

**MANS**

# **Public Procurement in Montenegro in 2017**

**Shadow Report**



**NOVEMBER 2018**

<b>1.</b>	<b>CONTENT</b>	<b>1</b>
<b>2.</b>	<b>SUMMARY</b>	<b>2</b>
<b>3.</b>	<b>LEGISLATIVE AMENDMENTS ARE A STEP BACKWARDS</b>	<b>3</b>
3.1.	Problematic provisions of the amended Public Procurement Law	3
3.1.1.	Financial threshold for small value procurement has been raised	3
3.1.2.	Urgent procurement without any control	4
3.1.3.	Government aircraft contrary to the Public Procurement Law	5
3.1.4.	Certain state companies and procurement in the area of defence exempt	6
3.1.5.	Contract with the second-ranked bidder increases the price by 10 percent	6
3.1.6.	Less transparency and an increasing value of public procurement	6
3.2.	Critics of the European Commission	7
<b>4.</b>	<b>INSUFFICIENT CAPACITY FOR THE FIGHT AGAINST CORRUPTION</b>	<b>9</b>
4.1.	Only 4 reports for corruption have been submitted to the Directorate	9
4.2.	An effective system of remedies is still insufficient	10
4.3.	Only three inspectors for a complete public procurement system	10
<b>5.</b>	<b>CERTAIN PUBLIC PROCUREMENT DECLARED SECRET</b>	<b>12</b>
5.1.	Case 1: Reconstruction of the road is a state secret	12
5.2.	Case 2: At what price is the electricity purchased is a secret	12
5.3.	European Commission: Bilateral agreements must not restrict competition	13
<b>6.</b>	<b>RECOMMENDATIONS</b>	<b>14</b>

## 2. SUMMARY

In a small country such as Montenegro, with only 630,000 inhabitants, the state in which the government has not changed for three decades and which is being described as "captured", which is an illustration of systemic corruption and a strong influence on private interests in decision-making,<sup>1</sup> **the value of public procurement reached the sum of half a billion euros in 2017.** This information is sufficient to say how vast space there exists for corruptive actions in this area, which is otherwise recognized as one of the most vulnerable to misuse, and therefore transparency, competition and mechanisms for controlling public procurement procedures should be at a much greater level than they are.

Within the framework of the accession negotiations with the European Union, **Montenegro** has opened a chapter on public procurement at the end of 2013. At that time, Montenegro was obliged to enter into its national legislation the standards of the European Union directives, but Montenegro is very late with these tasks. Namely, **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**, despite its Public Procurement Law being based on some of the basic principles that are present in European practice, such as cost-effectiveness and efficiency of public funds, competition, equality or transparency. There are still shortcomings in planning public procurement in a proper manner, procured goods and services often do not justify their purpose, technical specifications are often adjusted in a way that favors individual bidders, contracts are changed by the conclusion of an annex after their signing, and monitoring of their implementation is almost completely absent. All this is outlined in the Shadow Public Procurement reports in Montenegro in previous years.<sup>2</sup>

Therefore, **this Shadow Public Procurement Report** for 2017 focuses on problematic provisions of the amended Public Procurement Law from the same year, and these are mostly presented through individual practical examples that open the question of real motivations of the Government to amend certain legal solutions. **Part of the Shadow Report is devoted to insufficient capacity to fight corruption in the area of public procurement**, as well as to additionally undermined transparency of public procurement, which is significantly aggravated by the refusal of state bodies or state companies to disclose documentation regarding individual procurements. The Shadow Report **also contains recommendations for improvement of legal solutions** in the Montenegrin Public Procurement System.

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<sup>1</sup> In its latest Enlargement Strategy, released in early 2018, the European Commission has shown that Western Balkan countries show clear elements of state capture, including links with organized crime and corruption at all levels of government and administration, as well as a clear mix of public and private interests.

