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Dejan Milovac
Ines Mrdović

PUBLIC WORKS & SECRET DEALS



Case Studies
from Montenegro
2011/2012

"PUBLIC WORKS & SECRET DEALS, Case studies from Montenegro 2011/2012.
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Title:

PUBLIC WORKS-SECRET DEALS
Case Studies from Montenegro 2011/2012

Author:

Dejan Milovac, Director, Urban Development Programme
Ines Mrdović, Coordinator, Urban Development Programme

Assistants:

Maja Aleksić, Assistant for Public Procurement
Nataša Seferović, Assistant for Urban Development - Podgorica
Marijana Subotić, Assistant for Urban Development - Herceg Novi
Jovana Bulatović, Assistant for Urban Development - Bar

Contact details:

The Network for the Affirmation of NGO Sector - MANS
Dalmatinska 188, Podgorica, Montenegro
Tel/fax +382.20.266.326, 266.327, 266.328
mans@t-com.me, www.mans.co.me

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Case Studies from Montenegro 2011/2012

Podgorica, 2012

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1. INTRODUCTION

This publication has come as a result of the project monitoring the procurement for public works, with the value of individual tenders exceeding 100,000 euro. In 2011 and 2012 this project was implemented by the Network for Affirmation of the Nongovernmental Sector (MANS), financially supported by the European Union Delegation to Montenegro.

Over the period observed MANS monitored all procedures for awarding public work contracts exceeding 100,000 euro in worth. We also reviewed several procurement procedures which took place before 2011, reported to us via the line for reporting corruption. Following detailed review, such examples showed some of the most drastic violations of the Public Procurement Law (PPL).

As a part of this publication, MANS particularly focused on most frequent violations of the Public Procurement Law recorded during the monitoring and investigation. These refer to favouring companies linked with decision-makers, subsequent increase of the overall deal value and introduction of additional works as a justification for higher final costs, extension of completion deadlines and failure to collect penalties stipulated in contracts, the violation of the principles of competition and transparency, and the conflict of interest situations among the participants to the public procurement procedures.

The investigation for the needs of this project was done solely pursuant to the documents obtained by invoking the Free Access to Information Law (FAI Law). To that effect, a voluminous amount of data was collected, including full tender dossier for certain public works, but also contracts signed by contracting authorities with successful bidders. Since one of the goals of this project was to increase transparency of the overall awarding process for public works contracts in Montenegro, MANS made this documentation available to the public at its web pages¹.

The documents were used for compiling the present case studies, but also for filing quite few criminal charges against state agencies acting as public works contracting authorities, as well as the participating companies and their owners suspected of violations to the PPL provisions.



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¹ <http://www.mans.co.me/odrzivi-razvoj/javni-radovi/>

2. MONITORING THE PUBLIC PROCUREMENT LAW

Between January 2011 and the end of July 2012, MANS monitored the public procurement processes for infrastructure works exceeding the value of 100,000 euros, covering all institutions bound by the PPL. However, the greatest share of calls for tenders for the works of such value was published by the Transport Directorate and the Public Works Directorate - some 90% of the total.

The remaining 10% mostly refer to the tendering procedures by the Agency for Construction and Development of Podgorica, by the Agency for Construction and Development of Herceg Novi, the Municipality of Budva, the Municipality of Bar, the Municipality of Pljevlja, the Municipality of Tivat, the Ministry of Culture, and the Public Company for Coastal Zone Management (Morsko dobro).

Over the period observed, MANS selected in total 208 public calls for infrastructure works, each exceeding the value of 100,000 euro, from the Public Procurement Directorate's website. In reference to them, contracting authorities passed 158 decisions awarding contracts to selected bidders.

In order to investigate whether the respective tendering procedures were compliant with the PPL, we invoked the FAI Law, i.e. we filed applications for accessing information to contracting authorities seeking tender dossiers (including bids, reports of bid comparison and evaluation, possible objections submitted by bidders), and contracts eventually signed by contracting authorities with successful bidders.

In the process, we filed in total 1,467 applications requesting access to information, recording a high percentage of granted requests by the contracting authorities. In as many as 95% of cases we received the documents requested, and we lodged appeals in the remaining 5 percent of cases.

Moreover, MANS particularly monitored the implementation of 15 public procurement contracts of strategic importance and great value, both at the state and the local levels, filing additional applications for accessing information in respect of them. As regards these 15 major cases, we checked whether the completion dates stated in the contracts were observed, whether deadlines were extended through annexes to original contracts, and in particular whether the contracting authorities were imposing penalties to contractors for failure to meet the contractual terms and conditions. In doing so, we filed additional 156 applications for accessing information, all granted.

MANS posted on its website all the data thus gathered, in a separate section on procurement procedures for public works. Over the period observed, the total of 118 contracts were posted there, plus additional 462 supporting documents, or 580 various documents in total posted and available to all interested parties.

Between January 2011 and the end of July 2012, we filed 88 initiatives with the Public Procurement Directorate, asking to verify the regularity of specific procurement procedures where there were grounds to believe these were not fully compliant with legal provisions.

Although with some delay, the Public Procurement Directorate responded to our initiatives, but it is problematic that in a number of cases they failed to offer a definite answer whether the public procurement procedure was violated or not. In contrast, in some cases they noted noncompliance in awarding contracts by contracting authorities, while in some there were no violations noted.

Based on the documents gathered and following their thorough review, in twenty cases we identified major noncompliance in public procurement procedures, prompting us to file in total 20 criminal reports with the Supreme State Prosecution. Several were filed in late 2011, while the remaining ones were filed in mid 2012.

The procedures as per reports are still pending, and the prosecution authorities have not issued any opinion on them as yet. These criminal reports were filed against the responsible persons within contracting authorities on the count of suspicion of misuse of office to favour certain companies contrary to the public interest, making deals for much higher amounts than the originally estimated ones, breach of the competition and transparency principles, and the violation of the conflict of interest provisions. The most striking cases are explained in detail in the next chapter through specific case studies.

3. INVESTIGATION INTO THE PUBLIC PROCUREMENT LAW VIOLATIONS

This chapter features some specific examples of the PPL violations through case studies giving details of unlawful actions taken not only by contracting authorities, but also the very Commission for Control over the Public Procurement Procedures, and the bidding companies.

Certain examples show that some bidders were favoured contrary to what is the public interest, although often not meeting even the eligibility criteria for tendering. It was such bidders who were granted contracts exceeding the estimated costs by as many as several millions.

In addition, quite often the contracting authorities would conclude annexes to the original contracts increasing the value of works. Likewise, all of the cases reviewed showed that contracting authorities always tolerated the extensions and never imposed any penalties on contractors, as a sanction for delays in meeting the contractual terms and conditions, although each of the contracts signed did contain such clauses.

At the same time, this chapter describes how contracting authorities violated the principles of competition and transparency underlying the public procurement procedures, thus eliminating more advantageous bids or prospective bidders. Also, several cases show gross violations of provisions governing the conflict of interest issues. Namely, it turned out that the expert supervision over some works was carried out by companies acting as subcontractors to the selected contractors in the same deal.

The thing causing particular concern are the actions of the state Commission for Control over Public Procurement Procedures which, as the highest instance under the PPL, is to see to the regularity of public procurement procedures. In several cases MANS established that the Commission proper was arbitrarily interpreting provisions and violated the law favouring certain bidders, damaging the state Budget by several hundred thousand euros.

Having identified various forms of non-compliance with the PPL, MANS filed criminal reports with the state prosecution for the most of the examples featured here as case studies. Also, in the greatest share of cases reviewed we established concurrent existence of different non-compliances around the same case, but the studies focus on and are categorised by the most drastic violations that occurred within the specific cases.

3.1. Favouring certain companies and pushing up the price

This section features two cases with multiple violations of the PPL provisions and favouring of a specific company to the detriment of the public interest. The severity of unlawful actions is particularly reflected in the fact that the Transport Directorate enabled the bidders to win several-million deals without even meeting the entry eligibility criteria and without having the financial standing needed for the given public work.

Case study 1 - Risan-Žabljak, Tunnel "Ivica" section

In October 2008 the Transport Directorate published a call for selecting the most advantageous bid for the construction of the Risan-Žabljak road, the "Ivica" tunnel at the Šavnik-Grabovica section. The estimated value of this deal, funded from the state Budget over the period of seven years, was 14.5 million euro.

4. Procijenjena vrijednost nabavke
Procijenjena vrijednost nabavke je 14 500 000,00 €.
Nabavka će se finansirati iz Budžeta Crne Gore na period od 7 godina.
Izvođaču će biti isplaćivana sredstva na njegov račun u roku od 7 godina od dana potpisivanja ugovora, a po kvartalnim anuitetima.

In December 2008 this deal was awarded to the company "Putevi" from Užice, Serbia, which was the only one giving a bid at the price of 17.5 million euro. Hence, the contract was concluded

at a price exceeding the estimated one for as many as three million, which means that the Transport Directorate did not use the option offered by the law to cancel such a tender.

