

/policy brief

PUBLIC PROCUREMENT AND NON-CONVICTION OF PERSONS/COMPANIES - THE CASE OF TOŠKOVIĆ

This policy brief was created with the financial support
of the European Union.

Its contents are the sole responsibility of the Balkan
Tender Watch Coalition (BTW) and do not necessarily
reflect the views of the European Union.

**BALKAN
TENDER
WATCH**



/PUBLIC PROCUREMENT AND NON-CONVICTION OF PERSONS/COMPANIES – THE CASE OF TOŠKOVIĆ

"Due diligence in the public procurement procedure, which would enable a real assessment of the eligibility of bidders to participate in the tender, is significantly limited by legal solutions that oblige contracting authorities to only a superficial, formal inspection of persons and companies. Such legal framework already produces a practice that allows for the conclusion of contracts with persons/companies that do not substantially meet the tender conditions."

Current Montenegrin Law on Public Procurement, which was passed on December 17, 2019, at the Sixth Sitting of the Second Ordinary Session of the Parliament of Montenegro, entered into force on July 1, 2020, and its implementation began only six months after its entry into force.[1]

The new law took over the anti-corruption provision from the previous law contained in Article 99, in the context of the Conditions of participation in a public procurement procedure and grounds for exclusion. Thus, the Mandatory conditions stipulate that "only a business entity which fulfils the following conditions shall participate in a public procurement procedure:

1) it has not been the subject of a conviction by final judgement, and the executive director of which has not been the subject of a conviction by final judgement for a criminal offence with the following elements:

- *criminal association;*
- *creation of a criminal organisation;*
- *giving a bribe;*
- *receiving a bribe;*
- *giving a bribe in business operations;*
- *receiving a bribe in business operations;*
- *evasion of taxes and contributions;*
- *fraud;*
- *terrorism;*
- *terrorist financing;*
- *terrorist association;*
- *participation in foreign armed formations;*
- *money laundering;*
- *trafficking in human beings;*
- *trafficking in minors for adoption;*
- *slavery and transport of enslaved people;*

In the process of participating in the tender, the interested entity confirms that it meets this requirement by obtaining a certificate from the competent Ministry of Justice, which refers to an extract from the criminal record, containing data on the (non) conviction of the person and/or company, and then submits it to within its bid. [2]

[1] Official Gazette of Montenegro no. 74/2019 from 30.12.2019

[2] Article 100, paragraph 1, item 1 of the current Law on Public Procurement

/PUBLIC PROCUREMENT AND NON-CONVICTION OF PERSONS/COMPANIES - THE CASE OF TOŠKOVIĆ

Nevertheless, it was precisely the process of proving a person's and/or company's criminal record that was subject to abuse, even while the previous legal solution was in force. The previous version of the Law on Public Procurement contained a provision that stipulated that "the bidder who proves that himself and his legal representative are not convicted by a final court decision for any of the criminal offences of organized crime, corruption, money laundering and fraud may participate in a public procurement procedure".[3]

Thus, it happened that a person who was convicted of one of the listed criminal offenses fictitiously ceded one of the management positions in the company - participant in the tender, by appointing another founder and/or director, depending on the position he/she is in. Montenegrin media have reported on this phenomenon on several occasions.[4]

Another phenomenon has also been noticed. Namely, in many cases, Montenegrin competent authorities were inactive in their mutual communication, thus, for example, the construction company "Toškovići" won several multi-million tenders even though its formal owner, Ivica Tošković, was legally convicted of evasion of taxes and contributions and the creation of a criminal organization, which are criminal offenses that would have eliminated him from the bidding process had the Law on Public Procurement been consistently applied.[5]

This case perfectly illustrated the vagueness of the law and the inactivity of institutions. Namely, at the end of March 2020, the Water Utility Company "Vodovod" from Podgorica concluded a contract on the construction of a part of the secondary wastewater treatment for the needs of the project of building a new waste water treatment plant in Podgorica, precisely with the company "Toškovići".[6]

The contract was worth 1.83 million euros, and at the time of its signing, Ivica Tošković was legally convicted of committing the listed criminal offenses. Although the project was implemented according to the international tender rules of KfW Bank that funds it, they contained similar provisions regarding the conditions that bidders must meet. The rules of KfW Bank provide that "contracts realized from the bank's funds cannot be concluded with companies/persons who have been legally convicted for participation in criminal organizations, money laundering, terrorism, child labour or white slave traffic."[7]

[3] Formerly valid Law on Public Procurement, Article 65, Paragraph 1, Item 4 (Official Gazette of Montenegro, No. 42/2011, 57/2014, 28/2015 and 42/2017)

[4] See at: <https://www.vijesti.me/vijesti/ekonomija/390695/priznali-poresku-prevaru-pa-pobijedili-na-drzavnom-tenderu>

[5] Judgement of the High Court in Podgorica Kvs. no. 157/19, from November 1, 2019

[6] See at: <https://www.ovpg.me/>

[7] See at: <https://www.kfw-entwicklungsbank.de/PDF/Download-Center/PDF-Dokumente-Richtlinien/FZ-Vergaberichtlinien-V-2021-EN.pdf>

/PUBLIC PROCUREMENT AND NON-CONVICTION OF PERSONS/COMPANIES – THE CASE OF TOŠKOVIĆ

The case was discovered by the NGO MANS which brought it to the attention of KFW Bank, under whose pressure the Capital City Podgorica, i.e. Podgorica's "Vodovod", had to terminate the contract.[8]

On the other hand, the same company abused the public procurement process through domestic legislation as well. Namely, even though Tošković was sentenced according to a summary proceeding, the Agency for Construction and Development of Podgorica awarded his company three more contracts related to public works, with a total value of nearly two million euros.