<sup>2</sup> Link: <http://www.balkantenderwatch.eu/dokumenti/30/2013/05/08/crna-gora.html>

### 3. 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.

#### 3.1. Problematic provisions of the amended Public Procurement Law

In its 2017 Work Program<sup>3</sup>, the Government of Montenegro planned to adopt a new law on public procurement by the middle of the year which would be harmonized with the *acquis* of the European Union. Instead, it offered to the local public the amendments to the old Public Procurement Law, providing for several new solutions, which essentially undermined transparency and competition in public procurement<sup>4</sup>.

Main novelties are definition of small value procurement, for which a financial threshold has been significantly raised, and introduction of urgent procurement, for which implementation no approval of the Public Procurement Directorate is required, as well as new exemptions from application of the Public Procurement Law, which include procurement in defense or a state-owned company with commercial or industrial activity.

##### 3.1.1. Financial threshold for small value procurement has been raised

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 **favours direct negotiation and the situation of favoring individual bidders**, thus disrupting competition.

Precisely **the data from the second half of 2017**<sup>5</sup>, in which the amended Public Procurement Law was applied, indicate a clear trend of the contracting authorities to increasingly resort to this non-transparent procedure. Namely, the value of small value procurement in that period amounted to EUR 28.2 million, while in the first half of 2017, when the previous law was in force, the value of direct agreements and shopping method amounted to EUR 19 million.

<sup>3</sup> [http://www.gsv.gov.me/spi/Program\\_rada\\_Vlade](http://www.gsv.gov.me/spi/Program_rada_Vlade)

<sup>4</sup> The Law was adopted by the Parliament of Montenegro and is applied since mid-2017; link:

<http://www.skupstina.me/index.php/me/sjednice/zakoni-i-drugi-akti/?naziv=Predlog+zakona+o+izmjenama+Zakona+o+javnim+nabavkama&epa=&brojAkta=&datumOdDan=1&datumOdMjesec=5&datumOdGodina=2017&datumDoDan=1&datumDoMjesec=8&datumDoGodina=2017&vrstaAkta=Zakon&pageOffset>

<sup>5</sup> 2017 Annual Report on Public Procurement in Montenegro; link: <http://www.ujn.gov.me/2018/07/godisnji-izvjestaj-o-javnim-nabavkama-u-cg-za-2017-godinu/>

	Period from 1 January 2017 until 30 June 2017	Period from 1 July 2017 until 31 December 2017
Direct agreements and shopping method	19,000,572 euros	
Small value procurement		28,222,374 euros

Table 1: Increasing small value procurement; Source: Report on Public Procurement in Montenegro for 2017

### 3.1.2. Urgent procurement without any control

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.** According to the MANS data, 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.

The following table shows several cases of application of the earlier Public Procurement Law, when contracting authorities requested from the Public Procurement Directorate approval for conducting a negotiated procedure without prior publication of invitations to public competition, referring to the reasons of urgency, even though the legal conditions for their approval were not met<sup>6</sup>.

CONTRACTING AUTHORITY	PROCUREMENT	DESCRIPTION	VALUE	REASON FOR REJECTION
<b>Regional diving center</b>	Boat rental with bar-code	Underwater scouting and possible demining should protect human lives and material goods	130,000 euros	There are no proven reasons for urgency
<b>Central Bank of Montenegro</b>	Procurement of new aggregates and UPS devices	The existing aggregate is 14 years old and is not reliable at work	67,000 euros	There are no proven reasons for urgency
<b>Budvanska rivijera Hotel Group, JSC Budva</b>	Laundry, ironing and chemical cleaning of hotel laundry	It is necessary for the hotel to operate smoothly and avoid reclamation of guests	170,000 euros	There are no proven reasons for urgency
<b>Budvanska rivijera Hotel Group, JSC Budva</b>	Supply of fresh fruits and vegetables and nuts	It is necessary for the hotel to operate smoothly and avoid reclamation of guests	78,000 euros	There are no proven reasons for urgency
<b>Institute for Emergency Medical Assistance</b>	Current maintenance	Required tin works due to technical inspection of vehicles, to provide health care for citizens	4,500 euros	There are no proven reasons for urgency

Table 2: Some of the examples that contracting authorities have presented as urgent, but they were not; Source: Data of the Public Procurement Directorate

According to the Public Procurement Directorate, in the second half of 2017, the value of urgent procurement in Montenegro amounted to just over three million euros.

