante and ex-post control of procurements only related to funding provided by the international donors. However, responsibilities and tasks of the State Audit Institution also are different and related to ex-post control of financial management in a particular institution.

Looking through the list of stakeholders and their tasks one can recognize that tasks and responsibilities of procurement inspectors are very close if not the same as those necessary for the institution making ex-ante control of public procurement procedures.

The Experts recommend reconsidering tasks and responsibilities of the Administration for Inspection Affairs, which relates to public procurement. State may oblige public procurement inspectors to provide such a service having few amendments in relevant

legislation (if any). It will increase trust to the system and make public procurement more accountable and sustainable. However ex-ante control should not block the public procurement system or create undue difficulties for Contracting authorities. It should concentrate only to essential areas, for example large value contracts (but not everyone) as control requires large financial and human resources for both sides – controlling institutions and controlled institutions.

There are different practices on ex-ante control in different EU member states. For example Poland organizes ex-ante control in Public Procurement Office with the focus on EU funded projects, Latvia does the same concentrating on large value contracts on random choice, other countries have their own systems and procedures. Still ex-ante control is recognized as useful tool to prevent irregularities and illegal actions during procurement procedures for important state projects .

V USED ABBREVIATIONS

<i>DPPP</i>	Directorate for Public Procurement Policy
<i>SC</i>	State Commission for Control of Public Procurement Procedures
<i>PPI</i>	Public Procurement sector of the Administration for Inspection Affairs (Public Procurement Inspectorate)
<i>SAI</i>	State Audit Institution
<i>AC</i>	Administrative Court
<i>CA</i>	Contracting Authority
<i>EO</i>	Economic Operator
<i>CSO</i>	Civil Society Organisation
<i>NGO</i>	Non-Governmental Organization
<i>MEAT</i>	Most economically advantageous tender
<i>PP</i>	Public Procurement
<i>LPP</i>	Law on Public Procurement

Annexes

Annex 1 List of documents provided before the mission

1. Report from Montenegro for the annual meeting of the Internal Market and Competition Subcommittee (in the context of the Stabilisation and Association Agreement EU-Montenegro), where public procurement issues are discussed. June 2019
2. Public Procurement Law
3. Public Procurement Law - amendments
4. TAIEX Peer Review, Public procurement: implementation capacity, contract monitoring and supervision in Montenegro, October 2016, Timo Rantanen
5. Letter from the EC to the Minister of Finance of the Republic of Montenegro on PPP Law (04.02.2019)
6. COM reply on PPL July 2019
7. Public procurement in Montenegro; Policy-brief; May 2019, MANS,
8. Public Procurement in Montenegro in 2017, Shadow Report, November 2018,
9. Working note prepared by Directorate for Public Procurement Policy,
10. Low Value Procurement in Montenegro: Without Transparency or Competition, Institute Alternative, May 2018
11. CONFIDENTIAL PROCUREMENT IN MONTENEGRO: FAR FROM PUBLIC'S CONTROL, Institute Alternative, March 2018
12. Strategy for Development of the Public Procurement System in Montenegro for the period 2016 – 2020
13. SIGMA Monitoring-Report-2017-Montenegro
14. SIGMA Monitoring-Report-2019-Montenegro
15. Public Finance Management Program Reform for the period 2016 - 2020 - Annual Report for the year 2018
16. Report on the PFM reform "The other side of the coin", NGO Institut Alternative
17. 2016 report of Employers federation of Montenegro "Corruption in Montenegro"
18. Inception Report "Improvement and Strengthening of the Institutional Set Up and Legal Framework in the Area of Public Procurement and State Aid"
19. Legislative framework on public procurement, public-private partnerships and concessions, Public procurement update for the EFS SC on 14 November 2019;
20. COMMISSION STAFF WORKING DOCUMENT, Montenegro 2019 Report, Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2019 Communication on EU Enlargement Policy, {COM(2019) 260 final}

Annex 2 List of meetings

Day 1: Monday 18 November 2019	16:30 – 17:30	Preparatory meeting at the EU Delegation
Day 2: Tuesday 19 November 2019	9:00 – 10:00	Introductory meeting with the national institutions
	10:15 – 11:45	Directorate for Public Procurement Policy
	12:00 - 13:30	State Commission for Control of Public Procurement Procedure
	14:30 -15:45	Public Procurement Inspectorate
	16:00 – 17:00	Agency for Competition Protection
Day 3: Wednesday 20 November 2019	9:00 - 10:15	State Audit Institution Audit Authority
	10:15 - 11:30	Administrative Court
	11:45 – 13:00	Meeting with Business Associations
	14:00 – 15:30	Civil Society Organisations
	15:45 – 17:00	EU Support to Public Procurement – Technical assistance projects
Day 4: Thursday 21 November 2019	7:00 – 8:00	Ministry of Public Administration
	8:00 – 9:00	Agency for Prevention of Corruption
	9:00 – 10:30	Administration for Public Works
	10:45 – 12:15	Ministry for Transport and Maritime Affairs, Directorate for road transport, MONTEPUT, Road Authority, Rail infrastructure of Montenegro
	13:15 – 14:45	Ministry of tourism and sustainable development, Directorate for communal services, PROCON, VODACOM
	15:00 – 17:00	Capital city Podgorica
Day 5: Friday 22 November 2019	8:00 – 9:00	Union of municipalities of Montenegro
	9:00 – 10:00	Local self-governing units and public utility companies, Budva, Bijelo Pole
	10:15 – 11:15	Ministry of Health
	11:30 – 13:00	Clinical Center of Montenegro
	14:00 – 15:00	Health Insurance Fund
	15:15 - 16:00	De-briefing with DEU