Namely, the PPL gives an opportunity to the contracting authority to cancel the tender if the prices offered substantially exceed the estimations, and in the case at hand such a move would have been optimal from the point of view of the public interest.

Eight months later the Transport Directorate terminated the contract with "Putevi", and to this date MANS has not received any additional documents to give an insight into the reasons for the termination. Immediately following the termination, in August 2009, the Transport Directorate launched the negotiation procedure, without previously published public call, by sending the call for bids directly to four companies. These were the Podgorica-based companies "PORR", "Tehnoput" and "Bemax", and the "Mehanizacija i programat" from Nikšić. The call stipulated that the price offered may not exceed 17.5 million euro, as in the contract previously awarded to "Putevi".

XI. INFORMACIJE O PONUĐENIM CIJENAMA	
Cijena najpovoljnije ponude	- 17.546.108,64 € sa PDV-om
Najniže ponuđena cijena	- 17.546.108,64 € sa PDV-om
Najviše ponuđena cijena	- 17.546.108,64 € sa PDV-om

An excerpt from the bid opening report

Interestingly, the Transport Directorate received the approval from the competent authority, the Public Procurement Directorate, to enter into the negotiation procedure only 20 days after it had actually sent the call for bids to the above companies, although it was obliged by law to obtain the approval first, and only then to send the call.

<p style="text-align: center;">DIREKCIJA ZA SAOBRAĆAJ</p> <p>Broj: 02-6682/1 Podgorica, 03.08.2009.godine</p> <p style="text-align: center;">ZAPISNIK SA OTVARANJA PONUDA</p> <p>po pregovaračkom postupku bez prethodnog objavljivanja poziva za javno nadmetanje – Poziv br. 13/09, za izbor najpovoljnije ponude za izvođenje radova na izgradnji puta Risan – Žabljak, dionica Šavnik – Grabovica – Tunel «Ivica», L=11,14 km</p>	<p>Podgorica, 24.08.2009. godine</p> <p style="text-align: center;">CRNA GORA Direkcija za saobraćaj Kabinet Direktora - g-dina Veselina Grbovica, dipl.ing. -</p> <p style="text-align: right;"><i>Podgorica</i></p> <p>Predmet: Zahtjev za davanje prethodne saglasnosti o ispunjenosti uslova za sprovođenje pregovaračkog postupka bez prethodnog objavljivanja poziva za javno nadmetanje za javnu nabavku « izvođenje radova na izgradnji puta Risan – Žabljak, dionica Savnik – Gabovica – Tunel „ Ivica „ L = 11,14 km » čija procijenjena vrijednost iznosi 14.500.000,00 eura, (Vaš akt broj 02-6345/1 od 17.jula 2009.godine i dopunskog akta broj 01-6345/2 od 19.avgusta.2009.godine,</p>
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Documents proving that the Transport Directorate published the call unlawfully - comparison of dates

The “Bemax” company was the only one to send a bid, and thus in December 2009 the construction works contract was concluded with them for the total value of 17.5 million euro. However, the Transport Directorate violated the PPL drastically by awarding the works to “Bemax”, since this company did not meet the tender eligibility criteria.

Namely, among a number of documents to be provided, bidders were obliged to make available the certificate of having access to loans or other financial means up to the full bid amount, which in the case at hand would be 17.5 million euro.

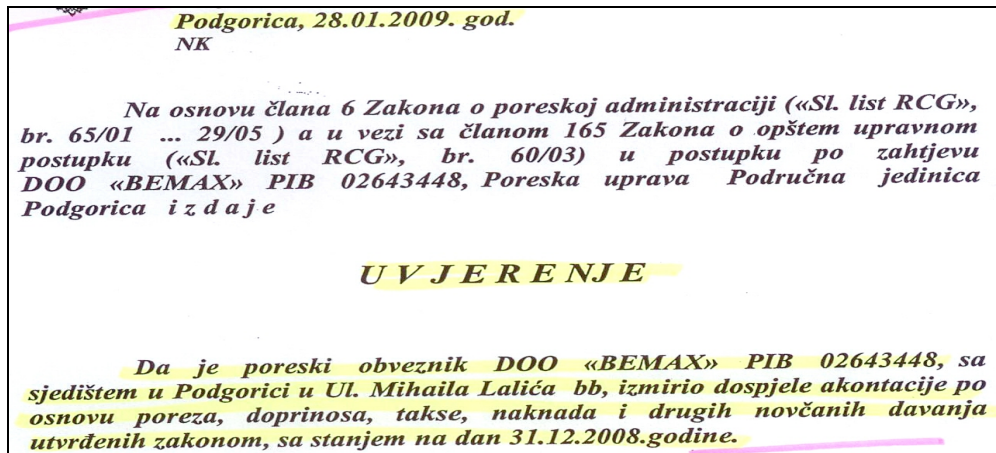
Instead of any such proof, “Bemax” furnished an affidavit stating that at the time they were carrying out works in total value of 55 million euro and, hence, were creditworthy to independently finance the construction works on the Risan-Žabljak road.

This actually means that “Bemax” vouched for itself for the credit facilities and such an affidavit is indubitably no relevant proof, because of which the Transport Directorate was obliged to reject the bid as invalid.

<p style="text-align: center;">IZJAVA PONUĐAČA O KREDITNOJ SPOSODNOSTI</p> <p>Izjavljujemo da, u ovom trenutku, preduzeće Bemax d.o.o. iz Podgorice izvodi radove u vrijednosti od 55.484.180,44 €, i samim tim je kreditno sposobno da, samostalno, iz ostvarenog profita, finansira radove na izgradnji puta Risan-Žabljak, Dionica: Šavnik-Grabovica-Tunel Ivica (L=11,14 km).</p>
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Affidavit of creditworthiness by Bemax

Incidentally, this was not the only reason to reject the "Bemax" bid, because their tax clearance certificate was also older than six months, which is not allowed under the PPL. As a part of its tender documents, on 03 August "Bemax" filed a tax clearance certificate bearing the date of 28 January 2009, meaning that at the time of bid opening it was invalid. This was another reason to deem the bid by "Bemax" as invalid, but it did not happen.



Tax clearance certificate by Bemax

With reference to this case, MANS lodged criminal charges against responsible persons within the Transport Directorate on the count of misuse of office against the public interest, but also against the director of "Bemax" for suspicion of misuse of position in business activity. MANS received no response by the state prosecution until the moment of publication.

Case study 2 - Risan-Žabljak, Section: Entry to the "Ivica" Tunnel - Motički Gaj



When in February 2008 the Transport Directorate published a call for the construction of the tunnel "Ivica", on a section of the Risan-Žabljak road, the estimated value of works was 16 million euros.

The interested bidders could learn from the public call that these works would be financed from the state Budget. However, it was only after the bidder was chosen and the contract concluded that the Transport Directorate revealed the payment would be done over seven years, in quarterly annuities.

Hence, prospective bidders were unaware of this at the time of the public call for tenders, which might have affected their decision whether to take part. At the same time, this constitutes a violation to the PPL, undermining the principles of transparency and competition.

Following the least price criterion, out of the four bids received, the Transport Directorate selected the Austrian company "PORR Technobau" for the total price somewhat over 21 million euro. Although the price offered exceeded substantially the one estimated, neither in this case did the Transport Directorate use the opportunity offered by the law to cancel the tender, but decided against the public interest to award the deal exceeding the initial estimation by as many as five million.

XI. INFORMACIJE O PONUĐENIM CIJENAMA	
Cijena najpovoljnije ponude	- 21.181.513,78 € sa PDV-om
Najniže ponuđena cijena	- 21.181.513,78 € sa PDV-om
Najviše ponuđena cijena	- 27.822.619,19 € sa PDV-om

An excerpt from the bid opening report

On the other hand, by examining the tender dossier it becomes evident that the Transport Directorate not only awarded the work for a much higher price, but also favoured the "PORR Technobau", whose offer should have been rejected as invalid.

Namely, bidders were required to furnish a certificate of having access to credit or other financial facilities enough to secure adequate cash flow throughout the development stage as a proof of their financial worthiness.

The amount of such guarantees should at least equal the bid price. Notwithstanding such a clear requirement, "PORR Technobau" provided a bank certificate of having access to credit facilities in the amount of 17.5 million euro, while it should have been issued at 21 million euro instead. Hence, the bid was invalid since the company failed to meet the required eligibility criteria, leading to yet another violation of the PPL provisions.

dokaz da ima pristup kreditnim sredstvima na iznos 17 500 000, 00 € (u visini građevinskih radova iz ponude) –Bank Austrija Creditanstalt , i istovremeno izjava da sredstva ponuđača nisu u blokadi, naveden broj zaposlenih u preduzeću Porr Teehnobau und Umwelt

In place of a bank certificate

Likewise, the contracted completion date was the end of 2009. In May 2010, however, the works were still in progress, and the Transport Directorate signed an annex to the contract with "PORR Technobau" moving the completion date to the end of October 2010.

