

Government of Montenegro

Ministry of Finance

Questionnaire

Information requested by the European Commission to the Government of Montenegro for the preparation of the Opinion on the application of Montenegro for membership of the European Union

05 Public Procurement

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Podgorica, December 2009

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**CHAPTERS OF THE ACQUIS – ABILITY TO ASSUME THE
OBLIGATIONS OF MEMBERSHIP**

Chapter 5: Public Procurement

I. General Principles

1. How does the Montenegrin regulatory framework incorporate the general Treaty principles of transparency, equal treatment, free competition and non-discrimination.

The Law on public Procurement (Official Gazette of Montenegro 46/06) (Annex 23), contains the general principles of the Treaty: transparency, equal treatment, free competition and non-discrimination and are defined as follows:

The principle of transparency implies that public procurement procedures must be public, which is provided by announcement of invitation for public tender on the website of the administrative body responsible for matters of public procurement - the Public Procurement Directorate, and at least one daily newspaper that is distributed on the territory of Montenegro, in the manner prescribed by the Law and the public procurement standard forms. There are no impediments that, in addition to the language in official use in Montenegro, the invitation may be published in a foreign language commonly used in international trade. The decisions on selection of the best offers in all public procurement procedures (with the exception of small value of direct procurement agreement - up to EUR 2 000.00) are also published on the website of the Directorate, in accordance with the Law and standard forms. Likewise - the website contains decisions on public procurement annulment procedures. Furthermore, subsequent to delivery of notification of contract award, a tenderer that participated in the process of public procurement is entitled to review and obtain information on concluded public procurement procedure, in accordance with this Law. At the beginning of the calendar year, a public procurement plan of all covered parties governed by the Law is available to tenderers – a prior information notice published on the website of the Directorate, indicating any public procurement which the covered party intends to implement during the calendar year when the value of procurement is over EUR 100 000.00 so, the tenderers have sufficient time to select and create the preconditions for submission of tenders in certain public procurement procedures. The website also contains the necessary instructions and specify the obligations that covered parties are compelled to accept in accordance with the Law, such as the preparation and publication of the public procurement plan by the end of the current year (when the value of procurement is over EUR 100 000.00); creation and submission of annual report on public contracts concluded in the previous year by 28 February of the current year; opinion on the basic application of certain provisions of the Law; sections containing the Law, regulations and directives on public procurement; opinion on the application of regulations; notices and instructions to tenderers; the reports on activities related to international cooperation; organization of seminars; all published reports on public procurement; newsletters and magazines; reports about the training in the area of public procurement; advisory and consultancy services are available including direct telephone contacts (help desk). A list of covered parties governed by the Law is published on the website of the Directorate and updated by the end of each calendar year. In addition, there are specifically designed sections relating to general tasks under the Directorate's authority, including free access to information. Montenegro is the first in the region to establish a centralized publication of information regarding the procedures of public procurement on the Public Procurement Directorate's website. Therefore, a centralized publication of information regarding public procurement in Montenegro has been achieved in specified manner.

The principle of competition, which means that the contracting authority is obliged to take all necessary measures to ensure competition among potential tenderers, in accordance with the Law. The contracting authority can not restrict competition among tenderers, and in particular can not put restrictions on potential tenderers by unjustified use of limited procurement process or by using measures that favour certain tenderers. Entities who are preparing tender documents or some of its parts can not act as tenderers, subcontractors or contractors and can not cooperate with tenderers in preparation of tenders, if it threatens the competitiveness. Therefore, the principle of competition implies an obligation of contracting authority to provide competition among potential tenderers in a manner where contracting authority publish and advertise invitation to tender, in accordance with the Law, whereas in cases of low value public procurement (shopping) provides a direct solicitation of at least three tenders. However, competitiveness does not mean that the

contracting authority is obliged that during the public tendering process ensure the existence of at least two valid tenders, which could be compared and evaluated. The reason for this is because the competitiveness is provided by a mere publication of public invitation, which gives the right to all potentially interested tenderers to participate in public procurement concerned. The exception is a restricted procedure of public procurement, where the legislator envisaged that the principle of competition is achieved by providing at least three qualified tenderers. Because of mentioned reasons, the legislator has envisaged that contracting authority can not restrict competition among tenderers, especially when it is conducted by unjustified use of restricted procedure or measures that favour certain tenderers. In order to achieve this principle, the legislator has envisaged strict conditions that must be met in order that contracting authority can acquire the right to implement restricted procedure of public procurement. Moreover, the contracting authority can not use measures that favour certain tenderers in the procedure. In this regard, it is important to emphasize that the Law do not recognise preferential treatment of local tenderers in relation to foreign tenderers, whether they are registered in Montenegro, or outside of Montenegro. The previous Law on public procurement of 2001 also did not include preferential treatment, which provided consistent application of principles of competition and non-discrimination. The Law expressly prohibits the use of trademarks and seals in technical specifications, but there is an exception here also, when such declaration can not be avoided. In this case, the contracting authority is obliged to indicate in the public invitation and tender documents the trademark or seal only as an example and to add the words "or equivalent", which gives option to tenderers to offer some other commodities also, not just one that have certain trademark or seal. Owing to the increasing openness of the domestic market, local tenderers will be forced to adapt their products and services to the requirements that meet the particular technical norms and standards, while on the other hand such technical adjustments will enable equal treatment with other tenderers in public procurement procedures. In order to achieve competition among tenderers, the entities that are preparing tender documents, or some of their parts, can not act as tenderers, subcontractors or contractors and can not cooperate with tenderers when preparing their tenders, if it threatens competition, because acting in such manner would give rise to conflict of interest and seriously endanger the equality of tenderers. In this regard, the responsible person of the contracting authority, the officer for public procurement, the members of the Commission for opening and evaluation of tenders, the persons who participated in the preparation of tender documents, as well as the tenderers, are required to sign a declaration of independence.

There were 3.51 in average tenders submitted for each one public procurement procedure (there were 2,084 procedures excluding small value contracts), which is in accordance with the principle of transparency, openness and competition in public procurement.

