

SHADOW REPORT

ON PUBLIC PROCUREMENT
IN MONTENEGRO 2023





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Balkan Tender Watch is a regional coalition of CSOs working on fight against corruption in public procurement in the Western Balkans.



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INTRODUCTION

Starting from 2018, Balkan Tender Watch - a regional coalition of civil society organizations working on fight against corruption in public procurement - assesses the state-of-affairs in public procurement in the Western Balkans.

Based on the unique monitoring methodology comprised of 68 indicators, the average score for all six WB countries related to public procurement performance in terms of application of legislative, institutional, systemic and practical anticorruption measures is calculated at 67%, which means that 33% of all public procurements are still implemented under serious threat of corruption.

In 2022, the total value of public procurement in all WB countries amounted to total of 11.6 billion EUR. The average share of public procurement in the gross domestic product (GDP) of WB countries stands at 8.78%, while its share in total budget expenditure averages at 25.7%. When this amount is correlated to the calculated score of 67%, it could be inferred that, annually, 3.8 billion EUR are under direct threat of corruption.

As regards the general preparedness of WB countries in the area of public procurement, the European Commission has assessed Montenegro as the best prepared and Bosnia and Herzegovina as the least prepared country. Montenegro has moderate-to-good and Bosnia and Herzegovina has some level of preparedness. Kosovo is assessed as some-to-moderately prepared, with remaining WB countries (Albania, North Macedonia and Serbia) falling within the range of moderate preparedness. All WB countries are recommended to improve integrity, fight against corruption and conflict of interests in public procurement, and to ensure consistent implementation of public procurement rules.

Public procurement in the Western Balkans is characterized by absence of/insufficient competition, incomplete transparency, lack of efficient control across the entire public procurement cycle, especially in respect to contract performance, and lack of integrity.

Almost all WB countries suffer some form of non-alignment of their respective legislative and institutional frameworks, which creates problems in implementation of public procurements.

Impunity for violations, abuses and criminal offences committed as part of tender procedures remains the biggest problem in the fight against corruption in public procurement and hinders all and any efforts made towards more efficient public spending.

WB countries are recommended to further improve transparency, accountability and liability in public procurement, take specific measures aimed at detecting and preventing conflict of interests, promote integrity in public procurement, as well as process and monitor cases of malpractice and abuse.

WB countries should take urgent and enhanced efforts to ensure and promote competition, equal treatment and non-discrimination in public procurement, as well as to provide further professional and continuous training for persons involved in public procurement.

In addition to the Comparative Evaluation Report, for state-of-affairs in the field of public procurement at the level of individual WB countries is covered under annual shadow reports aimed to offer country- and evidence-based insight into and "local" view of public procurements: how effective is the public procurement system; is the legislative and institutional setup appropriate; and do the practical measures taken safeguard against corruption.

Abstract

In Montenegro, public procurement is a high-risk area for corruption. Throughout the years, Montenegro has scored high under the Corruption Perceptions Index¹. In an environment where over 2 billion EUR are spent on public procurement over a four-year period (the mandate of the current parliamentary convocation), accounting for an average share of 8% to 15% in the country's GDP, the public sector has great financial power. These data are indicative of the need for transparency, efforts to strengthen bidding companies, and trust restoration in the public sector and daily control of law enforcement. In Montenegro, the Electronic Public Procurement System has been in use for two years now and has accounted for some progress in the area of data availability and monitoring implementation of procurement procedures, especially having in mind that all public procurements are conducted through this system.

¹ <https://www.transparency.org/en/cpi/2021/index/mne>

PUBLIC PROCUREMENT IN 2022

The total value of public procurements in Montenegro has doubled in 2022 compared to the previous year (2021) and amounted to over 0.5 billion EUR.² This increase in value of public procurement was conditioned by the end of the COVID pandemic, but also rising inflation and larger amount of money put into circulation following the global trends. The fact that the average number of bids per tender procedure has increased to 3.5 is encouraging, but is not enough if this trend does not continue and evolve into a situation that could be assessed as competitive market. Equally worrying is the fact that 35.74% of the total value of public procurement was contracted on the basis of only one bid submitted, which is the highest percentage observed in the last four years.³

Comparative overview of public procurement value, as shown in the Ministry of Finance's 2022 Report

Year	Value of public procurements (in EUR)	Value of procurements for electricity and coal (in EUR)	Total value of public procurements (in EUR)
2018	449,373,407.93	85,739,160.97	535,112,568.90
2019	608,224,346.95	107,425,391.96	715,649,738.91
2020	545,150,791.50	97,346,199.40	642,496,990.90
2021	219,680,113.13	112,609,062.06	332,289,175.19
2022	506,954,976.20	246,772,232.57	753,727,208.77

The average duration of public procurement procedures is 105 days for limited procedures, 81 days for open procedures and 34 days for negotiating procedures without previously announced procurement notice. The law grants contracting authorities discretionary powers to decide which type of procedure to organize when initiating procurement of goods, works or services. However, open procedures account for 73.26% of all public procurements, making this indicator good.