<sup>6</sup> Responses of the Public Procurement Directorate obtained pursuant to the Free Access to Information Law, which relate to decisions accepting or denying approval on the fulfillment of conditions for conducting negotiated procedure without prior publication of invitations to public competition

### 3.1.3. Government aircraft contrary to the Public Procurement 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 argued that the main reason for exemption is that there are frequent faults on its aircraft, which need to be removed immediately, and that carrying out public procurement procedures would make it difficult. However, all public procurements related to the use of the Government aircraft were exempted from the Law, which was completely unjustified and distorted transparency and competition as the basic principles of the public procurement system.

In addition, **MANS's documentation revealed that 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**, which is further explained in the case study below.

#### **Case Study: The Directorate granted no approval, the Government changed the law**

When, in June 2017, the State Parliament sent amendments to the Public Procurement Law, the Government briefly explained the reasons for exemption for its aircraft in the following manner: „For the purposes of using the Government's aircraft, used by high state officials, it often happens that a failure occurs on the aircraft, both in the country and abroad, which must be removed immediately, so it is impossible to carry out public procurement procedure in these exceptional cases”.

However, the MANS data<sup>7</sup> show that previously the Government has repeatedly with no justification requested from the Public Procurement Directorate approvals for engaging private air carriers, due to the inability of the Government's aircraft to cover all state flights, and such requests were rejected.

Thus, at the end of April 2015, the Government requested approval for engaging a private air carrier without the tender being conducted and for a price of EUR 234,000, explaining that it is seeking for approval “for precaution and in the event of a possible unforeseen event”. The Public Procurement Directorate has refused to give approval, referring to a clear legal provision stipulating that approval is issued only for procurements caused by unforeseen events such as natural disasters, fire, incidents, accidents, etc.

In September 2015, the Government requested approval for conducting a negotiated procedure without prior publication of invitation to public competition and for procurement of a regular service on its aircraft. The value of the procurement was EUR 48,000, but the Public Procurement Directorate refused to give its approval, arguing that the request concerned the August of that year and that the money had already been spent, which was contrary to the Public Procurement Law. It is very important to point out that in August 2015, the Government was on vacation, so the question remained whether its aircraft was abused for private flights of its officials in that month. Prime Minister of the Government of Montenegro during that period was Milo Đukanović, and the media subsequently published that in that year for government flights the Government paid for the use of a private jet owned by his brother<sup>8</sup>.

<sup>7</sup> Responses of the Public Procurement Directorate obtained pursuant to the Free Access to Information Law, which relate to decisions accepting or denying approval on the fulfillment of conditions for conducting negotiated procedure without prior publication of invitations to public competition

<sup>8</sup> Article in the daily newspaper “Dan” of July 8, 2017 entitled “Milo rented a brother's airplane using state money”; link: <https://www.dan.co.me/?nivo=3&rubrika=Vijest%20dana&datum=2017-07-08&clanak=606032>

### **3.1.4. Certain state companies and procurement in the area of defense exempt**

**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. Thus, exempt from the obligation to carry out public procurement procedures remained one of the most significant tourist companies in the country, which are in majority state ownership, such as the Hotel Group Budvanska Rivijera JSC or the Institute Dr Simo Milošević, but also the national airline company Montenegro Airlines, **thus enabling annually tens of millions of euros to be spent non-transparently and with limited competition.**

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.**

### **3.1.5. Contract with the second-ranked bidder increases the price by 10 percent**

**A step back** in legislative amendments is also the provision according to which, in case the best bidder does not sign a contract or does not provide a good performance guarantee, **the contracting authority may conclude the contract with the next bidder if his bid is not higher than the selected for more than 10 percent.**

The thing is that in case of multi-million contracts this 10 percent can represent a large amount of money and the legislator's intent of introducing such a provision is completely unclear because it is **impossible to control the potential secret agreements between companies participating in tenders. All this in practice can increase the real value of jobs at the expense of the state budget.**

Furthermore, although it is stipulated that the contracting authority is obliged to seek compensation of 10% from the bidder refusing to conclude the contract, it should be pointed out that court proceedings for reimbursement of damages can last very long and the question is whether the end-user will eventually be reimbursed or not, especially if the bidder entered bankruptcy or liquidation.