Član 3.
Ukupan iznos radova po inoviranim predmjeru iznosi 20.923.240,55 € bez obračunatog PDV-a. i to:

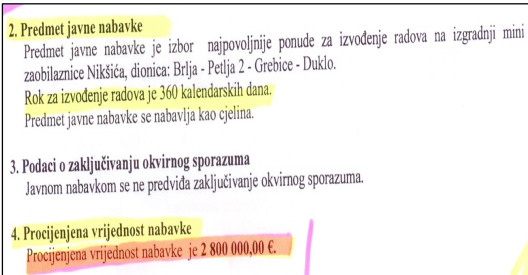
However, the annex to the original contract not only extended the completion date, but also established a different price for the deal, being now, according to the bill of quantities, close to 21 million euro, less the Value Added Tax (VAT). Factoring in the VAT amount due, the total costs of works go up to some 24.5 million, or an incredible eight million more than what the initial estimations said.

Acting in this case, MANS lodged a criminal report against the responsible persons within the Transport Directorate on the count of law violation and misuse of office working against the public interest. At the time of the publication, this report was still pending.

3.2. Increasing the deal price and additional works

In the following several cases, contracting authorities enabled subsequent and additional works, thus increasing the contracted deal price by several times. The cases below feature annexes to the original contracts approving additional costs, signed several months, or even years, after the original completion date has elapsed. Often, furthermore, the nature of such additional works is not known.

Case study 3 - Mini bypass road in Nikšić



In February 2008, the Transport Directorate published a call for tenders to select the most advantageous bid to develop a mini bypass around Nikšić. The works were supposed to be complete within one year, at the estimated costs of 2.8 million euro.

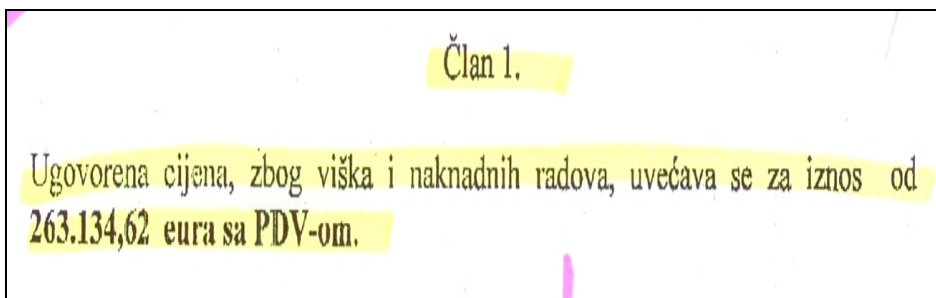
Following the least price criterion, out of the three bid received, the Transport

Directorate selected the Nikšić-based company "Mehanizacija i programat" with the bid at 3.6 million euro.

Hence, the bid exceeded by as much as 880.000 euro the estimated value of works, and again the Transport Directorate did not resort to the option from the law to cancel the tender on the account of having the bids increasing substantially the estimated price.

The contract was signed in March 2008 and stipulated the bypass to be developed within two years. Under the contractual terms and conditions, the "Mehanizacija i programat" was supposed to receive quarterly payments for the works done.

In three years, between October 2008 and October 2011, the Transport Directorate paid for these works the total of 15 instalments of the same amount, 245,382 euro. On the occasion of the last payment in October 2011, an annex to the contract was signed increasing the deal price by 263,134 euro, on the account of subsequent works.



The price increased by more than 260,000 euro

Hence, the annex on additional works was concluded three and a half years after the original contract signature, at the time when the works should have been long since completed, making one wonder how such works surfaced all of a sudden and leaving suspicions whether these were executed at all.

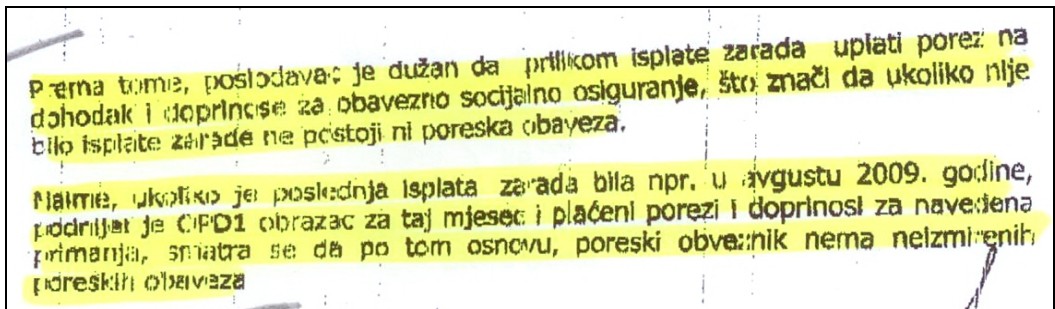
At the same time, the total value of the deal reached close to four million euros, or as much as 1.2 million euro of taxpayers' money more than the initial estimations. Again in this case MANS lodged a criminal report, but to this date the state prosecution failed to respond to it.

Case study 4 - Third lane on Podgorica - Cetinje road

In February 2010 the Transport Directorate published a call for the construction of the third lane on the Podgorica-Cetinje road. The estimated value of works was 2.5 million euros, and was supposed to be completed within three months.

The total of seven companies offered bids, and the one offered by the Podgorica-based company "Tehnoput" of the total value of close to 1.3 million euros was selected as the most advantageous one.

However, the "Bemax" company from Podgorica complained against such a decision to the Commission for the Control over Public Procurement Procedures claiming the invalidity of the bid offered by "Tehnoput", as a company with tax liabilities.



Commission's interpretation

The Commission upheld the complaint, ordering the Transport Directorate to repeat the decision-making procedure. In doing so, the Commission utterly disregarded the interpretation by the Ministry of Finance that "Tehnoput" had no outstanding tax liabilities. To the contrary, the Commission arbitrarily interpreted the legislation and passed an unlawful decision favouring the "Bemax" company, as further reconfirmed by the Administrative Court's judgment, ruling in favour of "Tehnoput" in June 2010.

However, at the time the contract was already concluded with "Bemax" (in late March 2010) for the value of works exceeding 1.6 million euro. This leads to a conclusion that the state Budget sustained damages of some 300,000 euro, the amount for which the "Tehnoput" bid was lower, on the account of the wrong decision by the Commission.

In addition, in late December the Transport Directorate and "Bemax" signed an annex to the contract envisaging additional works increasing the total costs for some 61,000 euros. It is not known what additional works these might be, or how it was possible to sign an annex to the contract at the time when the works were long since completed.

Član 1.

Ugovorena cijena radova iz osnovnog ugovora, zbog naknadnih i viška radova izvedenih po nalogu Investitora, Nadzornog organa i na osnovu Prvog izvještaja Komisije za tehnički pregled izvedenih radova, broj: 02-9791/2 od 18.11.2010. god., radi povećanja bezbjednosti i stabilnosti rekonstruisanog putnog pravca, uvećava se za iznos od **61.076,66 €** sa PDV-om i ukupno iznosi **1.678.094,02 €** sa PDV-om.

An excerpt from the Annex to the initial contract

MANS lodged a criminal report against the responsible persons within the Commission on the count of misuse of official authorities to the damage of the state Budget.

Case study 5 - City Library in Podgorica

The first contract for the city library building extension was concluded between the Agency for the Construction and Development of Podgorica and the "Cijevna komerc" company back in September 2006. The contracted value of the deal was over 550,000 euros, and the works were due to be completed within 90 days.

However, the works were not completed within the time envisaged, as confirmed by the information that only a year afterwards, in October 2007, an annex to the contract was concluded extending the completion date to April 2010. It is noteworthy that at the time of the annex signature, two new contracts for the library restoration were already in force, as explained in detail in the next section.

Član 1.

Član 6. stav 1. osnovnog ugovora se mijenja i glasi:

Obzirom da u ugovorenom roku od 90 dana računajući od dana uvođenja u posao (30.07.2007 god. do 30.10.2007 god.) nije bilo moguće završiti radove koji su predmet osnovnog ugovora »Nadgradnja objekta Gradske biblioteke u Podgorici«, rok izvođenja radova se produžava i Izvodjač se obavezuje da iste završi najkasnije do 01.4.2010 god.

Rok se produžava zbog pojave nepredvidjenih i naknadnih radova u skladu sa Informacijom o radovima na objektu biblioteke i izgradnji Aneksa broj 9657 od 04.10.2007 god., koja je sačinjena i usaglašena od strane Komisije za nadzor i Projektantskog nadzora.

An excerpt from the annex to the initial contract

Hence, the library building extension was due to be completed, according to the newly set deadline, in April 2010, but it never happened. Early that year, the Agency requested from the Public Procurement Directorate to approve additional works on the library extension amounting to close to 140,000 euros, or the 25% of the initial contract value.

This percentage is the maximum amount allowable for additional works under the Public Procurement Law and may be awarded to the contractor without repeating the tendering procedure. The Directorate approved the request, and thus the total value of the library building extension increased to close to 670,000 euros.

Subsequently, two annexes to the original contract were concluded with "Cijevna komerc" - one in March 2010, rescheduling the completion date to 30 June the same year. The other annex was signed in April and stipulated that the additional works' value was close to 140,000 euros.