A significant and worrying fact is the low share of simple procedures (15.20%) organized through the electronic system, as well as public procurement contracts in the value not exceeding 5,000.00 EUR that are awarded outside the system and imply direct selection of procurement items offered by particular bidder.⁴

Some contracting authorities organize direct procurements even when the use of this procedure is not justified or when the procurement's value exceeds 5,000 EUR, VAT excluded, as well as in cases where the annual estimated value of the procurement subject reaches the amount of more than 40,000 EUR. Additionally, they sometimes divide the procurement into individual items (lots) to avoid more transparent process through the Montenegro's Electronic Public Procurement System (CEJN), which is contrary to the Law on Public Procurement.⁵

² The exact amount is 506,954,976.20 EUR.

³ The exact amount is 181,184,905.30 EUR.

⁴ A total of 6,819 contracts, in cumulative value of 443,837,960.59 EUR, were implemented through CEJN. The amount of funds awarded under direct procedures accounts for 63,117,015.61 EUR.

⁵ <https://institut-alternativa.org/en/direct-and-without-control-simple-procurement-up-to-5000-eur/>

Breakdown of simple procurement procedures (value below 5,000 EUR) in 2022 per category of procurement subject

Procurement subject	Number of contracts/invoices	Total value (in EUR)
goods	87,645	23,886,741.86
services	64,802	36,149,912.81
works	1,815	3,080,360.94

TOTAL	154,262	63,117,015.61
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The share of public procurements awarded under negotiating procedure without previously announced procurement notice accounts for 11.14%.⁶

The overall number of bids submitted in public procurement procedures increased from 15,386 in 2021 to 22,474 in 2022, which is considered encouraging.

The table below provides an overview of the value of contracts for goods, services and works awarded under public procurement procedures in the period 2018 - 2022.

Year	Category of procurement subject	Contracted value (in EUR)
2018	goods	198,591,595.34
	services	90,191,618.03
	works	160,590,194.56
2019	goods	219,766,066.52
	services	100,252,711.75
	works	288,205,568.68
2020	goods	238,876,180.30
	services	80,481,928.02
	works	225,792,683.10
2021	goods	105,748,013.39
	services	31,609,982.77
	works	45,362,943.57
2022	goods	261,036,103.82
	services	97,645,941.66
	works	148,272,930.72

There is an evident increase in the value of public procurements after 2021, which was still conditioned by reduced volume of work by the institutions during the COVID pandemic. A significant increase in procurement of goods is also noted compared to previous years, while the same could not be said for procurement of services and works that are within the scope of procurement from previous years.

⁶ <https://ujn.gov.me/wp-content/uploads/2023/06/Izvjestaj-o-javnim-nabavkama-za-2022.godinu.pdf>

INSPECTION REPORT IN THE FIELD OF PUBLIC PROCUREMENT

The report for the first half of 2022 shows that, among the total of 675 legal entities obliged to apply the Law on Public Procurement and registered in the relevant list at the Electronic Public Procurement System, inspection supervision has been conducted at 160 entities. In that, the inspectors found 137 irregularities (at 59 entities subject to supervision). Among the total number of inspections, 27 were conducted upon previously motioned initiatives, resulting in establishment of eight irregularities. As regards inspections conducted in relation to preparation of the report on implementation of public procurement contract and its publication in the Electronic Public Procurement System within 30 days from the day of its completion, the inspection found 52 irregularities among 64 inspections conducted (81.25%), while supervision of low-value procurements and urgent procurements, which were conducted on the basis of previously motioned initiatives, resulted in identification of 8 irregularities among 11 inspections conducted (72.73%). The high number of irregularities indicates to the need for increased control system and capacity-building at the Public Procurement Inspectorate. The need to regulate the legal framework, introduce more stringent penal provisions, better technical equipment of inspectorates, as well as increased number of inspectors, has been reiterated for many years.⁷

⁷ <https://wapi.gov.me/download-preview/b8f25dc1-b690-49f3-8ad2-9636718bc741?version=1.0>

CORRUPTION RISK

According to official institutional data in Montenegro, there is no conflict of interests in public procurement. Information that, in the course of 2022, the Directorate for Public Procurement Policy has not received a single report on existence of possible corrupt actions or potential conflict of interests is not encouraging in terms of detecting weaknesses in the public procurement system. Trust in the institutions needs to be strengthened, but also continuous monitoring and initiation of procedures by competent authorities.