Annex 3 List of procurement cases

1. Road Authority
2. Public works administration
3. PREDMET Rail infrastructure MNE
4. Communal services Podgorica
5. Agency for water management Budva
6. Agency for communal services, Bijelo Polje
7. Bijelo Polje Municipality, Secretariat for Housing and Communal Services and Transport
8. PHI CLINICAL CENTRE OF MONTENEGRO
9. Vodovod i kanalizacija Podgorica
10. Medica devices for stitching wounds and prevention of bleeding for the needs of the Clinical Center of Montenegro and other Public Health Institutions of Montenegro
11. Public Procurement Review Body: Administration for Inspection Affairs – The Sector of Public Procurement Inspection; Registration Number: Request for initiation of a misdemeanour procedure no. 02010/2018 – 8934 of 02.11.2018;
12. Procurement of office supply for the needs of LLC “Project-Consulting” – Podgorica (PROCON)
13. Capital City Podgorica – SW Bypass

Annex 4 Statistical data on the SC's work³

The cases received during the period 20 June 2018 to 1 May 2019

During that period, the State Commission received 370 cases out of which there were: 333 appeals, 16 requests for continuation of proceedings, 1 request for postponing the execution of an administrative act and 20 rulings of the Administrative Court of Montenegro annulling the decisions of the State Commission.

Note: These are data for newly received cases, while in the mentioned period State Commission has on its work cases from the previous year which is why there is a difference in the number of received cases and issued decisions.

Decisions of the State Commission in the period 20 June 2018 to 1 May 2019

The State Commission has reached a total of 430 decisions, out which 362 were decisions upon lodged appeals, while the remaining decisions were passed upon the requests for continuation of the proceedings and upon rulings of the Administrative Court.

Appeals

In cases upon appeals, during the period 20 June 2018 to 1 May 2019, the State Commission resolved 397 appeals and issued 362 decisions. The reason for this mismatch between the number of resolved appeals and issued decisions is the merging of a certain number of appeals for the purpose of conducting integrated proceedings, for reasons of efficiency and expediency. Out of mentioned 397 appeals, 94 were accepted, 100 were rejected, 4 were dismissed, 10 were withdrawn, while in 189 cases the public procurement procedures were annulled ex officio, upon the appeal partly or entirely.

Data on the submitted appeals in public procurement procedures

During the period 20 June 2018 to 1 May 2019, 385 appeals were submitted in an open public procurement procedure, 6 appeals in public procurement procedure by shopping, 2 appeal in negotiated procedure without prior publication of contract notice, 2 appeals in low-value procurement and 2 appeals in urgent procurement, which were removed by the appellant as LPP provides that the SC is not competent for deciding on appeals for a low-value procurement and urgent procurement.

Data on the submitted appeals in public procurement procedures, according to the type of procurement subject

In procedures for procurement of supplies, there were 158 appeals submitted, for procurement of works, there were 78 appeals, while there were 161 appeals in procurement procedures with services as their subject.

Cases upon rulings of the Administrative Court of Montenegro

During the period 20 June 2018 to 1 May 2019, the State Commission received 48 rulings of the Administrative Court of Montenegro, out of which there were: 23 rulings refusing lawsuits against the decisions of the State Commission; 20 rulings accepting the lawsuits

³ Data source: Report from Montenegro for the annual meeting of the Internal Market and Competition Subcommittee (in the context of the Stabilisation and Association Agreement EU-Montenegro), where public procurement issues are discussed. June 2019

and 4 decisions on suspension of the procedure due to withdrawal of the appellant from the submitted appeal and 1 ruling which obliges State Commission to issue an Act of execution of the Administrative Court's ruling. During the same period, in the procedure of execution of the Administrative Court's rulings upon which the cases were returned for reconsideration, the State Commission adopted 42 decisions.

Lawsuits

In the period 20 June 2018 to 1 May 2019, the Administrative Court of Montenegro submitted 46 lawsuits to the State Commission, out of which 35 lawsuits were submitted against the State Commission's decisions adopted in the period 20 June 2018 to 1 May 2019, while 11 lawsuits regard the decisions adopted by the State Commission before 20 June 2018.

Extraordinary review of Court's decisions

During the period 20 June 2018 to 1 May 2019, the State Commission received five rulings by the Supreme Court, out of which: three rulings refusing the request for extraordinary review of court's decisions as ungrounded, two rulings accepting the requests for extraordinary review of court's decisions.