This increase was approved to "Cijevna komerc" based on the request sent to the Agency only after it procured the approval from the Public Procurement Directorate; interestingly, the bill of quantities for additional works matches up to a cent the sum approved, i.e. the 25% of the initial price.

NADOGRADNJA				
1	Zidanje zidova od blok opeke d=25cm pos III.1 m2 350,37 x 28,50	9,985.55	1,697.54	11,683.09
2	Zidanje zidova d=12cm pos III.5 m2 143,43 x 24,82	3,559.93	605.19	4,165.12
3	Betoniranje armirano-betonskih rebara 40x50 cm pos II.51 m3 36,58 x 155,00	5,669.90	963.88	6,633.78
4	Nabavka i montaža armature pos II.8 kg 6237,48 x 1,00	6,237.48	1,060.37	7,297.85
5	Celična konstrukcija pos IV.1 kg 13385,68 x 2,30	30,787.06	5,233.80	36,020.86
6	Celična konstrukcija . Dopunska ponuda kg 1537,72 x 2,30	3,536.76	601.25	4,138.01
7	Vadenje ostataka drvenih greda iz kamena i AB zidova Dopunska ponuda kom 120,00 x 26,00	3,120.00	530.40	3,650.40
8	Nabavka i ugradnja fasadnih panela. Dopunska ponuda m2 38,50 x 42,30	1,628.55	276.85	1,905.40
9	Fasadna bravarija, daljinska komandaza roletne kom 62. Dopunska ponuda varijanta II.	11,501.00	1,955.17	13,456.17
10	Fasadna bravarija. Dopunska ponuda m2 45,95 x 348,89	16,031.50	2,725.36	18,756.86
11	Nabavka i ugradnja zidne i podne keramike pos V.3 m2 778,10 x 19	14,783.90	2,513.26	17,297.16
12	Nabavka i ugradnja hrastovog parketa po V.1 m2 235,00 x 36,00	8,460.00	1,438.20	9,898.20
13	Termotehničke instalacije dopunska ponuda br 16173 od 24.12.2008.	3,758.21	638.90	4,397.11
UKUPNO:		119,059.84	20,240.17	139,300.01

An excerpt from the bid by Cijevna komerc

While the library building extension contract was still valid, although largely in delay, the Agency for Construction and Development of Podgorica decided to issue a new public call for the library building works. It was published in April 2007 and covered two lots.

The first lot involved the library building restoration and the construction of the underground passage, with the estimated value of works amounting to 670,000 euros, while the second lot involved the construction of an annex to the building, with the value of works estimated at half a million euros.

The economically most advantageous bid was set as the bid selection criterion. The public call did not give any deadline for the work completion.

Ekonomski najpovoljnija ponuda, sa sledećim podkriterijumima, prema opadajućem redosledu

1. Ponudjena cijena0-60 bodova
2. Kvalitet.....0-30 bodova
3. Rok završetka radova0-5 bodova
4. Garantni period..... 0-5 bodova

Bid selection criteria

When announcing this public procurement, the Agency was in breach of the tendering rules. Namely, the decision to launch a tender was made three days after the call was issued. This is in direct contravention to Article 28 of the PPL, stipulating clearly that “before launching the public procurement procedure, the contracting authority shall adopt the decision to launch and conduct the procedure”.

In addition, although the call did not stipulate the completion date, the actual decision precisely stated that the “maximum limit for the works execution for both lots was four months”.

AGENCIJA ZA IZGRADNJU
I RAZVOJ PODGORICE" D.O.O.
Broj: 35/07
Podgorica, 30.07.2007.god.

Na osnovu člana 8. Odluke o osnivanju Agencije za izgradnju i razvoj Podgorice d.o.o. i člana 20. Statuta Agencije a u skladu sa članom 28. Zakona o javnim nabavkama (Sl. list RCG broj 46/06) donosim

O D L U K U

o pokretanju i sprovođenju postupka javne nabavke br.35/07

I. Agencija za izgradnju i razvoj Podgorice d.o.o., iz Podgorice, Ul. Jovana Tomaševića bb, matični broj 02397579, oglašava poziv za otvoreni postupak javne nabavke za izvođenje radova po sledećim partijama:

1. Rekonstrukcija Biblioteke i izgradnja podzemnog prolaza (tačka programa 8.1.12.)
2. Izgradnja aneksa Biblioteke (tačka programa 8.3.1.)

Decision to launch the public procurement procedure

One bid was submitted by “Cijevna komerc”, which proposed two options for each lot, bearing with different costs. The option A for the library building restoration and the underground passage construction amounted to somewhat over 800,000 euros, while the option B price was close to 940,000 euros.

At the same time, the value of the works on constructing the annex to the library building amounted to 460,000 euros in the option A, and a trifle less, a bit under 460,000 euros, in the option B.

1.«CIJEVNA KOMERC»d.o.o Podgorica, Ulica crnogorskih serdara bb, ponuda zavedena pod brojem 4985 i 4986 od 31.05.2007 godine. Ponuda je primljena na arhivi Agencije u 13,45 časova.

Ovaj ponuđač nudi:

1. Rekonstrukciju Biblioteke i izgradnju podzemnog prolaza

za cijenu od:

VARIJANTA A : 818.098,83 € sa uračunatim PDV-om , u roku od 12 mjeseci, način plaćanja 30 % avansa, ostatak situacijama.

VARIJANTA B : 938.886,96 € sa uračunatim PDV-om sa istim uslovima kao u prethodnoj varijanti.

2. Izgradnja aneksa Biblioteke

za cijenu od:

VARIJANTA A : 462.489,43 € sa uračunatim PDV-om , u roku od 12 mjeseci, način plaćanja 30 % avansa, ostatak situacijama.

VARIJANTA B : 457.553,66 € sa uračunatim PDV-om sa istim uslovima kao u prethodnoj varijanti.

An excerpt from the bid by Cijevna komerc

In both cases the Agency opted for more expensive offers. Given that the price had the greatest weight in overall scoring, this indicates an evident misuse of authorities by giving preference to the supposedly better technical solutions.

This is particularly evident in the library building restoration and the underground passage building lot, since the preferred option exceeded the estimated price for over 268,000 euros.

1. Rekonstrukcija Biblioteke i izgradnji podzemnog prolaza

Komisija predlaže naručiocu da prihvati ponudu ponuđača „Cijevna komerc“ iz Podgorice, VARIJANTU B, po cijeni od 938.886,96 eura sa uračunatim PDV-om. Rok za izvođenje je 12 mjeseci, avansno plaćanje u iznosu od 30 %, a ostatak putem situacija.

2. Izgradnja aneksa Biblioteke

Komisija predlaže naručiocu da prihvati ponudu ponuđača „Cijevna komerc“ iz Podgorice, VARIJANTU A, po cijeni od 462.489,43 eura sa uračunatim PDV-om. Rok za izvođenje je 12 mjeseci, avansno plaćanje u iznosu od 30 %, a ostatak putem situacija.

An excerpt from the bid by Cijevna komerc

The contracts were signed in July 2007, with the works to be completed within one year. However, a year later annexes were signed envisaging additional works and putting the completion date another two years forward.

Član 1.

Član 11. stav 1. osnovnog ugovora se mijenja i glasi:

Obzirom da u ugovorenom roku od 12 mjeseci računajući od dana uvođenja u posao (30.7.2007 god. do 03.8.2008 god.) nije bilo moguće završiti radove koji su predmet osnovnog ugovora »Rekonstrukcija biblioteke i izgradnja podzemnog prolaza«, rok izvođenja radova se produžava i Izvodjač se obavezuje da iste završi najkasnije do 01.4.2010 god.

Rok se produžava zbog pojave nepredvidjenih i naknadnih radova u skladu sa Informacijom o radovima na objektu biblioteke i izgradnji Aneksa broj 9657 od 04.10.2007 god., koja je sačinjena i usaglašena od strane Komisije za nadzor i Projektantskog nadzora.

An excerpt from the Annex to the initial contract

Since even the new deadlines were not observed, the Agency followed the same scenario used already in the library building extension contract. First it procured consent from the Public Procurement Directorate for the negotiation procedure to be followed for additional works up to 25% of the initial contract value, or over 230,000 and 115,000 euros, respectively, in the cases at hand. Then, annexes to the contracts were concluded, and only after that did the "Cijevna komerc" submit bids for extra works, matching to a cent the amounts approved.

In December 2009 the Agency for Construction and Development of Podgorica published another tender for the works on the library building. This time the call referred to joinery and procurement and instalment of mechanical engineering equipment and fire-resistant doors. The estimated value was 520,000 euros, and "Cijevna komerc" was again the only one to submit a bid and was awarded the contract for a slightly larger amount.



To date the City Library building has not been completed and put to use. In this case, MANS lodged two criminal reports, and is still awaiting a response.