Agency for Prevention of Corruption (APC) and conflict of interests in public procurement in Montenegro

Contracting authorities are obliged to check accuracy of statements on (non)existence of conflict of interests and to take action in this regard, although they do not have (automated) access to registries and databases that would help them in that.

In Montenegro, no institution is charged with determining conflict of interests in public procurement, keeping registries and records on conflict of interests and acting upon reports. APC, which is networked with other databases important for determining conflict of interests in public procurement, is completely excluded from public procurement control. The very fact that the relevant legislation stipulates an obligation for submission of asset declarations to this agency, but these are not used for substantive control, gives rise to the need to improve the system of prevention and processing of conflict of interests by developing a control mechanism. Throughout the years, there are two segments of APC's work wherein it deals with public procurement, those being: whistleblower reports and financing of political entities and election campaign processes. Analysis of the Agency's performance in respect to its proceedings in the field of public procurement for the period from 1st January 2016 to 1st January 2023 shows that it has received only 750 reports from whistleblowers and has initiated 58 proceedings in *ex officio* capacity during the analysed period.⁸

When it comes to the public procurement cycle, the first thing that needs to be mentioned is planning. Throughout the years, the institutions in Montenegro have been struggling with inadequate public procurement planning. Large number of institutions continue the practice of amending public procurement plans without providing relevant explanation thereof, failing to adopt these plans within the law-stipulated deadline or not at all, and failing to publish them on the institution's website. Hence, more stringent obligations need to be determined for contracting authorities in respect to development of their annual public procurement plans.

More specifically, these plans should contain an analysis of the institution's procurement needs in the previous three years, and an explanation for drastic differences in currently planned needs compared to previous needs for same type of procurements, as well as a special explanation for new type of procurements. Amendments to public procurement plans must necessarily contain an elaboration of reasons for such changes. High degree of corruption occurs in the phase on planning and preparation of the public procurement procedure by using discriminatory conditions and criteria and technical specifications for the procurement subject.

Development of tender documents that favour particular bidder; use of discriminatory criteria for selection of the most favourable bid; division of procurement items in order to implement less transparent and competitive procedures; unreasonably high use of negotiating procedure without previously announced procurement notice; as well as inadequately regulated system

⁸ https://www.antikorupcija.me/media/documents/Analiza_postupaka_iz_oblasti_javnih_nabavki_za_peri-od_01.01.2016_-_01.01.2023..pdf

of data secrecy and flow of confidential information until the public opening of bids are just some of the risks during the process of preparing tender documents. Concerns are also raised in respect to the extent to which contracting parties use direct negotiations to award procurement contracts, which could indicate to evident misuse thereof, having in mind that this type of procurement procedures are not transparent.

Data availability and transparency are very important, especially in the case of direct public procurement, and require proactive publication of all contracts and invoices that should be subject of supervision by the Public Procurement Inspectorate.

The share of direct public procurements in the total of number of public procurements was significantly high, drawing attention to this type of procedure in the European Commission's 2022 Progress Report.⁹

The system of public procurement should be strengthened through harmonization of the legal framework, changes to the set of laws and by-laws that govern the overall procedure for implementation of public procurement.

Instead of the Ministry of Finance's Rulebook on the Manner of Implementing Simple Procurements, they should be regulated by the law and the Government's Regulation on the Manner of Implementing Simple Procurements in order to stipulate imperative norms in the form of consumption limits for direct contracting.

'Lowest price' should not be used as the main criterion for awarding contracts and contracting authorities should prioritize the quality of works, goods and services in public procurement procedures in line with the specific features of the procurement subject in order to ensure extended lifespan of public procurements and protect the budget.

Higher level of control, reduced bureaucracy, simplification of procurement procedures, adequate training and advocacy campaigns would have a significant impact in terms of greater confidence in the public procurement system and increased number of bidders.