The principle of equality of tenderers means that the contracting authority must ensure that all tenderers have equal treatment in all phases of public procurement procedure. This principle provides an equal treatment through the unification and standardization of the announcement and publication of public invitation, which is available to all interested potential tenderers. In addition, the conditions for participation in the public procurement procedure are the same for all tenderers, regardless of whether or not the tenderer is natural or legal person, and regardless of the registered office of the tenderer (in country or abroad), while during the public procurement process, all tenderers are treated equally in the realization of their rights. This principle obliges the contracting authority not to disclose any information to individual tenderer which is not disclosed to all, both in the preparation phase of the public invitation and tender documents, as well as in the process of public procurement during the period of public invitation, public opening of tenders, review, evaluation and comparison of tenders and decision on the best tender or a decision on annulment of the public procurement procedure. In this sense, the principle of equality of tenderers is very close to the principle of transparency. This principle represents the equality in the broadest sense, i.e. it prohibits the territorial and personal discrimination. In this sense, the Montenegrin law was positively rated since it does not recognize preferential treatment in favour of domestic tenderers. The regulations governing the operations of business organizations or part of foreign business organisation do not require that such undertakings must be registered in Montenegro in order to participate in public tenders. Moreover, pursuant to the regulations governing the area of space planning and construction of buildings, and in relation to the application of the Law on Public

Procurement, the tenderers in the public procurement procedures confirm the fulfilment of conditions for execution of works i.e. obtaining of license in accordance with their national (domicile legislation), whereby the principle of equality of tenderers is set to maximum level.

It is also important to mention the other principles contained in the Law, such as *the principle of economy and efficiency* in the use of public funds, according to which the contracting authority is obliged, in the procedure of public procurement and selection of the best tender, to provide an economical and rational use of public funds, *the principle of special rights of tenderers* where the majority of employed are persons with special needs, in which case the contracting authority may, in the text of public tender invitation in the tender documents, specify that the contract will be granted under the same conditions to tenderers where the majority of employed are persons with special needs, who due to the nature or extent of their disability can not perform the work under normal conditions.

II. Award of public contracts

Legislation

The Public Procurement System in Montenegro was established by the Law on Public Procurement (Official Gazette of the Republic of Montenegro 46/06) which entered into force on 29 July 2006, the secondary legislation enacted on the basis of the Law, the standard forms and sample forms on the procedure of its application. On the basis of the Law on Public Procurement, an institutional framework to perform entrusted tasks within the state administration of Montenegro was established, the consistent application of laws and regulations was enabled, and prerequisites were achieved for the full implementation of EU legislation and compliance with the obligations envisaged by the Stabilization and Association Agreement, in the area of public procurement.

The implementation of the Law on Public Procurement respected the rules and requirements of the European Union with regard to ensuring full freedom of movement of goods, people and capital. The economic entities of the European Union which are established in Montenegro or outside of Montenegro were granted access to the award of public contracts in Montenegro, under the same conditions that apply to the Montenegrin economic entities on the basis of the Law on Public Procurement. The principle of freedom of the open market is fully respected, which is in accordance with Article 76 of the Stabilization and Association Agreement.

Secondary regulations, standard and sample forms adopted on the basis of the Law on Public Procurement are:

- Rulebook on the form, content and manner of issuance of certification to guarantee due settlement of financial obligations arising from public procurement (Official Gazette of the Republic of Montenegro 71/06 and Official Gazette of Montenegro 23/07, 67/08) (Annex 27),
- Rulebook on the methodology of expressing criteria in the appropriate number of points, the manner and procedure for evaluation and comparison of tenders, (Official Gazette of the Republic of Montenegro 71/06 and Official Gazette of Montenegro 23/07, 67/08) (Annex 28),
- Standard form: Conditions and method of establishing public contract value (Annex 26),
- Standard form: the public procurement plan,
- Standard form: the form of invitation to tenders,
- Standard form: the form of announcement of public tendering,
- Form: Decision on contract award,
- Form: Decision on the contract award in negotiation process without prior publication of a invitation for public tender,
- Form: Decision on procurement of low value,
- Form: Decision on public procurement cancellation,
- Standard form: the tender documents for goods,
- standard form: the tender documentation for works,
- Standard form: the tender documents for services,
- Standard form: the form of public tender opening minutes,
- Standard form: the form of tender examination, evaluation and comparison,
- Standard form: the form of the report on the procedure of public procurement
- Standard form: request for submission of tenders by shopping method and
- Standard form: the method of public procurement record keeping (Annex 29).

The Law on Public Procurement, in essence, is aligned with the Directive 2004/18/EC of the classic sector of public procurement, Directives 89/665/EC and 92/13/EC in the area of protection of rights. The public procurements in the utility sector are awarded under the same conditions as the public procurement in the classical sector.

The obligation in Article 41 paragraph 2 of the Interim Agreement, which refers to the harmonization of legislation of public procurement system with the system of the European Union in the area of utility sector (simplification of procedures), will be fully met by harmonization with all EU regulations and standards by their incorporation into national legislation, through the Law

amending the existing Law or the enactment of the new public procurement law for the utilities sector, in late 2010 or early 2011, which will ensure the compliance of national legislation on public procurement with Directive 2004/17/EC. Furthermore, this compliance will provide a harmonization with the new directive in the field of protection of the rights, the Directive 2007/66/EC and full harmonization with the Directive 2004/18/EC, which provides for the new procedures in the part relating to electronic communications, dynamic purchasing systems and electronic auctions, marginal value of public procurement, deadlines for the duration of invitations and other improvements of the Law. The competent institutions responsible to perform the state administration tasks in the area of public procurement (Ministry of Finance, the Directorate and the Commission) have started with the activities in preparation of technical basis for understanding the requirements for complete harmonization of legislation in the area of public procurement legislation with the EU legislation. Within the IPA 2007 Assistance Program - Further Development and Strengthening the Public Procurement System in Montenegro, which will last one year and eight months, starting mid-2009 (the procedure was conducted before the European Commission and the consultant for the project implementation selected) is expected to provide assistance in the harmonization of legislation that started mid-2009 in regard to the activities relating to considering the needs, whereas the activities concerning amendments or creation of new regulations will follow by the end of 2010, particularly in the area of utility services sector in regard to simplification of procedures, given that, the existing Law is applied under the same conditions for the contracts in the classical as well as contracts in the communal sector respectively. It is planned that the new law will be prepared and sent for the adoption procedure in the fourth quarter of 2010. In addition, the continuous training of civil servants of the Public Procurement Directorate and the Commission for the Control of Public Procurement Procedures will be provided, together with the training of employees who perform the public procurement tasks for contracting authorities and tenderers, auditors and judges, accompanied by support to the Public Procurement Directorate in regard to personnel and technical equipment and development of information technologies, spreading information on public procurement and intensified public awareness campaigns in this area.