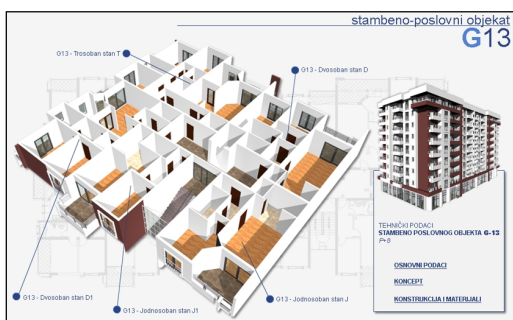
3.3. Extension of deadlines and collection of penalties

In all the cases reviewed where MANS noted the extension of deadlines it proved that the contracting authorities always tolerated such prolongations and never imposed any penalties on successful bidders, as a contractual sanction for delays in contract execution, although provided for under the terms of the contract. Below are some characteristic cases, with excessive extension of the completion dates.

Case study 6 - A contract between Postal Services and the mighty Mayor of Bar

On 03 July 2008, having conducted a public competition, Montenegrin Postal Services "Pošta Crne Gore" entered into an agreement with the Zavod za izgradnju Bara (ZIB) owned by Pavićević, on joint construction of a residential and commercial building.

The Contract referred to a construction of a residential and commercial building no. 13 in zone G within the DUP "Topolica 1" in Bar, at the location of today's main post building in Bar. The Contract envisaged that the stake of Pošta in this joint deal to be the building lot of 3,734m² and the old post building that was supposed to be demolished and the new building of mixed use built. ZIB, on the other hand, was supposed to assume full construction costs, payment of municipal fees, and procurement of a building permit and certificate of occupancy.



For its stake, Pošta was to receive 30% of all residential and commercial units in the future building, or not less than 4.3 million euro in value in total. The remaining 70% was supposed to go to ZIB.

ZIB committed itself to a turn-key project to be completed for not more than 30 months starting from the signature day, i.e. not later than January 2011. The contract also envisaged that Pošta was entitled to 0.1% of the said 4.3 million for each day of the delay, or 5% of the amount at the most. On the other hand, ZIB committed to ensure blank bills with monthly authorities as a guarantee for timely and good quality works.

The contract also envisaged for Pošta to set up a supervisory service to monitor the implementation of contracted works.

Six months after the expiry of the deadline, and almost three years after the Contract signature, the winning bidder ZIB failed to build a single floor of the envisaged building of mixed residential and commercial use. The construction site has been fenced, the foundations and the underground floors built, and that is it. The valid urban plan envisages an eight-storey building on this lot.



Construction site, May 2011

Information received by MANS from Postal Services of Montenegro , invoking the Free Access to Information Law, evidence many an irregularity in the contract execution, both by the Pavićević's company, but also by Pošta.

According to information held by MANS, Pošta failed to set up the supervisory service that was supposed to monitor the contract execution, but approached ZIB on the account of the delay for the first time after the deadline has already expired in early February this year. In the letter signed by Milan Martinović, Executive Director of Pošta, ZIB is called to provide an explanation regarding the delay in the contract execution and supply evidence of being able at all of executing this investment.

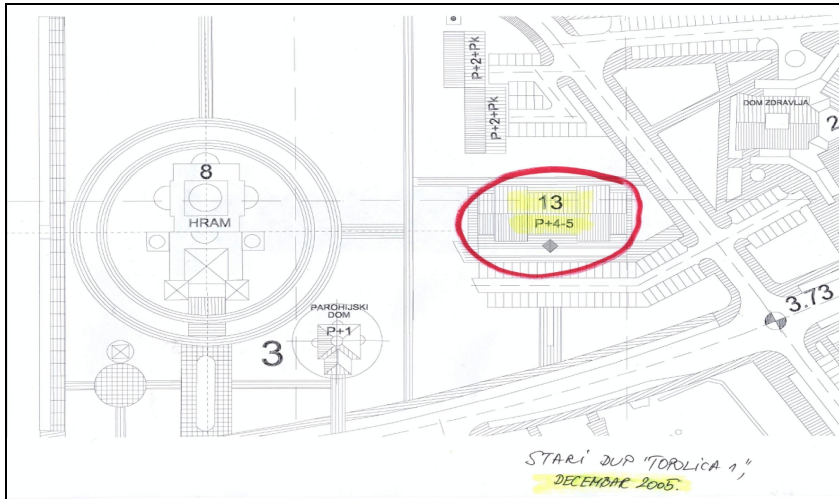
In the next letter sent to ZIB on 08 February this year, Martinović informs ZIB that a joint working group needs to be set up composed of the representatives of Pošta and ZIB, that should assess the situation on the ground and prepare the so-called Protocol on the Degree of Development.

The said working group came up with the Protocol already on 10 February which stated that of all the works envisaged ZIB carried out only the dislocation of underground electrical and water installations, and that the excavation works for the foundation are now in progress.

The interesting thing about the Protocol is that at the moment of the conclusion of the contract between Pošta and ZIB in 2008 no building was envisaged at the given lot and one of the reasons for the delay was the fact that ZIB waited for the adoption of amendments to the plan which occurred in September 2009 before starting the development. However, the official data depict a different scenario.

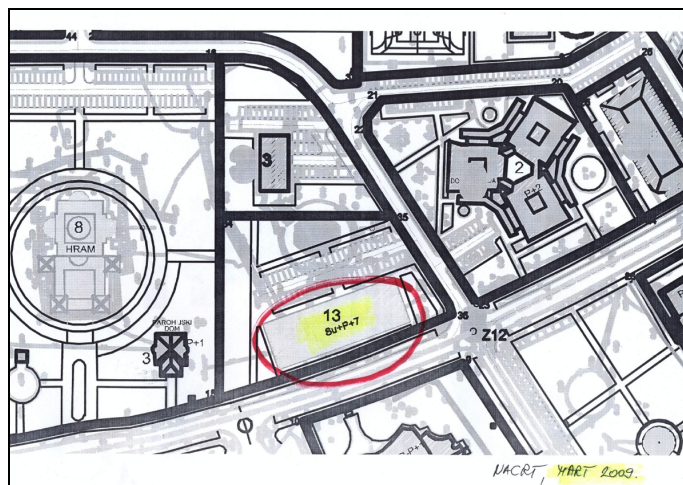
The changes of the DUP "Topolica 1" from December 2005 envisaged for the given lot the residential and commercial building of the size ground floor + 4 to 5 upper floors (G+4-5), which is understood to have provided grounds for the Contract conclusion

between Pošta and ZIB in the first place. The contract itself does not provide information on the gross floor area, nor the number of floors, nor the total investment value, which enabled at a later stage when the DUP was changed to increase the number of floors of the future building without any problems.

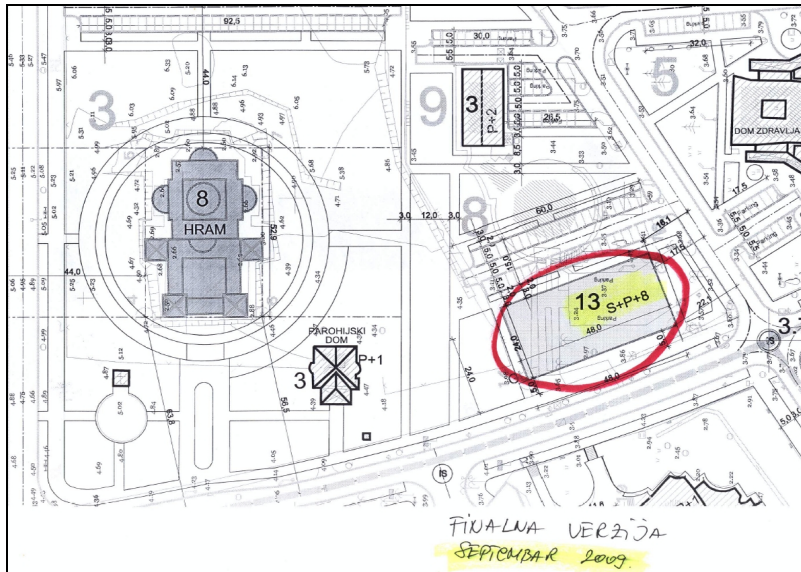


An excerpt from DUP Topolica 1, December 2005

In July 2009, a year after signature of the Contract between Pošta and ZIB, the Amendments to DUP Topolica were put for public discussion, which instead of 5 storeys envisaged now a 7-story building at the lot owned by Pošta. During the public discussion no one had any objection on the number of floors envisaged, nevertheless the final draft of the DUP approved in September 2009 had another, eighth storey added. The amendments to the plan were done by "Basketing" known as of earlier for their cooperation with ZIB and Žarko Pavićević.