⁹ https://www.eeas.europa.eu/delegations/montenegro/montenegro-2023-report_en

STATE-OF-AFFAIRS IN PUBLIC PROCUREMENT IN MONTENEGRO - EU PERSPECTIVE

According to the EU Progress Reports for the last five years, Montenegro is moderately prepared in the area of public procurement. For some years, the European Commission has outlined limited progress made in this area with criticism (2018 and 2019 Progress Reports). In these reports, the EU has noted that Montenegro must harmonize its entire legislative system on public procurement with the EU acquis in all areas, with a special focus on concessions, public-private partnerships, and defence procurements. Moreover, Montenegro was recommended that it must establish and strengthen administrative capacity, institutional capacity at all levels and take adequate measures to ensure enforcement of the law, as well as show a good track record in terms of fair and transparent functioning of the public procurement system that provides value for the money spent, competition, and effective protection against corruption. Another EU recommendation relates to efforts to further improve the functioning of the remedies system, as well as administrative and IT capacity, as well as infrastructure at the State Commission for Public Procurement Control.

The last three Country Reports (2020, 2021 and 2022) have recorded progress in this area. In particular, the EU noted progress made by Montenegro in respect to the legal framework, with improvements to the remedy system, adoption of secondary legislation to the Laws on Public-Private Partnerships and Public Procurement, and regulation of procurement rules in the area of defence and security, as well as in respect to the Electronic Public Procurement System. In Montenegro, the Electronic Public Procurement System started its operation in January 2021. The new electronic system introduces new quality and transparency in the public procurement system. The legal framework on public procurement is well aligned with the EU acquis. Amendments to the Law on Public Procurement entered into force in January 2023. However, the number and value of negotiating procedures without previously announced procurement notice remain very high, accounting for more than 11% of all procurements in terms of value, organized through CEJN. Use of this procedure by public authorities should be exceptional, given the potential for irregularities and corruption. The problem related to capacity-building persists, and therefore it is necessary to strengthen the administrative and institutional capacity in respect to public procurement control, especially at the Commission for Public Procurement Control and the Public Procurement Inspectorate, with a view to ensure adequate enforcement of the law.

In the coming year, Montenegro should, in particular: focus on effective implementation of public procurement and public-private partnership legislation; greatly reduce the number and value of negotiating procedures without previously announced procurement notice; fully respect public procurement rules in all cases.

RECOMMENDATIONS

- As regards recommendations related to the public procurement cycle, the first thing that needs to be improved is **adequate planning** on the part of contracting authorities, as well as introduce an obligation for market research before development of procurement plans. Also responsible persons at the institutions who do not submit plans within the law-stipulated deadline and the institutions that amend their procurement plans more than once in the course of the year without providing specific explanation thereof should be subject to penal provisions.
- Ex-officio **controls** by competent institutions during the entire public procurement process should be **strengthened**, and the Public Procurement Inspectorate should be given greater authority in this respect.
- The law should be amended in respect to statute of limitations for offenses in the field of public procurement, while the Criminal Code should be updated with introduction of legal provision that recognizes criminal responsibility in the field of public procurement.
- The Anti-Corruption Agency, Public Procurement Inspectorate, Commission for Public Procurement Control and the Ministry of Justice, as well as the Revenue and Customs Administration, should be networked with the Electronic Public Procurement System in order to allow better control and introduce monitoring of public procurement processes in ex-officio capacity.
- **Individual responsibility should be strengthened**, and stricter penal provisions should be introduced for authorized persons conducting actions related to the public procurement procedure on behalf of the contracting authority. In addition to misdemeanour provisions, sanctions in the form of ban for performance of work in the field of public procurement as type of punishment would certainly have an effect in this respect.
- As regards public procurement in the defence and security sector, **stronger control mechanisms** should be established or this area should be regulated by drafting and adopting a special law that would respond to all specificities of this type of procurements in terms of planning, implementation, reporting and supervision over implementation of such procurements.
- Efforts are needed to ensure mandatory compliance with recommendations made by the **State Audit Institution** which, for years, has controlled public procurement performance of institutions and has underlined problems, both at the level of individual institutions and at systemic level.
- **There is a need for greater transparency** in implementation of simple procurements, i.e. direct contracts, including an obligation for these procedures to be implemented through the electronic system and to define an annual threshold for contracting authorities in terms of the total amount of funds that could be spent under such procedures and the total number of such procedures that could be organized.
- Particular emphasis should be put on the need for active monitoring of **public procurement contract** implementation, accompanied by detailed report on supervision over contract implementation, which would be published together with other documents in the Electronic Public Procurement System.

- An obligation to **sanction bidding companies** in cases of poor contract performance and establishment of database with bidding companies that have not fulfilled their obligations under the procurement contract would increase the responsibility on the part of economic operators.