The Law on Concessions (Official Gazette of Montenegro 08/09) lays down the conditions, manner and procedure for the granting of concessions, the subject of concessions and other issues of importance for the realization of the concession.

The provisions of chapter IV, VII, VIII, IX and Articles 141, 142 and 143 of the Law on Private Sector Participation in Delivery of Public Services (Official Gazette of the Republic of Montenegro 30/02) cease to apply from the day of entry into force of this Law, as well as provisions of other chapters relating to concessions and BOT arrangements, whereas the provisions of other laws that regulate process of granting concessions do not apply if they are contrary to this Law.

2. Please provide us with the definitions of public contract and the contracting authority/entity, following your procurement legislation.

According to Montenegrin Law on Public Procurement, a public procurement is a set of all actions and activities undertaken by the contracting authority, having as their object the supply of products, provision of services or performance of works, and for which funds have been allocated by the contracting authority. **Public procurement contract** is a contract concluded between a contracting authority and a tenderer, in written or electronic form, having as its object the procurement of goods, provision of services or performance of works. **Public supply contract** is a contract concluded in written or electronic form involving the purchase, lease, rental or hire purchase, with or without option of purchase, including necessary site preparation, execution of works and installation operations. **Public works contract** is a contract concluded in writing, having as its object the execution and/or design and execution, of works related to one of the activities within the meaning of Annex I of the Law, or the realisation of a work corresponding to the terms specified by the contractual parties. The term «work» means the outcome of building or civil engineering works taken as a whole, which is sufficient of itself to fulfil an economic or technical function. **Public service contract** is a contract concluded in written or electronic form, having as its object the provision of services that are not excluded from this Law. A public service contract is also a contract having as its object both products and services if the value of the services in question

exceeds that of the products covered by the contract as well as the contract having as its object services within the meaning of Annex I of the Law which are minor in comparison to the basic subject of the contract. The draft contract must be an integral part of the tender documents so that potential tenderers are aware of the rights and obligations of the parties arising from the concerned public procurement procedure. Contractual relations between the parties according to Montenegrin legislation are governed by regulations on the obligations (the Law on Obligations). The Law on Public Procurement regulates the procedure of public procurement up to the selection of the best tender, at what time the application of the Law on Public Procurement ends, that is, the Law on Obligations applies as of the moment of the final decision in the award of the contract. **Contracting authority** is party liable for the application of the Law, conduct of the public procurement procedure and allocates funds for that purpose, and the **tenderer** is a legal or natural person that submits a tender for supply of goods, render of services or execution of works.

The procurement of goods and services and the award of the performance of works, according to this Law, must be implemented by the **covered parties** applying the Law (**contracting authorities - contracting entities**) and they are:

- 1) state authorities, state administration authorities, organizations, institutions and other beneficiaries of the Budget of Montenegro and of other public funds;
- 2) local self-government authorities, local administration authorities and organizations and institutions that are beneficiaries of the budget of a local self-government unit and of other public funds;
- 3) organizations of mandatory social security, established in accordance with laws governing these types of insurance;
- 4) undertakings and other legal persons in which Montenegro, a local self-government unit or other covered parties under this Law hold more than 50% of shares or participation in their ownership and have more than a half of members in their management body, and which perform activities in the general interest, not having an industrial or commercial character;
- 5) legal persons that in awarding public contracts use the funds, that were provided, as a subsidy or as a guaranty, by Montenegro or a local self-government unit or other covered party under this Law.

The administrative authority responsible for public procurement activities - Public Procurement Directorate, prepares and publishes the List of covered parties that are subject to the application of the Law. The List of covered parties is published on the website of the Directorate and updated no later than 31 December each year. The obligation of the implementation of the law depends on the fulfilment of the conditions for application of public procurement procedures in accordance with definitions of the Law and not whether the certain covered party is on the List, so even if the covered party is not listed, there is a requirement for the application of regulations on public procurement.

According to the Law on Concessions (Official Gazette of Montenegro 08/09), the granting of concessions is based on principles: transparency, non-discrimination and competition.

The application of the principle of **transparency** in the process of granting concession ensures that all participants in the process of granting concessions have complete, accurate and timely information about procedures, standards and criteria for the selection of concessionaires, the tenderer who was awarded the concession and the conditions of its tender.

The application of the principle of **non-discrimination** in the process of granting concession ensures the equal treatment of all tenderers in the process of granting concessions.

The application of the principle of **Competition** in the process of granting concessions ensures the conditions for the participation of higher number of tenderers.

The Law on Concessions provide definition of the terms: concession, contracts and contracting bodies. Accordingly, the **concession** is the right to use natural resources, goods in general use, and other goods of general interest, which is owned by the state, or performing activities of public

interest, with payment of concession fees by the concessionaire or the provision of financial benefits or other support to the concessionaire to achieve an appropriate public interest. Furthermore, **concession** is also the right of funding, research, design, construction or reconstruction, use, maintenance, revitalization and handing over the facility, equipment or plant into the ownership of the grantor, within the agreed period, including other similar forms.

The **concession contract** is a contract concluded for a definite time, in writing, that regulates the mutual rights and obligations between the grantor and the concessionaire.

The **grantor** is the Parliament of Montenegro, Government of Montenegro, local self-government, the Capital or the Historic Royal Capital.

The **concessionaire** is domestic or foreign business organisation or other legal entity, entrepreneur or a natural person eligible for the concession, the consortium or other form of business connection which regulate their mutual relations and common interests by separate contract.

In accordance with the Law on Concession, the concession contract is a contract concluded for a fixed time period, in writing, which regulates the mutual rights and obligations between the grantor and the concessionaire, where the term *grantor* refers to the Parliament of Montenegro, the Government of Montenegro, local self-government, the Capital and the Historic Royal Capital, while the term *concessionaire* refers to domestic or foreign business organization or other legal entity, entrepreneur or natural eligible for the concession, the consortium or other form of business connection which regulate their mutual relations and common interests by separate contract.