An excerpt from Draft DUP, March 2009



An excerpt from the final DUP, September 2009

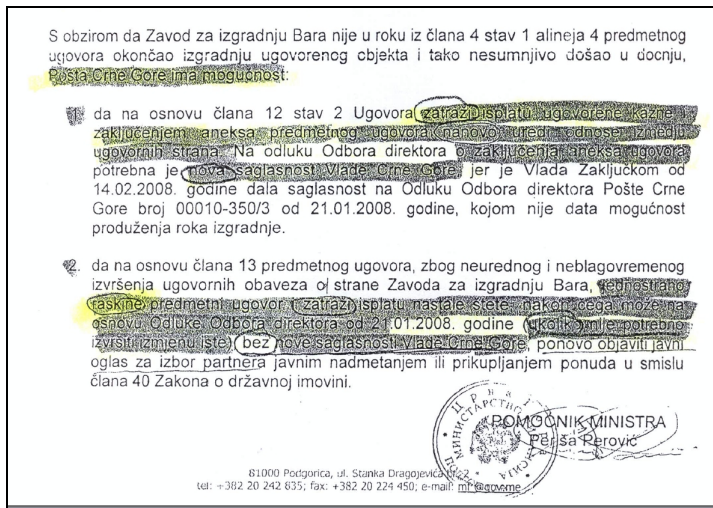
Particularly disconcerting is the fact that the Protocol itself states that after signing the Contract ZIB **“started the building design based on the unofficial information on planning documents”**. This is indicative of suspicion that ZIB, through its owner, Žarko Pavićević, had privileged access to information on final solutions in the Detailed Urban Plan, in this case the final number of storeys allowed.

U međuvremenu je AD "Zavod za izgradnju Bara", na osnovu nezvaničnih saznanja o planskoj dokumentaciji, radio na projektu, uz prethodni dogovor sa predstavnicima "Pošta Crne Gore" DOO u vezi projekta, odnosno projektnih rješenja, kao i organizaciji prostora na urbanističkoj parceli i stvaranja mogućnosti nesmetanog funkcionisanja postojećeg objekta Pošte.

Excerpt from the Protokol

This reconfirms our suspicions that the Mayor of Bar is unable to keep his office, in which capacity he has the authorities to initiate the amendments to planning documents and act in public interest, separate from the need that as the majority owner of ZIB to procure for his company as much profit as possible. In this specific case, there is no official record of anyone during the public discussion for G-13 asking for the increase in the number of floors, implying that the agreement with “Basketing” was made in a different arrangement.

The representative of Pošta informed the Ministry of Finance of the situation with ZIB and asked for advice how to proceed. In early March, in a letter to Pošta, the Deputy Finance Minister, Periša Perović indicated two possible scenarios.



Excerpt from the Ministry response

The first scenario implied the termination of Contract with ZIB, the payment of agreed penalty for being in default and calling a new tender without prior approval from the Government. The second scenario also implied the collection of the agreed penalties and conclusion of an Annex to the Contract to provide for new arrangements with ZIB, i.e. set the new deadline for completion of works. Pošta would need prior Government approval for the Annex because the previous approval did not envisage any possibility for extension of the deadline.

According to the terms and conditions of the 2008 Contract, as the investor, Pošta Crne Gore was obliged to monitor the development and far before the deadline expiry note that ZIB would be unable to honour its commitments. Moreover, by signing the Contract ZIB undertook to provide guarantees to Pošta as a security for timely execution of works, but it is not known whether Pošta has ever used it to compensate for damages caused by the breach of the Contract. This leads to a conclusion that Pošta has tacitly enabled ZIB to be in default without having paid any penalties to date.

In mid March this year ZIB approached Pošta with the demand to conclude an Annex to the 2008 Contract to extend the deadline for completion of the construction works by the end of 2012. It is noteworthy here that one of the criteria for winning the tender was the deadline by which ZIB committed to complete the building, which has been doubly extended by this Annex. On the occasion, ZB informed Pošta that they have agreed with the Atlas bank, should there be a need, to support them in the project execution.

Finally, in early May this year, the Board of Directors of Pošta approved the text of the Annex of the ZIB Contract which was sent to the Government for approval. The Annex was considered in the last session of the Government held on 02 June this year.

Član 4. osnovnog ugovora mijenja se i glasi:

Ugovorne strane saglasno konstatuju da Pošti pripada 30% neto površine izgrađenog objekta i to:

- 1790 m² stambenog prostora
 - 329 m² poslovnog prostora
- koji prostor ima biti predat Pošti najkasnije do 31.12.2012. godine.

ZIB Bar, shodno prihvaćenoj ponudi, cijeneći mogućnost otkupa pripadajuće neto površine izgrađenog objekta obezbjeđuje Pošti:

- Prenos sredstava po osnovu nepreuzetih stanova u iznosu od 3.222.000,00 eura uz dinamiku isplate:
 - a) 500.000,00 eura do 15.09.2011. godine
 - b) 500.000,00 eura do 15.03.2012. godine
 - c) 600.000,00 eura do 15.06.2012. godine
 - d) 700.000,00 eura do 15.09.2012. godine
 - e) 922.200,00 eura do 15.12.2012. godine
- Poslovni prostor velicine 329 m² urađjen po sistemu „ključ u ruke„
- Kontinuirano vršenje poštanskih usluga u postojećem objektu do uklanjanja istog.

At the proposal of ZIB, the Annex envisages the extension of the deadline for the completion of works by the end of 2012 and sets for the first time the total area of business and residential premises belonging to Pošta as per this deal. Thus, Article 1 of the Annex envisages 1,790m² of residential and 329 m² of business premises belonging to Pošta.

Excerpt from the Contract Annex I

Instead of taking over the apartments, Pošta decided, as per the Annex, for ZIB to pay the total of 3.2 million euro instead for the 1,790m² of residential area, or 1,800 euro/m² which exceeds by far the current market prices. Obviously, the greater price per m² enables ZIB to transfer to Pošta less space in residential area. The 329 m² of business premises are estimated at 1.12 million euro, or at the rate of 3,400 euro/m².

With this Annex, ZIB undertakes to secure blank bills as a security for timely execution of works, implying that ZIB failed to do so at the time of entering into the 2008 Contract with Pošta.

Pošta Crne Gore, odnosno njen direktor Martinović i Odbor direktora su najvjerojatnije prilikom sklapanja ugovora iz 2008. godine, ZIB-u „progledali kroz prste“ i u posao izgradnje stambeno-poslovnog objekta ušli bez ikakve garancije od strane ZIB-a da će posao biti kompletiran na vrijeme. Na ovaj način nisu adekvatno zaštitili interese ovog državnog preduzeća što se nažalost u slučaju saradnje sa ZIB-om pokazalo kao velika greška. I pored toga što je postojao dovoljan osnov za jednostrani raskid ugovora sa ZIB-om, tokom dvije godine trajanja ugovora, čelni ljudi iz Pošte to pitanje nikada nisu stavili na dnevni red.

S On the occasion of signing the 2008 Contract, Pošta Crne Gore, i.e. its director Martinović and the Board of Directors have most probably “turned a blind eye” and plunged into the development deal without any performance guarantees issued by ZIB. Thus, they failed to properly protect the interests of this state-owned company which has unfortunately turned to be a huge mistake in the case of cooperation with ZIB. Notwithstanding the existence of adequate grounds for one-sided termination of the Contract with ZIB for the two years of its duration, the leading people of Pošta never put this issue on the agenda.

Case study 7 - Sport hall in Kotor

The public call for the construction of a sport hall in Kotor was published in March 2009 by the local Institute for Education and Rehabilitation of People with Hearing and Speech Impairments as the contracting authority. The value of this public procurement was estimated at 4.5 million euro with the works due to be completed within 18 months.

Twelve bidders submitted their bids, and the one offered by the Cetinje-based company "Lipa", 5.2 million euros in value and 12 months for completion, was selected as the most advantageous. Since one of the subcontractors was the company "Eling", with a share of 20% of the total works, it means this company also had to provide full documents requested in the call for tenders. However, this was not the case.

The contracting authority asked all bidders to provide as a proof of their expert and professional abilities the track record of similar executed projects whose nature and complexity were equivalent to the works to be executed.

"Eling" as a subcontractor for "Lipa" was also obliged to submit their track records, since the PPL clearly stipulates that if the value of subcontractor's works exceeds 10% of the total, than the subcontractor must meet all the eligibility criteria as the main contractor.

Iz navedenog naručilac je zauzeo stav, da nedostavljenje odvojenog akta u od strane podugovorača koji si tiče referenci ponuđača, obzirom da su dostavljene licencij firme kao i ovlaštenja lica koja će biti angažovana na radovima iz ponude, predstavlja manje odstupanje, obzirom da nema nikakvog bitnog uticaja na ponudu (čl. 68 stav 2 tačka 11 Zakona o javnim nabavkama), te da je ponuda ponuđača „Lipa“ D.O.O iz Cetinje ispravna.

Notwithstanding this deficiency in the bid and the fact that their offer exceeded by some 700,000 euros the estimated value, the Institute for Education and Rehabilitation of People with Hearing and Speech Impairments deemed it to be a minor deficiency and utterly unlawfully awarded the contract to

the company not even meeting the eligibility requirements.

Završeno svega 25 odsto radova

KOTOR - Iako je sportska dvorana u Kotoru trebala da bude završena 12. maja, prema riječima direktora Zavoda za rehabilitaciju lica sa poremećajima sluha i govora Borislava Kocićevića, u krugu kojeg se gradi sportska dvorana, do sada je završeno svega 25 odsto radova.