### **3.1.6. Less transparency and an increasing value of public procurement**

Amendments to the Public Procurement Law have not provided for greater transparency and competition in the overall public procurement system in the country, although it would be natural that this would be the case, especially as the value of public procurement grows year-on-year.

Thus, **in just three years, the value of public procurement increased by 37.4 percent or 195.4 million euros.** In 2014, the value of public procurement amounted to 327.1 million euros, a year later 428.9 million; in 2016 this value was 447.7 million and reached the level of 522.6 million euros in the previous year.

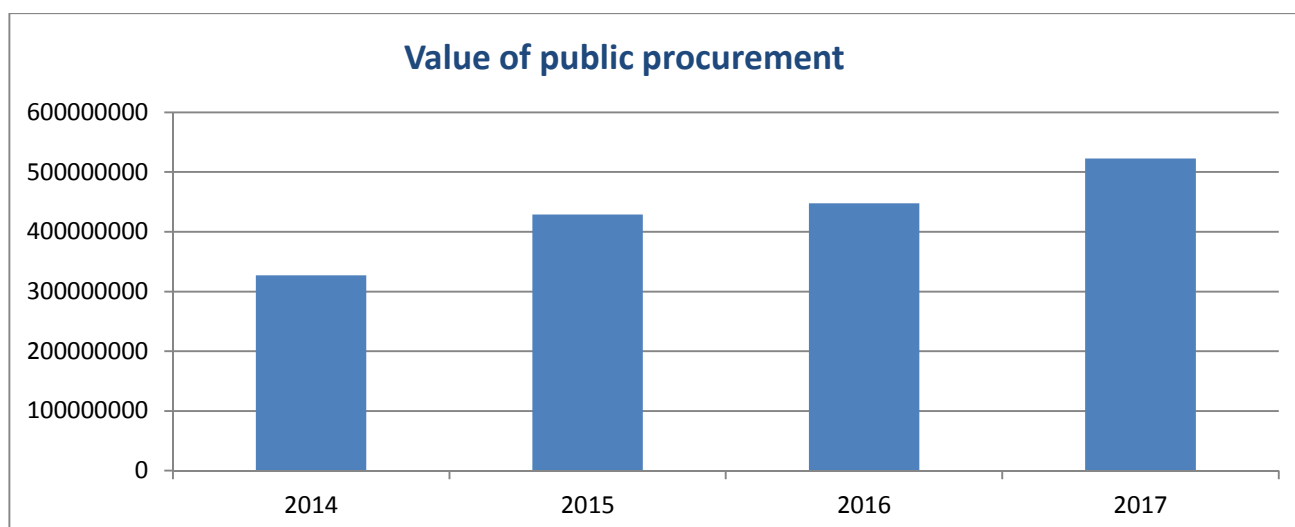


Chart 1: The value of public procurement is growing significantly; Source: Data of the Public Procurement Directorate

In relation to the share in Gross Domestic Product, there was also a growth of 9.6% in 2014, 11.8% a year later, in 2016 it was 11.7%, and in the previous 12.3%.

YEAR	2014	2015	2016	2017
SHARE IN GDP	9,62 %	11,89 %	11,77 %	12,33 %

Table 3: Increase in share of public procurement in GDP; Source: Data of the Public Procurement Directorate

### 3.2. Critics of the European Commission

In its 2018 Progress Report for 2018<sup>9</sup>, the European Commission has criticized the amendments to the Public Procurement Law, which were adopted in mid-2017, assessing that they constitute a backsliding in terms of alignment with the EU *acquis*.