The contracts concluded on the basis of the Law on Concessions, refer to:

- exploration or exploitation, or exploration and exploitation of mineral resources;
- use of rivers and other waters, or their parts or a certain amounts of water for the purposes determined by separate law;
- construction or reconstruction, maintenance and use of water facilities;
- use of forests;
- use of radio frequencies;
- construction of hydro-melioration systems and extraction of materials from the water land;
- construction, maintenance and use or reconstruction, modernization, maintenance and/or use of roads, road supporting facilities, railroads, air transportation facilities and airports, water transportation facilities and ports, telecommunication facilities, oil pipelines, gas pipelines, facilities for the storage, transport and distribution of oil and gas, facilities of the health and educational institutions, public utility facilities for communal activities;
- design, construction, maintenance and use of energy and other facilities for the production, transmission and distribution of electricity, heat and gas, or their reconstruction, modernization, maintenance and use;
- use of river and lake banks;
- implementation of publicly valid education programs;
- organizing lottery games of chance and special games of chance in casinos;
- construction, maintenance and use of sports and recreational facilities, sports fields and space for sports, recreation and cultural activities;
- construction, maintenance and use of buildings or the reconstruction, modernization, maintenance and use of existing buildings in areas with natural healing properties and other natural values.

In addition to aforesaid, the subject of concession may be the use of other natural resources, goods in general use and other goods of general interest in the ownership of the state, in

accordance with the law, as well as performance of other activities that are legally defined as the activities of public interest.

3. Does your current legislation cover all types of contracts (good, services and works; concessions and PPP)? Please list the contracts excluded from the scope of the procurement legislation.

The Law on Public Procurement covers the public procurement contracts of goods, services and performance of works. The Law on Concessions (Official Gazette of Montenegro 08/09) (Annex 24) and the Law on Participation of the Private Sector for the Delivery of Public Services (Official Gazette of the Republic of Montenegro 30/02 and Official Gazette of Montenegro 08/09) (Annex 25) apply to contracts granting concessions, thus, separate laws covering these areas. Public Procurement Law does not apply to:

1) procurement of weapons, ammunition and other materials necessary for the defence and security of Montenegro which are declared by the law and other regulations as confidential, and which implementation must be accompanied by special security measures;

2) procurements that are made on the basis of international agreements or contracts signed between Montenegro and one or more countries and international organizations, which relate to:

- delivery of goods, rendering of services, performance of works, which envisage a joint application or implementation of the project by the signatory states;
- the stationing and deployment of military forces;
- public procurement that are conducted on the basis of a special procedure of international organizations.

3) procurement:

- a) acquisition, development, production or co-production of program material, intended for radio and television broadcasting and contracts for the allocation of broadcasting frequencies;
- b) arbitration and mediation services and notary services, except for services under Annex I, which is an integral part of the Law;
- c) financial services in connection with the issuance, sale, purchase or transfer of securities or other financial instruments, especially the contracting authority's transaction, with the aim of raising money and capital and services of the Central Bank of Montenegro;
- d) services related to employment.

The Law does not apply either to the procedure for awarding concessions and privatization of the economy, as well as the sale and lease of land, existing buildings or other immovable property or rights deriving from them, which is carried out by the covered parties under the Law. These procedures are governed by separate regulations for these areas.

According to the Law on Concessions, the concession contract is a contract in writing concluded for a definite period of time, which governs mutual rights and obligations between a grantor and a concessionaire; where the term *grantor* refers to the Parliament of Montenegro, the Government of Montenegro, local self-government, the Capital and the Historic Royal Capital, and the term *concessionaire* refers to of domestic or foreign business organization or another legal entity, entrepreneur or a natural person that acquired a concession right, as well as consortium or other form of business associations that regulates their mutual relations under a separate contract.

4. Please list the relevant thresholds stated in your legislation and explain what procedure shall be followed. Are all tenders above a certain threshold published before the launching of the procedure? What are the types of information that your legislation requires to be included in notices of invitation to tender?

Subject to the value of a public contract, the public procurement procedures are divided into three value scales.

Value Scale 1 for the implementation of open or restricted negotiation procedure with or without prior publication of the invitation to public tender and the framework agreement, refers to cases where the procurement value exceeds the amount of EUR 10 000.00 for the procurement of goods and services, or EUR 30 000.00 for the selection of the best tender in the case of works contracts.

Value Scale 2 for public procurement of low value (shopping method), applies in the case when the value of public procurement ranges from EUR 2 000.00 to 10 000.00 for procurement of goods and services, or EUR 2 000.00 to 30 000.00 for procurement of works.

Value Scale 3 for the implementation of public procurement procedure by direct agreement, applies in the case when the value of public procurement does not exceed EUR 2 000.00.

The commitment of the legislators for adoption of above specified grades that are significantly below the threshold of the European Union is conditioned by the degree of development of the Montenegrin economy, the need for development of market economy and the establishment of discipline in the procurement process as well as understanding of the importance that the implementation of public procurement procedures have for social development. For the purpose of the comparison: in 2008 (out of a total of 3 248 public procurement contracts granted in the main public procurement procedures - no small value) there were 514 contracts granted, or 15.8% which value amounted to over EUR 100 000.00 (state bodies and organizations - 188 contracts, state public institutions and state public enterprises - 156, local self-government authorities – 119, and local public institutions and local public enterprises - 51 contracts), that is, the value of all other purchases were below EUR 100 000.00 which gives a realistic picture of the value of public procurement carried out in Montenegro.

According to the Law on Public Procurement (Official Gazette of the Republic of Montenegro 46/06), all invitations to public tender must be published on the website of the Public Procurement Directorate as competent administrative authority, except for the implementation of the negotiation procedure without prior publication of a invitation to public tender, as well as the low value procedures - direct agreement (shopping method). The Invitations are published in at least one daily newspaper distributed in the territory of Montenegro. There are no limitations that invitations may be published in some of the official languages of the European Union or another foreign language. Moreover, a part or whole tender document can be composed in a foreign language. The decisions on the contract award of all public procurement procedures (with the exception of direct agreement - the value of procurement up to EUR 2 000.00), are published on the website of the Directorate. The invitation to public tender, which content, form and structure is prescribed-defined by a specified standard form, contains information about contracting authority, subject-matter of the procurement, estimated value of public procurement, conditions for participation, criteria, time and place of the review of tender documents, time limit and place for submission of tenders and for the public opening of tenders, date of making decision on the public procurement contract award, as well as the name of contact person that will provide additional information. The invitation to public tender may also contain other details necessary for informing tenderers more fully about the subject-matter of the public procurement. During the publication phase, the Public Procurement Directorate as competent administrative authority, assesses and provides the conformity of the invitations to public tender with the conditions set forth in the public procurement regulations. In this manner, the Directorate has the role of controller and performs continuous monitoring of public procurement, preventive instructional supervision and provides conditions for a competitive and transparent functioning of all participants in the processes of public procurement as well as specialized and general education on public procurement. The invitation to public tender

that has not been published and posted in the manner prescribed by the Law shall not have the legal effect. The specified forms (invitation, tender documents, decisions) are harmonized with the forms listed in the Annexes of the EU Directives.