Kako je kazao Kocićević, razlog zbog kojih ponemali rade nije postovana su loša kvaliteta termalnog postolja, uskladjivanje projekatne dokumentacije, izvođenje nepotrebni radova na zavrtanjima i ispod temelja, te izmjena trase drenažne obilježje.

- Vremenski uslovi usporili su završavanje radova, kao i one na hidroizolaciji suterenskih zidova, a zamjetnija je i trasa visokonaponskih kablova i izgrađen privremeni kanalizacioni sistem na obilaznoj obilazke koji su bili priklijučeni na septičke jame - pojašnjava Kocićević.

Na sastanku kojem su prisustvovali sve zainteresovane strane u vezi sa ovim investicionim projektom ocijenjeno je da je moguće produžiti rok za izvođenje



preostalih radova i to pod istim uvjetovim uslovima sa istim izvođačima i timom inženjera koji obavljaju stružni radove. Takođe je potrebno sačekati da priključci sa dvorane na kanalizacioni sistem budu obavljeni Generalnim urbanističkim planom, a to posreduje u procesu.

Uz razumijevanje za nanesenu štetu iz nesreće zbog odložene saobraćajnice koja produkuje pored gradilista, pokušaćemo da je što prije osposobimo - kazao je Kocićević i podsjetio da kanalizacioni sistem ispod saobraćajnice nije funkcionisao prije početka radova na izgradnji dvorane.

Zato ćemo sačekati koordinisane aktivnosti svih aktera kako ne bismo dva puta raspisivali istu trasu - najavljuje Kocićević.

Predračunska vrijednost radova na izgradnji sportske dvorane u Raketama je osam miliona i 600 hiljada eura, a glavni izvođač je preduzeće „Lipa“ sa Cetinja. J.B.C.

The Contract with "Lipa" was signed in October 2009, but the works did not start before May of the following year. Given the one year as the time envisaged for the completion of works, the sport hall was due to be completed in May 2011. However, at the time only 25% of the total works were completed.

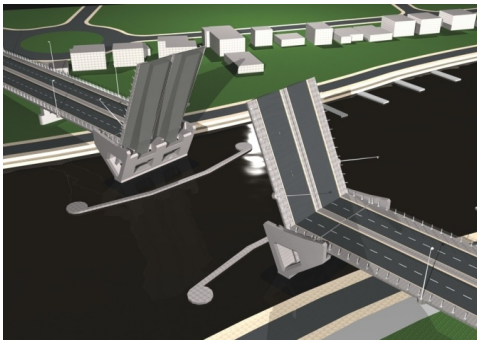
The annex to the contract extending the completion date for another 18 months was signed in June 2011. To date the Institute for Education and Rehabilitation of People with

Hearing and Speech Impairments failed to impose any sanctions on the contractor for delays in contract execution, and currently no works are in progress on the site.

Case study 8 - Bridge on Port Milena

In March 2010 the Transport Directorate published a call for tenders for the construction of a bridge at Port Milena, estimating the value of works at 18 million euros.

Seven prospective bidders applied, and following the least price criterion, the offer by "Primorje" Ajdovščina, Slovenia was selected as the most advantageous bid. This company offered to do the whole works for under 14 million euros.

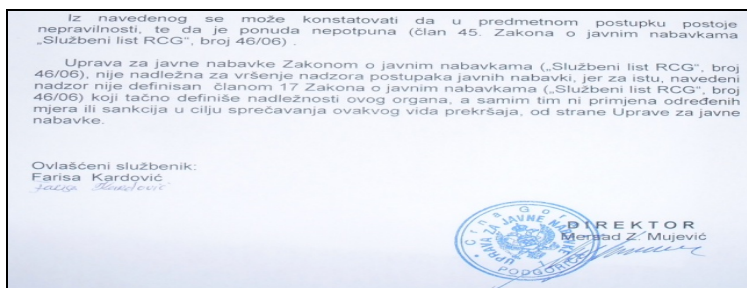


By reviewing the tender documents, MANS established that "Primorje" failed to provide the licence issued by a competent authority to prove its professional capacities, but undertook to procure it if awarded the contract.

The PPL clearly stipulates that bidders are to furnish all the proofs requested by the call for tenders, otherwise their bid is to be rejected as invalid.

The Transport Directorate's decision to award the contract to "Primorje" despite their failure to meet the eligibility criteria prompted two bidders to complain against the decision. However, both complaints were rejected by the Directorate on formal grounds (allegedly, they were not filed by responsible persons), without entering into the merit of complaints.

Acting in this case, MANS requested from the Public Works Administration an official interpretation whether the PPL was violated. In their response, the Administration stated that there were some irregularities in this public procurement procedure, and that the bid submitted by "Primorje" was incomplete.



An excerpt from the opinion given by the Public Procurement Administration

After this interpretation, MANS filed a criminal report to the state prosecution against the responsible persons in the Transport Directorate on the count of misuse of office by non-compliance with the PPL provisions, favouring and awarding the contract to the company which did not meet the eligibility criteria for the tender. We are still waiting for the response.



In addition, the contract for the construction of the bridge on the Port Milena canal was signed in October 2010, and the works were due to be completed within 18 months. It means the bridge should have been completed in April 2012

Deserted construction site

Meanwhile, however, the “Primorje” company went bankrupt and thus in late 2012 the construction site was closed. According to the information from the Government of Montenegro, at the time of bankruptcy, 87% of the works were completed, with the investment to date of close to 13 million euros.

Case study 9 - Krapina road in Budva

In February 2009 the Municipality of Budva published a call for tenders for the construction of the local road in the place called Krapina. The value of the works was estimated at 1.98 million euros, but surprisingly, the tender dossier quotes 400,000 euros as the value for these works. We are unaware whether this was a mistake.

Two bids arrived as per this call, one from the Budva-based company “Gugi commerc” which offered the price somewhat over 2 million euros and the execution of works within 25 days, and the Kotor-based company “YU briv” with the price of 1.97 million euros and the completion of works in 21 days.

However, under the pretext that “Yu briv” failed to provide photographs of previous works, the commission deemed it to be a major deficiency and thus eliminated the bid with 70,000 euros lower price offered.

The contract with “Gugi commerc” was signed in September 2009 and the road was due for completion within 25 days. Nevertheless, to this date, three years afterwards, the road has not been finished yet, although the financial statements show that the total value of the works executed already exceeded the contracted costs, with over 2.3 million euros being already paid.

OKONČANA SITUACIJA	
NA OBJEKTU: IZGRADNJA OBJEKATA INFRASTRUKTURE NA SEOSKOM PODRUČJU	
MJESTO GDJE SE IZVODE RADOVI: BUDVA	
UGOVOR BR. 001-2270/1 OD 04.09.2009 GOD.	
UGOVORENA VRIJEDNOST RADOVA:	2.035.385,91 €
IZVEDENI RADOVI PO PRVOJ PRIVREMENOJ SITUACIJI:	1.886.739,07 €
IZVEDENI RADOVI + PDV(17%):	2.344.811,86 €
ZANAPLATU:	648.072,79 €
Slovima: Sasto četrdeset osam hiljada sedamdeset dva eura i 79/100	

Namely, the documents available show that, for instance, the unbelievable 115.000 euros were spent for disposal of the excavated material at the landfill, or over 5,000 euros for the construction of roadside guardrails although there are no such guardrails on site. At the same time, as much as 260,000 euros were already spent on contingency expenses.

According to the documents, the road has

already been finished

Due to manifest misuse in the implementation of this project, MANS lodged criminal reports against the responsible persons in the Municipality of Budva, and against authorised representatives of "Gugi commerc".



The allegedly finished road towards Krapina - a photograph taken in September 2012

3.4. Violation of the principles of competition and transparency

In certain public procurement cases reviewed MANS identified indubitable violation of the principles of competition and transparency upheld by the PPL.

The following two studies show how the most advantageous or prospective bidders were eliminated through violation of these principles and in the first case the decisive role in such unlawful actions was played by the Commission for Control over the Public Procurement Procedures.

Case study 10 - Tailings impoundment in Mojkovac

In February 2010, the Public Works Directorate published a call for tenders for restoration works on the tailings impoundment in Mojkovac.

The value of this tender was 3 million euros, while the bidders were requested to submit three types of licences as proofs of their professional competencies: for transport, for hydro-technology and for geodetic works.



As many as 17 companies submitted their bids, and the “Tehnoput” company from Podgorica was selected as the most successful which offered to do the whole work in six months for close to 1.6 million euros.

However, the one company, “Bemax” from Podgorica, complained against the decision claiming that the successful bidder failed to prove its professional competence because it did not make available the licence for low and high voltage.

Nedovoljno precizan zahtijev naručioca u pogledu karaktera instalacija uslovljava obavezu ponuđača da uz svoju ponudu dostave licencu za izvođenje radova na instalacijama jake struje i licencu izvođenje radova na instalacijama slabe struje.

An excerpt from the complaint by Bemax

The Public Works Directorate rejected their complaint given that such a licence was not requested in the call for tenders. Interestingly, it was “Bemax” that furnished such a licence.