In February 2020, a contract was signed with the company, which provided for the reconstruction of "18. Jul" Street in Podgorica, worth 400,000 euros. At the time when Tošković signed the contract, he had already been convicted for three months for creating a criminal organization and tax evasion. By analysing the tender documentation, MANS found that Tošković submitted a Certificate from the Ministry of Justice from August 2019, in which it is stated that he had not been convicted. At the time, the Agency replied to MANS that they did not additionally check the documentation submitted by Tošković, but they also emphasized that it was in accordance with the Law on Public Procurement:

"The bidder "Tošković" LLC submitted a notarised copy of the Certificate of the Ministry of Justice of Montenegro from August 9, 2019, that there were no records of convictions for Ivica Tošković in the criminal records, which had not expired at that time, thus, no additional verification was conducted."[9]

It remains unclear how the management of the city agency missed such an important fact, bearing in mind that Tošković was one of the actors in the "Vardar" affair, which was extensively reported by the media.[10]

In addition to "18. Jul" Street, the company "Tošković" was also assigned the works of reconstruction of "Veliše Mugoše" Street in Zagorič and "Vuka Karadžića" Street in the center of Podgorica. Both contracts, worth over one and a half million euros, were signed by the Agency in October 2019, after the High Court in Podgorica confirmed the plea agreement with the owner of the company, Ivica Tošković.[11]

It was the legal institute of Plea Agreement that was one of the mechanisms which enabled the company to participate in tenders. Namely, although Ivica Tošković was convicted as a natural person and the owner of the company, in accordance with the Law on the Liability of Legal Entities for Criminal Offenses, the company as a legal entity - **was not** - and proceedings are still being conducted against it.[12] In this way, the company may obtain an extract from the criminal record

[8] See at: <http://www.mans.co.me/osudenom-za-utaju-poreza-dali-milionski-ugovor/#prettyPhoto>; <https://www.pobjeda.me/clanak/podgoricki-vodovog-poktenuo-raskid-ugovora-sa-konzorcijumom-toskovic-tehnoput-mne>

[9] Response of the Agency for Construction and Development of Podgorica no. 12403 from 25.09.2020

[10] See at: <https://www.vijesti.me/vijesti/crna-hronika/394689/toskovic-vraca-drzavi-140-000-eura>

[11] See at: <https://www.vijesti.me/vijesti/crna-hronika/394689/toskovic-vraca-drzavi-140-000-eura>

[12] Law on Liability of Legal Entities for Criminal Offenses ("Official Gazette of the Republic of Montenegro", No. 2/2007, 13/2007 - corrected and "Official Gazette of the Republic of Montenegro", No. 30/2012 and 39/2016)

/PUBLIC PROCUREMENT AND NON-CONVICTION OF PERSONS/COMPANIES – THE CASE OF TOŠKOVIĆ

that shows that it has not been convicted, which is also true in this case, at least after the proceedings have been completed.

Ultimately, the business that best illustrates the inertness of Montenegrin institutions when it comes to respecting the law is the construction of a recycling yard in Berane, which was also awarded to Tošković. He and his company applied for the tender of the then Public Works Administration, and as part of the bid, he submitted a confirmation from the Ministry of Justice from January 31, 2020. After that, he was awarded a job worth 1.3 million euros. The Ministry of Justice's explanation at the time regarding the fact that Tošković submitted a certificate of non-conviction, issued after the final judgement, was as follows:

"The certificate issued on 01/31/2020 for the person Ivica Tošković was issued on the basis of the state of the data in the electronic database that existed on the date of issuance of the certificate in accordance with the Regulation on the manner of keeping criminal records. The information on the conviction according to the judgment of the High Court in Podgorica KVS No. 157/19 was submitted to the Ministry of Justice by the court on February 10, 2020."^[13]

The then management of the Public Works Administration justified themselves by explaining that they had no need or reason to check "the validity and veracity of official documents issued by the institution responsible for their issuance."^[14]

However, after the discovery of MANS, this contract was also terminated, but the guide was left for other actors of similar affairs - who, by simply changing the company's registration data, gain the opportunity to participate in the public procurement process.

In addition to this practice, current Law on Public Procurement does not restrict the right of persons and companies against whom investigative and even judicial proceedings are ongoing for some of the criminal offenses that would make them ineligible to apply for a state contract, to participate in the public procurement procedure. Although the presumption of innocence is guaranteed by the Constitution of Montenegro, the establishment of a so-called "black list" of entities in the public procurement procedure would help contracting authorities to timely review all aspects of the decision to award a job in a tender to a company or person against whom criminal proceedings are or were conducted.

[13] See at: <http://www.mans.co.me/wp-content/uploads/2020/10/Screenshot-2020-10-04-at-10.46.24.png>
[14] See at: <https://www.mans.co.me/presuda-putovala-tri-mjeseca-osudeni-dobio-milionske-poslove/>

/recommendations

Recommendations

- *The validity of the Certificate issued by the Ministry of Justice, which is taken from criminal records, should be reduced to 30 days*
- *In the process of evaluating the bids of various bidders for contracts worth more than 250,000 euros, a detailed due diligence should be carried out with the engagement of an independent audit firm;*
- *- A Black List of companies and persons/owners who have been convicted of the listed criminal offenses should be established, while being on the Black List would carry a certain number of negative points when evaluating the bids of those persons*