5. Please provide a general description of your existing procurement, concession and PPP procedures. Are interested entities allowed to proceed to negotiations? If yes, under which conditions?

In accordance with the Law on Public Procurement (Official Gazette of the Republic of Montenegro 46/06), a contracting authority may apply one of the following procedures:

- 1) open procedure of public procurement;
- 2) restricted procedure of public procurement;
- 3) negotiated procedure of public procurement;
- 4) award of contract by entering into framework agreement;
- 5) direct solicitation of tenders (shopping method);
- 6) direct agreement.

The Law recognizes special cases of awarding contract, and these are:

- 1) award of public procurement contracts by means of design contest and
- 2) award of consulting services contract.

When awarding public contract, a contracting authority, as a rule, shall choose open or restricted procedure.

Open procedure of public procurement is the main and the most transparent public procurement procedure. This procedure involves publication of a public call for competition. All persons interested in winning the public contract may participate and submit a tender in accordance with the requirements and conditions specified in the call for competition and the tender documentation. As a rule, the contracting authorities should always apply this procedure, since it enables implementation of all principles of public procurement to the greatest extent. The largest number of tenderers, in this procedure, can submit offer to contracting authority, thereby achieving competitiveness and encouraging market competition among tenderers. Implementation of an open procedure of public procurement is in the interest of the contracting authority, because in this procedure, in comparison to the restricted and negotiated procedure, receives lower prices and more favourable conditions. Open procedure of public procurement means that pre – determining of the tenderer's qualification is not required, which is necessary in a restricted procedure of public procurement, nor is transparency and competition limited, as in restricted procedure of public procurement, where at the second stage of invitation, only a certain number of tenderers are invited to submit their tender. The legal provisions that apply to open public procurement procedure, apply for a restricted and negotiated procedure also, except when otherwise provided by Law.

The ***restricted procedure of public procurement*** has been provided for by the legislator as an exception to open public procurement procedure and it can be applied only if conditions envisaged by the Law have been met. This is quite complex and lengthy procedure, so the assumption is that contracting authorities will opt for this procedure only when, in addition to fulfilment of conditions laid down, the public procurement is of high value and of great importance for the contracting authority. The restricted procedure of public procurement is conducted in two stages. At the *first stage*, the contracting authority is obliged to, publicly announce an invitation to public tender on the website of the Public Procurement Directorate and through an announcement in a daily newspaper that is published and distributed on the territory of Montenegro, in the manner prescribed by the Law. The contracting authority is obliged to specify the minimum conditions for establishment of qualification requirements in the invitation to public tender, in addition to the mandatory conditions

prescribed by the Law. The aforesaid conditions shall be elaborated in more detail in the tender documentation. Conditions for determination of qualification are particularly related to the contracting authority's legal status, business capacity, financial capacity, technical qualifications and the qualifications of personnel, whereby the contracting authority is obliged to provide that the consistent application of the principles of equal treatment and non-discrimination are respected in this area as well. After the public tender opening procedure, the Commission for Opening and Evaluating of Tenders, in accordance with the quoted provisions, is required to determine the qualification of tenderers, based on conditions pre-defined in the public invitation and tender documentation. The Commission for Opening and Evaluation of Tenders is obliged to establish the qualification of at least three tenderers, in order that the procedure is successful, on the basis of which the competent authority of the contracting authority shall adopt the Decision. At the *second stage*, the contracting authority is obliged to send invitation to tender to all qualified tenderers. In this invitation, a request for submission of the evidence on suitability of tenderer is not specified, given that the same had been provided in the previous qualification stage. At the second stage of the restricted procedure, the contracting authority shall perform the selection of the most favourable tender solely on the basis of criteria laid down in the public invitation. The procedure for protection of tenderers' rights has been provided for in the restricted public procurement procedure as well, whereby legislator established the contracting authority's obligation to inform tenderers whose request for qualification has been rejected on reasons for rejection. These reasons may be based on the qualification requirements only. A tenderer may lodge a complaint against the decision on rejecting the request for qualification within eight days of receiving the decision, as elaborated in detail in the chapter that refers to the procedure on protection of tenderers' rights and the public interest. If in the second stage of the restricted public procurement procedure tenderer no longer meets the qualification requirements or other conditions pre-defined in the public invitation and tender documentation, the contracting authority has the right to exclude such tenderer from the list of qualified tenderers. Certainly, here also imply that the tenderer is obliged to timely inform the contracting authority about any changes that have occurred in its status or operations, which could affect his qualification and further procedure in selection of the best tenderer.

The negotiated procedure with prior publication of a contract notice applies for public procurement of goods, works and services:

- 1) when the contracting authority in the open and restricted procedure does not get any proper and acceptable tender, provided that the initial subject-matter of contract and contents of tender documentation are not substantially altered. An invitation for competition does not have to be published if all tenderers that have submitted tenders in open or restricted procedure are included in negotiated procedure by the contracting authority;
- 2) when the nature of the works, goods or services or the risks related to specific procurement does not allow for prior identification of overall pricing;
- 3) in the case of services within category 6 of Annex I of the Law and intellectual services, such as services involving the design of works, where the nature of the services to be provided is such that contract specifications cannot be established with sufficient precision to permit the award of the contract by selection of the best tender according to the rules governing open or restricted procedures;
- 4) in respect of works which are performed solely for purpose of research, testing or development and not with the aim of ensuring profitability or recovering research and development costs.

The contracting authority, in order to obtain the best tender, negotiate with tenderers on tenders submitted, in order to adapt them to the requirements to the requirements which they have set in the contract notice, tender documentation and additional documents, if any. The contracting authority may provide for the negotiated procedure to take place in successive steps in order to reduce the number of tenders to be negotiated, by applying the award criteria specified in the contract notice and tender documentation. The contract notice and tender documentation, in such case, shall indicate the possibility of use of successive steps of contract award procedure.