After the Directorate rejected the complaint, this company complained to the Commission for the Control over Public Procurement Procedures, which decided in their favour and gave its opinion that all bidders were obliged to have furnished the licence for low and high voltage as a proof of professional competence.

At the same time, the Commission ordered the Public Works Directorate to act as per its decision awarding the contract eventually to “Bemax” for the price exceeding 1.7 million euros. This put all other bidders in an uneven position, thus undermining the principles of competition and equality among bidders. At the same time, the contract was awarded to a company whose bid exceeded by 150.000 the price offered by the originally selected bidder.

Again in this case we established the violations of the PPL provisions on conflict of interest. Namely, in a separate public procurement procedure the company called “Preduzeće za građevinski nadzor i laboratorijska ispitivanja” was selected to perform expert supervision over the works executed at the tailings impoundment. The documents revealed that this company acted in the same deal as a subcontractor for “Bemax”. MANS again filed two criminal reports, still pending.

Case study 11 - A footbridge in Bar

In early 2010 the Municipality of Bar published a call for tenders for constructing a footbridge worth 1.45 million euros. The call indicated that the successful bidder would be selected based on the criterion of the economically most advantageous bid, and excluded any possibility of advance payments to the contractor.



Considering the three bids received, the Municipality of Bar rejected one as invalid, while out of the two remaining ones it selected the more expensive one. Namely, the contract was awarded to the Podgorica-based company “Bemax” for the total sum of 1,448,015 euros, although the offer given by the Užice-based company “Putevi” was more favourable and amounted to 1,323,694 euros.

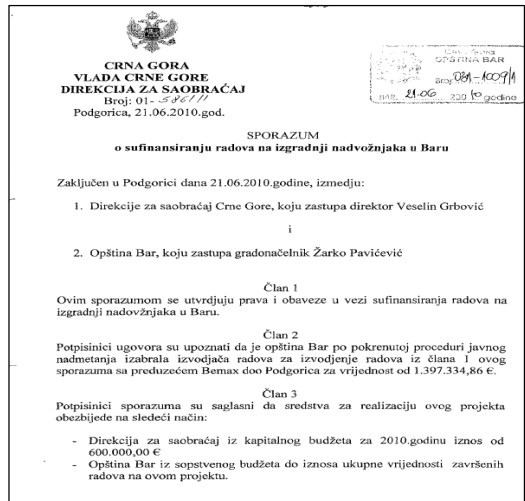
In the rationale of the decision awarding the contract to the company with a higher price bid, it was stated that “Bemax” offered more favourable terms of payment by proposing for 50% of the total price to be paid only after the works have been completed. As it stated further, “at the time of manifest crisis, this would relieve the municipality from further borrowing”.

However, this explanation is fully unacceptable since the PPL clearly stipulates that the tendering procedure may be carried out only if the contracting party has already secured the funds needed, which actually was the case here. Namely, in its 2010 Public Procurement Plan the Municipality of Bar already had appropriations for this deal.

The contract with "Bemax" was concluded in June 2010 and, utterly surprisingly, the contract envisaged the contractor would be immediately paid out 20% as advance payment, although it was ruled out by the tender terms.

Namely, the same day when the Municipality of Bar signed a contract with "Bemax", the Transport Directorate signed a Co-financing Agreement for the construction of the footbridge amounting to 600,000 euros, used for the advance payment.

Co-financing agreement



Hence, the explicit exclusion of the option of bids envisaging advance payment and never mentioning co-financing by the Transport Directorate, which enabled such form of payment, constituted gross violation of the principles of competition, transparency and equality among participants, underlying the PPL.

Pursuant to contractual terms and conditions, the construction works were supposed to have started in July 2010, with the completion date in March the following year. However, the beginning of construction was awaited for five months and the footbridge was officially inaugurated in July 2011. The Municipality of Bar did not warn the contractor of delays in the execution of works nor imposed any penalties on this account, explaining that this was caused by unresolved property ownership and titles over the land at the site for the bridge.

Acting in this case, due to serious violations of the PPL and favouring the "Bemax" company to the detriment of the public interest, MANS filed a criminal report against the responsible persons in the Municipality of Bar. The criminal report is still pending.

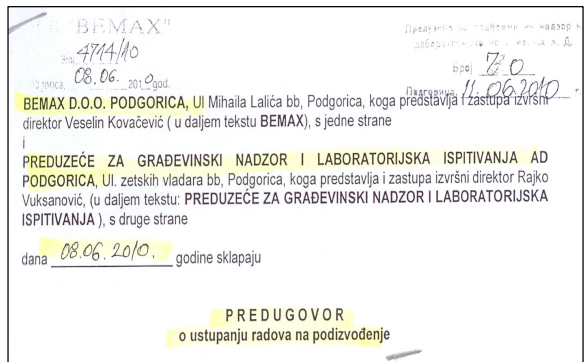
3.5. Conflict of interest

The following case studies show how the Transport Directorate and the Public Works Directorate grossly violated the PPL conflict of interest provisions. Namely, the expert supervision over the works was carried out by the companies that in the same deal were subcontractors to the selected contractors.

Case study 12 - Tomaševo-Pavino Polje road

In May 2010 the Transport Directorate published a public call for tenders to reconstruct a section of the Tomaševo-Pavino Polje road, with estimated value of works being 2.9 million euros. In July the same year, under the least price criterion, the Podgorica-based company “Bemax” was the successful bidder offering to complete the works in 12 months for the total price of less than 2.5 million euros.

The “Bemax” company commissioned as the subcontractor the “Preduzeće za građevinski nadzor i laboratorijska ispitivanja”, concluding the contract with this company in June 2010. However, in a separate public procurement procedure, the Transport Directorate selected this very company to perform the expert supervision over the reconstruction works on the section of the Tomaševo-Pavino Polje road.



The contract confirming the conflict of interest



The construction site at the Tomaševo-Pavino polje road

In other words, the quality of works executed by “Bemax” was supervised by the company acting as their subcontractor in the same deal. This constitutes a gross violation of the PPL provisions referring to conflict of interest, which prompted MANS to file criminal charges against the responsible persons at the Transport Directorate and the authorised representatives of both companies involved.

The contract envisaged that road reconstruction works to be completed within 12 months, i.e. by August 2011. However, the completion date was delayed several months, and the road was officially put to use not earlier than in late October the same year.

Despite the delays, the Transport Directorate failed to impose any penalties for exceeding the deadline, although envisaged as a possibility in the contract. We still have not received any response as regards the criminal report filed on the count of violations of the conflict of interest provisions.

Case study 13 - Ring road around Žabljak

As per the call for tenders from the beginning of the year, in late April 2011 the Transport Directorate passed the decision for the "Preduzeće za građevinski nadzor i laboratorijska ispitivanja" to carry out expert supervision over the construction works at the ring road around Žabljak, at the same time when it published the public call for tenders to construct the ring road.

The public call had the estimated value of works at 1.1 million euros, and the timeframe for completion set at three months. Out of the five bids received, in July the Directorate selected the offer given by the Nikšić-based company "Mehanizacija i programat" as the successful bidder for the total amount of some 830,000 euros.

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PREDUZEĆE ZA GRAĐEVINSKI NADZOR
I LABORATORIJSKA ISPITIVANJA A.D.
Broj: 120
Podgorica, 03-02-2011 god.

UGOVOR
O poslovno-tehničkoj i tehnološkoj saradnji

Sačinjen dana 01.02.2011. godine, u Nikšiću, između

1. AD „Mehanizacija i programat“ iz Nikšića, koje zastupa Izvršni direktor Vidak Mrvošević maš. ing., s jedne strane, i
2. „Građevinski nadzor i laboratorijska ispitivanja“ AD iz Podgorice, koga zastupa Direktor Rajko Vuksanović dipl.ing.grad., s druge strane.

Član 1.
Predmet i cilj ugovora

Ugovarači pristupaju sklapanju ovog ugovora u cilju racionalnijeg iskorišćavanja sopstvenih kapaciteta, zaokruženja tehnološkog procesa iz djelatnosti oba ugovarača, i efikasnijem nastupanju na domaćem i stranom tržištu.

The contract confirming conflict of interest

However, the companies "Mehanizacija i programat" and the "Preduzeće za građevinski nadzor i laboratorijska ispitivanja" already had concluded Business and Technical Cooperation Agreements, which means that this was a manifest conflict of interest situation, and "Mehanizacija i programat" could not have been selected as the contractor.

Moreover, it stems from the report of the bid evaluation panel for the bids for the ring road around Žabljak, from 01 July 2011, that the responsible persons in the Transport Directorate considered the issue of the possible conflict of interest, but eventually

concluded that the procedure for selecting the supervisory company was still underway, and thus the conflict of interest situation did not exist at the time.

This statement, however, was not true given that the decision to entrust expert supervision over the works to "Preduzeću za građevinski nadzor i laboratorijska ispitivanja" was passed on 28 April, or three months before the panel had its meeting.

Hence, this constitutes manifest violation of the PPL whose conflict of interest provisions expressly prohibit supervision to be carried out by a legal entity already having some sort of business cooperation with selected contractors, which was the case here.