“Montenegro remains moderately prepared on public procurement, which is an area particularly vulnerable to corruption. Several of the amendments to the Law on public procurement have reduced the level of compliance with EU rules. Prepared by an ad-hoc task force, and without public consultation, the amended law no longer applies to low-value procurement and procurements in the area of defense and security. The changes also introduced several new exemptions that are not in the EU *acquis*” states the European Commission's Report.

The European Commission recommended that in 2018 Montenegro should in particular:

- adopt legislation that is aligned with the 2014 EU Procurement Directives, including on concessions;
- prepare a detailed and comprehensive plan for the roll-out of e-procurement;
- improve the functioning of the remedies system, including its coverage of low-value procurements, concessions, and defense procurement, and improve the administrative capacity and IT infrastructure of the State Commission for the Control of Public Procurement.

Montenegro has not adopted any new laws by mid-November 2018. Namely, during the year, public consultations on draft laws on public procurement, amendments to the Law on Concessions and the Law on Public Private Partnerships have been finalized and sent to the European Commission for its opinion.

<sup>9</sup> The European Commission Progress Report on Montenegro 2018



When it comes to the electronic procurement system, in September 2018 the list of qualified bidders for realization of this project was set and it was sent to the Delegation of the European Union to Montenegro in Podgorica, which is a requirement for signing the contract<sup>10</sup>.

### **Negotiating chapter for public procurement open for the fifth year**

Negotiations of Montenegro in Chapter 5 - Public Procurement, as part of the European Union's accession process, last from December 2013.

The European Commission then defined three mandatory benchmarks for the closure of Chapter 5, namely:

1. Montenegro aligns its national legislative framework covering all areas of public procurement, including in particular concessions, public-private partnerships, and defense procurement, in accordance with EU procurement legislation.
2. Montenegro puts in place adequate administrative and institutional capacity at all levels and takes appropriate measures to ensure the proper enforcement and implementation of national legislation in this area in good time before accession.
3. Montenegro demonstrates a track record of a fair and transparent public procurement system, which provides value for money, competition, and strong safeguards against corruption.

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<sup>10</sup> Annex to the Report of the European Commission on Montenegro for the period 01 January 2018 - 20 October 2018, which was discussed at the session of the Government of Montenegro held on 08 November 2018; link: [http://www.gov.me/sjednice\\_vlade\\_2016/97](http://www.gov.me/sjednice_vlade_2016/97)

#### 4. INSUFFICIENT CAPACITY FOR THE FIGHT AGAINST CORRUPTION

In its 2018 Progress Report, **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.

##### 4.1. Only 4 reports for corruption have been submitted to the Directorate

In its Work Report for 2017, the Public Procurement Directorate points out that the Public Procurement Law has devoted particular attention to anticorruption policy (alluding to the obligation of the contracting authorities to have an anti-corruption clause in the contracts, otherwise they would be null and void) and prevention of conflict of interest, which is recognized as a potential source of corruption.

First of all, it should be noted that **the existence of an anti-corruption clause in the Public Procurement Law alone is not sufficient for an effective fight against corruptive actions and making deals through public procurement procedures** not only because of the fact that it is difficult to prove the existence of giving or receiving a bribe between the participants, but because it relates only to the period of conclusion of the contract but not to the later realization of the procurement.

**The Directorate estimates that corruption is most effectively fought by preventive measures**, and within such activities and monitoring of implementation of the public procurement system, it has established a help desk, a consulting and advisory services center through which it provides advice to the contracting authorities or bidders. However, the Directorate does not in any way state that providing advice has influenced the prevention of corruption and what results are achieved in that regard. Moreover, **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**.

In addition, 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 Public Procurement Directorate also states that **its Public Procurement Monitoring and Electronic Public Procurement Monitoring Unit, with only three employees, runs daily monitoring of on average over 87 documents** in order to ensure their compliance with public procurement legislation. However, this is a very small number of employees, so it is **indicative whether with such a small number of employees on a daily basis it can provide quality control over a huge number of published documents**. It should also be noted that the Public Procurement Directorate does not control the content of the tender specifications, which in practice make it possible to set up tenders.