The negotiated procedure without prior publication of contract notice, as the least transparent procedure (allows immediate engaging in negotiations), allows contracting authority to, exceptionally, award public procurement contract in the case:

1) procurement of works, goods or services:

- when no tenders, or no orderly and acceptable tenders, have been submitted in response to an open procedure or a restricted procedure, provided that the initial conditions of contract and contents of tender documentation are not substantially altered;
- when, due to technical or artistic reasons related to the subject-matter of a public contract or for the reasons connected with the protection of exclusive rights, the contract may be awarded only to a particular tenderer;
- when, exceptionally, due to verifiable reasons of extreme urgency caused by natural disasters, accidents and damages and other events unforeseeable by the contracting authorities, the minimum time limits established by this Law cannot be complied with. The circumstances invoked to justify extreme urgency must not in any event be connected to the contracting authority;

2) procurement of goods:

- when the goods involved are manufactured purely for the purpose of research, experimentation, study or development; this provision does not extend to quantity (serial) production to make profits or to recover research and development costs;
- when it comes to additional deliveries by the tenderer to whom the contract has been already awarded, which are intended either as a partial replacement of normal supplies or installations or as the extension of existing supplies or installations where previous contracts are still in force; where there are no substantial changes in price or other conditions and where a change of supplier would oblige the contracting authority to acquire material having different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance
- the goods quoted and purchased on the commodity market;
- for the procurement of goods under particularly advantageous terms, from either a tenderer who is in the procedure of liquidating its business activities or the insolvency of the debtor or through an arrangement with creditors or similar proceedings;

3) procurement of services, when the respective contract follows after the competition for the conceptual design and the contract is awarded to the winner, or one of the winners of the competition, in the latter case, all winners of the competition are invited to participate in the negotiations;

4) procurement of services and works:

- which are not involved in the initially considered project or in the original contract, but which due to unforeseen circumstances become necessary for the execution or performance of services or works described in them, and when such additional services or works can not be technically or economically separated from the main contract without major inconvenience to the contracting authority. However, such contracts can only be concluded with the tenderer to whom the main contract was awarded, and the aggregated value of contracts awarded for additional services or works can not exceed 25% of the value of the main contract;
- which represent the repetition of similar works or services entrusted to the tenderer to whom the same contracting authority awarded an original contract, provided that such works or services are in conformity with a basic project for which the original contract was awarded according to the open or restricted procedure. As soon as the first project is put up for tender, the possible use of this procedure shall be disclosed and the total estimated cost of subsequent works or services shall be taken into consideration by the contracting authority. This procedure may be used only during three years following the conclusion of the original contract.

The contracting authority may conclude a **framework agreement** only after completing open or restricted procedure. Awarding contract through the framework agreement is possible only in one or more of the following circumstances:

- a) if the object of the contract are daily services or consumer goods that have not been classified as durable assets;
- b) if the subject-matter of the contract are goods or services where the price and delivery terms are frequently altered;
- c) if the subject-matter of the contract are regular repairs or maintenance works;
- d) when the contracting authority is to award several identical contracts within one year and the framework agreement would reduce the procurement costs.

Once a framework agreement has been concluded, its provisions may not be amended and contracting authorities may not use framework agreements improperly or in such a way as to prevent, restrict or distort competition. The term of this agreement may not exceed four years, save in exceptional cases foreseen by regulations. If a framework agreement is concluded with a single tenderer, the contracts based on that agreement shall be awarded within the limits of the terms laid down in the framework agreement, and if a framework agreement is concluded with several tenderers, the latter must be at least three in number, providing that there are a sufficient number of tenderers to satisfy the selection criteria and/or acceptable tenders which meet the award criteria. Contracts based on the framework agreements, concluded with several tenderers, may be awarded either by application of the conditions laid down in the framework agreement without reopening competition, or, if not all the terms are laid down in the framework agreement, when the parties are again in competition, on the basis of the same conditions and, if necessary, more precisely formulated terms, and, where appropriate, other terms referred to in the specifications of the framework agreement, in accordance with the following procedure:

- (a) for every contract to be awarded, contracting authority shall consult in writing the tenderer capable of performing the contract;
- (b) contracting authority shall fix a time limit which is sufficiently long to allow tenders for each specific contract to be submitted, taking into account factors such as the complexity of the subject-matter of the contract and the time needed to send in tenders;
- (c) tenders are submitted in writing, and their content remain confidential until the stipulated time limit for reply has expired;
- (d) contracting authority award each contract to the tenderer who has submitted the best tender on the basis of the award criteria set out in the specifications of the framework agreement.

The contracting authority must, before commencing with the implementation of this procedure, obtain prior approval of the Public Procurement Directorate.

The prior approval of the Public Procurement Directorate shall be requested for implementation of the negotiated procedure without prior publication of an invitation to public tender, negotiated procedure with prior publication of invitation to public tender and contract award procedure by signing the framework agreement.

The Law also recognize the **procedures of public procurement of small value** as direct solicitation of tenders – shopping method and direct agreement, in which case there is no publication of invitation for public tender.

Shopping method applies to public procurement procedures up to EUR 10 000.00 for goods and services, and up to EUR 30 000.00 for works. Public procurement procedure by shopping method must be carried out by soliciting at least three tenders and the tenders have to be opened publicly. The Public Procurement Officer is responsible for the legality of the implementation of public procurement procedure carried out under the shopping method, and is obliged to keep record on the public contracts awarded under this shopping method and to submit the decision on the selection of the best tender to the competent administration authority - the Directorate, for publication on the website.

Direct agreement applies to public procurement of up to EUR 2 000.00. The Public Procurement Officer is obliged to keep records of public procurement that carried out by means of direct agreement and to state the number, value and name of the tenderer in the annual report submitted to the competent administrative authority - the Directorate.

The Law on Concessions (Official Gazette of Montenegro 08/09) and Law on Participation of the Private Sector for the Delivery of Public Services (Official Gazette of the Republic of Montenegro.30/02 and Official Gazette of Montenegro 08/09) apply to contracts granting concessions, thus, separate laws regulating these areas.

The aforesaid imply that, pursuant to Montenegrin legislation on public procurement, engaging in direct negotiations in the public procurement procedures is only possible in the negotiation procedure without prior publication of a contract notice, as the least transparent public procurement procedure, provided that previously have to be fulfilled the conditions prescribed by the Law and identified issues to be considered during the negotiations, that is, develop negotiation scenario in order to ensure consistent application of the principle of non-discrimination and equality of tenderers.

As for the area of concessions, the procedure for awarding concessions shall be initiated by the competent authority upon a development of a Concession Document, in accordance with the annual plan adopted by the Government, or municipalities.

The procedure referred to above may also be initiated upon an initiative presented by an interested party.

The initiative of the competent authority

The competent authority shall submit the Concession Document to the Government, or to the competent authority of the Municipality, in accordance with the Law.

The Concession Document is accompanied by the analysis of justifiability of achieving the public interest by awarding a concession, containing the indicators that such concession is capable of providing the public interests and the analysis of the possible alternatives in delivering the services; indicators that a planned concession is capable of ensuring an appropriate value for money; analysis of the assessments and balance of risks between the Grantor and the Concessionaire; consideration of the need that the Grantor has to have a stake in a concession company concerned (type and proportion of such stake); report from the public consultation.

Prior to sending a Concession Document for the adoption, the competent authority shall organize and carry out public consultation, within 15 to 30 days as of the day of submission of the public notice to such public consultation.

The competent authority may engage professional legal entities or natural persons to deliver support in drafting or for drafting of the proposal for the Concession Document and tender documentation, provided that these persons may not be tenderers in any procedure for awarding concessions for which they have delivered support in development of the Concession Document or they have drafted the Concession Document and prepared the tender documentation.

The Concession Document is adopted by the Government or the competent authority of the Municipality.

The competent authority, issues a public notice upon the adoption of the Concession Document.

The concession is awarded on the basis of public notice, by:

- Open procedure public competition (hereinafter referred to as: the open procedure),
- Two-stage procedure public competition (hereinafter referred to as: the two-stage procedure),
- Accelerated procedure public competition (hereinafter referred to as: the accelerated procedure).

Open procedure

A business organization, other legal persons, entrepreneur or natural person may submit only one tender, independently, under a consortium or other form of business association.

A tenderer is also obliged to submit, along with the tender, evidence on money deposit payment or secured bank guarantee, in the amount and for the period that are defined under public notice.

The amount of the deposit and the bank guarantee and the period for which security is provided, shall be set commensurate with the value of the subject matter of concession.

The procedure of public competition, based on a public notice, is conducted by an *ad hoc* tender commission composed of an odd number of members that are appointed by the competent authority.

In the procedure of public competition, the Tender Commission carries out the following procedures: opening of tenders; evaluation and verification of authenticity of tenders with regard to the requirements prescribed under the public notice and tender documentation; evaluation of tenders and composing a ranking list of tenderers.

The Tender Commission consists of a chairperson and a minimum of four members that are appointed from among the professionals in the area dealing with the subject matter of the concession (technical, legal, finances, and other professions).

Only timely submitted tenders are taken into consideration in the public competition procedure, accompanied by the required documentation. The Tender Commission compiles a ranking list of tenderers, pursuant to the criteria prescribed under public notice.

Tender not submitted in time, as well as tender not accompanied by the documentation required under the public notice and by the tender documentation, shall not be taken into consideration in public competition and is returned unopened to the tenderer.

The Tender Commission shall take the minutes in the course of public competition, which must be signed by the Tender Commission's members and the authorized representatives of tenderers.

Upon completion of a public competition, the Tender Commission shall approach the evaluation of tenders, based on the criteria prescribed under the public notice and tender documentation, and shall compose a ranking list of tenderers.

Tenders shall be verified prior to evaluation of tenders, for the purpose of establishing possible deficiencies and discrepancies in relation from the requirements prescribed under a public notice and tender documentation.

The criteria based on which evaluation of tenders is done, depending on the subject matter of concession, are the following: term of the requested concession; offered amount of the concession fee; offered price or tariff for delivery of services; references of the tenderer (technical and/or financial standing, track record in performing concession activity and alike); quality of service, the level of achievement of the public interest, the extent to which natural wealth will be used, effects on employment, infrastructure and economic development, programme and extent of environmental protection and measures for improving energy efficiency; the scope and the amount of the expected financial assistance and support by the Grantor, other criteria established by the Grantor.

The Tender Commission evaluates tenders by attributing certain number of points based on each criterion prescribed under the tender documentation, and produce a ranking list of tenderers based on the completed evaluation.

The Tender Commission is obliged to deliver to the competent authority a ranking list of tenderers within 30 days as of the day of opening of tenders, the report on the conducted procedure with the explanatory notes for the ranking list of tenderers, the minutes on the course of the procedure that must include data on the conformity with the requirements prescribed to be met by a concessionaire and the fundamental elements from tenders as per the structure of criteria based on which the evaluation of tenders was performed.

Public notice may set a longer time-limit than 30 days, as well as the competent authority may extend the time-limit, upon the proposal by the Tender Commission.

A ranking list of tenderers shall be posted on the bulletin board, that is, on the Web site of the competent authority.

Tenderers are entitled to examine the documentation within eight days as of the day of the publishing of the ranking list of tenderers on the web site of the competent authority, upon a written request. The tenderer is entitled to lodge an appeal about the ranking list of tenderers within 15 days as of the day of the publishing of the ranking list of tenderers on the Web site of the competent authority. The Commission acts upon tenderer's complaint: examines whether the Tender Commission conducted properly evaluation of tenders and ranking of tenderers, and examine whether the Tender Commission had properly applied the criteria for evaluating of tenders and ranking of tenderer's. If the Commission finds a violation of the procedure, or that criteria were inappropriately applied, the ranking list of tenderers shall be returned to the Tender Commission for the elimination of the established irregularities.

The competent authority submits to the Grantor a proposal to award concession, with explanatory note, the raking list of tenderers, the report on the conducted evaluation procedure together with the explanatory note for the ranking list of tenderers, the minutes of the Tender Commission on the course of the procedure, a proposal for a concession contract, a possible appeals by the tenderers if any, and the decision taken by the Commission upon such appeal. Upon the request of the Grantor, the competent authority is obliged to deliver other documents as well.

The Grantor decides on awarding concession within 30 days as of the day of the receipt of the proposal, if no appeals were presented about the ranking list of tenderers or about the evaluation procedure. If the complexity of a concession requires so, the Grantor may extend the time-limit for a maximum of 30 days, or 90 days if an administrative dispute has been initiated, in case of which it shall inform the tenderers.