**When it comes to assessments of the European Commission, it states that the capacity of the Public Procurement Directorate is inadequate to implement the reforms** needed to further improve the results of the public procurement system in an effective and timely manner.

#### 4.2. An effective system of remedies is still insufficient

**Neither the State Commission for the Control of Public Procurement**, which is responsible for dealing with complaints submitted, **has sufficient administrative capacity for more effective anti-corruption action**. Namely, in spite of the fact that the number of members of the State Commission has increased from four to six members with 2017 amendments to the Public Procurement Law and its professional services have 17 employees<sup>11</sup>, the backlog of cases still indicates weak administrative capacity.

**During 2017, the State Commission received 973 appeals**, while 298 cases were handed over from the previous year.<sup>12</sup> During 2017, the Administrative Court filed 71 lawsuits filed on the State Commission's decisions, while the Supreme Court delivered 12 judgments, of which eight judgments rejecting requests for review of court decisions as unfounded, in three judgments the requests were adopted; one judgement suspended the procedure for the dismissal of the prosecutor.

**The European Commission** in its 2018 Report **suggests that there is a significant number of Administrative Court rulings annulling the State Commission's decisions** and that in 2016 this was at about 40 %. This situation and the existing problematic capacity-related issues are, as assessed in the Report, undermining functioning of the remedies system.

The State Commission acts solely on the basis of the appeals filed, while ex officio acts only in cases of substantial violation of the Public Procurement Law, which includes carrying out a public procurement procedure without publishing or without the prior approval of the competent body, and for non-compliance of tender documents with the law, which might have led to the discrimination or the restriction of market competition. Concerning the foregoing, **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.

It should be noted that pursuant to the **Montenegrin Public Procurement Law lodging appeals by the bidders is still conditioned by paying the proceeding fee, which amounts to 1 percent of the estimated public procurement, which cannot exceed 20 thousand euros**. MANS has long pointed out that this a poor solution and at the same time illegal, because it restricts the right to appeal and is contrary to the Constitution of Montenegro, which in the area of human rights and freedoms guarantees to each person the right to a remedy against the decision on its right.

#### 4.3. Only three inspectors for a complete public procurement system

For the third important link in the control of public procurement, i.e. the Public Procurement Inspection, the European Commission noted its lack of capacity. **“Monitoring of contract awards and contract implementation is hindered by the public inspection service’s insufficient capacity to perform its tasks effectively**. In addition, better internal auditing within contracting authorities is required to improve monitoring and verification of contract implementation”, as stated in the European Commission's 2018 Progress Report on Montenegro.

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<sup>11</sup> Annex to the Report of the European Commission on Montenegro for the period 01 January 2018 - 20 October 2018, which was discussed at the session of the Government of Montenegro held on 08 November 2018; link: [http://www.gov.me/sjednice\\_vlade\\_2016/97](http://www.gov.me/sjednice_vlade_2016/97)

<sup>12</sup> 2017 Work Report of the State Commission for the Control of Public Procurement; link: <http://www.kontrola-nabavki.me/1/dokumenta/izvje%C5%A1taj%20o%20radu%20%202017%20godina.pdf>

According to the Work Report of the Administration for Inspection Affairs for 2017<sup>13</sup>, during the same year, **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.

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<sup>13</sup> 2017 Work Report of the Administration for Inspection Affairs; link: <http://www.uip.gov.me/biblioteka/dokument>

## 5. CERTAIN PUBLIC PROCUREMENTS DECLARED SECRET

In addition to the amendments to the Public Procurement Law, **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.

Two such cases are presented below, one of which relates to the reconstruction of the road and construction of tunnels worth EUR 35 million, and the second to the electricity imports by the Montenegrin Electric Enterprise JSC Nikšić, which imports electricity worth tens of millions of euros annually.

### 5.1. Case 1: Reconstruction of the road is a state secret

At the end of 2016, the **Ministry of Transport announced that it signed a EUR 35 million contract with the company "Euroasfalt" from Sarajevo** for reconstruction of a regional road to the north of the country, including tunnel boring.<sup>14</sup> **Conclusion of the contract did not precede the regular public procurement procedure** but was implemented pursuant to the procedure of the European Bank for Reconstruction and Development, which approved the loan for the mentioned investment.

At the beginning of 2017 MANS requested from the Ministry of Transport, based on the Free Access to Information Law, complete tender documentation, bidding, decision on election as well as a signed contract for the works. However, **the Ministry refused to submit the documentation, referring to the procedure of the European Bank for Reconstruction and Development, which does not publicly disclose procurement information**, arguing that the disclosure of information might endanger further cooperation with that credit institution and could further jeopardize the economic policy of the country.

However, **citizens of Montenegro will be the ones to return the loan and they will finance a specific investment**, and it is therefore **indisputable that the prevailing public interest is to know how the taxpayers' money is spent**. International practice of access to information goes also in this direction, and in an analysis of the international organization Access Info it is indicated that **"by definition, state authorities work in the public interest and do not have a business interest to be protected"**.

### 5.2. Case 2: At what price is the electricity purchased is a secret

The existing **Public Procurement Law exempts from its application the purchase of electricity** that is supplied by Montenegrin Electric Enterprise JSC Nikšić, a majority state-owned company, in Montenegro for the needs of consumers.

**On the basis of the Free Access to Information Law, MANS requested from the Montenegrin Electric Enterprise JSC Nikšić, electricity import contracts in 2017** in order to determine by whom, at what price and under what conditions is the electricity, paid by Montenegrin consumers, purchased. **Montenegrin Electric Enterprise JSC Nikšić rejected the request, arguing that the contracts represented a business secret**, and that their disclosure would have affected the trading interests of the companies of which they are buying electricity.

However, **citizens have the right to know from whom and at what price the electricity is purchased, because they are the ones that pay for it at the first place**. In addition, Montenegrin Electric Enterprise JSC Nikšić is a state-owned company whose business at all times must be subject to

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<sup>14</sup> Article on the Portal Vijesti entitled "34.7 million euros for reconstruction of the road: A journey from Berane to Kolašin will be shortened for more than 40 kilometers" from 02 December 2016; link: <http://www.vijesti.me/vijesti/za-rekonstrukciju-puta-347-miliona-eura-putovanje-od-berana-do-kolasina-skratice-se-za-preko-40-km-914498>

public control and the public's right to know cannot be subordinated to the interests of private companies that supply electricity. Moreover, **according to international standards, publishing contracts between public companies and private companies is clearly in the public interest.**

### 5.3. European Commission: Bilateral agreements must not restrict competition

In this section we note that, **thanks to international bilateral agreements, it is not entirely clear how much state money is spent on this basis.** These agreements exclude the regular application of public procurement procedures pursuant to domestic legislation and do not sufficiently provide transparency and competition.

In its 2018 Montenegro Progress Report **The European Commission pointed out that “Montenegro needs to ensure that any international bilateral agreement, including for large infrastructure projects, does not unduly restrict competition** and that they comply with the EU acquis and related provisions of the Treaty on the Functioning of the European Union on public procurement”. **The European Commission has asked Montenegro to provide it with all international bilateral agreements concluded in the last three years,** so in November 2018, the Government has mandated all ministries to deliver all agreements concluded by 2015 by the end of the same year.<sup>15</sup>

#### **The largest infrastructure project in the country without tenders and under secrecy**

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 euros.<sup>16</sup>

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<sup>15</sup> Information on the Plan for Meeting Final Benchmarks for temporary closure of negotiations in Chapter 5 - Public Procurement, which was considered at a Government session held on 1 November 2018; link: [http://www.gov.me/sjednice\\_vlade\\_2016/96](http://www.gov.me/sjednice_vlade_2016/96)

<sup>16</sup> MANS Report “Secret Paths of Money”; link: <http://www.mans.co.me/tajni-putevi-novca/>

## 6.RECOMMENDATIONS

The following are general recommendations for improvement of legislative solutions in the Montenegrin public procurement system:

- 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.

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**November 2018**

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