If a Grantor has abandoned the concession award, the Grantor is obliged to compensate the first ranked tenderer the actual expenses of the participation in the public notice, unless otherwise prescribed under public notice.

If the first ranked tenderer revokes the concession contract or fails to conclude the concession contract within the time-limit stipulated under the decision on awarding concession, the Grantor may call the tenderers, as per the order on the ranking list, to conclude a contract or may annul the public notice.

The competent authority shall inform the tenderers in writing of the results of public notice within five days as of the day of adoption of the decision on awarding concession. The decision on concession award or a decision on public notice annulment shall be published in the Official Gazette of Montenegro and on the web site of the competent authority.

If one tenderer submits the tender upon public notice, and the Tender Commission verifies that such tender meets the requirements and criteria of the public notice, the competent authority may annul the public notice or continue the procedure for awarding concession.

Two-stage procedure

The two-stage procedure is carried out in cases of granting concessions for projects that are complex from a technical, technical-technological, legal, financial or other aspect, or when a large number of tenderers is expected.

The two-stage procedure includes: public announcement for pre-qualification; pre-qualification procedure, when the Tender Commission evaluates applications for pre-qualification and accepts or rejects applications based on pre-established pre-qualification criteria; submitting Concession Document to qualified tenderers, purchase of tender documentation and submitting tenders by qualified tenderers within given time-limit; evaluation and ranking of tenders received from qualified tenderers; explanatory note for awarding concession and selection of tenderer as a concessionaire.

The competent authority lays down, in the notice for a two-stage procedure public competition, pre-qualification criteria which must be met by tenderers in order to qualify for the competition procedure. The pre-qualification criteria must be set in an objective, non-discriminatory and transparent manner.

The pre-qualification criteria are determined in line with the subject of the concession and contain, particularly capacity to execute the concession (technical and financial requirements) and professional references, or experience in carrying out the concessionary activity.

Public notice determines the documentation which is necessary for pre-qualification, which proves that pre-qualification criteria are met.

The time-limit for submitting documents for pre-qualification cannot be shorter than 20 days, as of the day of publishing of the public notice.

If only one tenderer applies for pre-qualification who meets the pre-qualification criteria, the competent authority may decide to continue or annul the concession awarding procedure.

Accelerated procedure

Concessions with the term of validity of the award of up to three years shall be awarded in the procedure which is established by the Law on Concessions, whereas the public consultation does not need to take place in the procedure for awarding concession; the Concession Document is prepared which, depending on the subject-matter of concession, includes elements determined by the competent authority; determines the time-limit for submission of tenders, which cannot be shorter than 15 days as of the day of publication of a public notice in the Official Gazette of Montenegro; ranking list of tenderers determined by the Tender Commission is submitted to the competent authority no later than 20 days as of the day of opening of tenders.

If the Government, or the Municipality, upon proposal of the competent authority, determines a model of the draft concession contract for certain subjects of concession, initial amounts of concession fee and other elements of importance for awarding concession, the competent authority prepares the Concession Document in line with the elements determined by the Government or the Municipality.

The initiative of an interested party

An interested party may submit an initiative to the competent authority to commence the procedure of awarding concession which is not included in the annual plan issued by the Government or the Municipality. The initiative shall be submitted to the competent authority and shall include data and information necessary for the preparation of a Concession Document.

If the competent authority estimates that the initiative is acceptable it shall determine the deadline for the party submitting the initiative to deposit the estimated amount for the development of the Concession Document, including the development of tender documentation and draft concession contract, costs for the work of tender Commission and the costs for carrying out a public consultation.

Competent authority shall be obliged to, within 15 days as of the day of depositing funds, commence the preparation of documents.

If, in the implemented procedure, a concession is awarded to a tenderer who is not a party that submitted the initiative for awarding concession, the competent authority shall, without a delay, return to the party who submitted the initiative deposited money, decreased by the amount for the purchase of tender documentation, while the costs for development of the Concession Document shall be collected from the concessionaire.

The procedure of awarding concession is implemented on the basis of public notice, by:

- Open procedure public competition (hereinafter: the open procedure),
- Two-stage procedure public competition (hereinafter referred to as: the two-stage procedure),
- Accelerated procedure public competition (hereinafter referred to as: the accelerated procedure).

Notwithstanding the procedure of public tender based on a public notice may be excluded in the case of:

- an extension of the period for awarding concession;
- an extension of the area designated for concessionary activity, that, due to technical and technological requirements, may not be established as a separate exploitation field for carrying out concessionary activity by another concessionaire;
- use of other mineral resources as the accessory ones within the approved exploitation field, provided that the concession period may not be longer than the period stipulated under the concession contract for the exploitation of the primary mineral resource within such exploitation field;
- when public competition would endanger national defence and security;
- tender that includes a project of technical and technological design and other elements based on which it is possible to consider the public interest and cost-effectiveness of the development of infrastructure and other needs having strategic importance for Montenegro; where the concession subjects may be construction, maintenance, and usage, or reconstruction, modernization, maintenance, and usage, or use of roads, road-related and the accessory structures thereof, railroads, air traffic facilities and airports, water transport facilities and ports, telecommunication facilities, oil pipelines, gas pipelines, warehousing structures, structures for oil and gas transport and distribution, health and education institute buildings, structures of public utility services, for the delivery of public utility services; designing, constructing, maintaining and using of the energy-related and other structures for generation, transmission, and distribution of electrical energy, thermal energy, and gas or their reconstruction, modernization, maintenance, and usage; that were not established by the concession award annual plan of the Government (which is issued by the Government or the Municipality), and which awarding of concession would facilitate the realization of the project matter;
- realization of the concession, which is done on the basis of international agreements or contract signed between Montenegro and one or more states or international organizations, which envisages a joint realization of the concession by the parties to the agreement.

The extension of the time-period, expansion of area designated for concessionary activity, or use of other mineral resources, as the accessory ones, within the approved exploitation field, is carried out upon entering into an annex to the contract, after obtaining prior consent of the Commission and a decision of the Government, or of the competent authority of the Municipality.

Exclusion of public competition based on a public notice when the public auction would endanger national defence and security is conducted with the consent of the Government.

In case of tender that includes a project of technical and technological design and other elements based on which it is possible to consider the public interest and cost-effectiveness of the development of infrastructure and other needs having strategic importance for Montenegro, must contain the description of concession subject-matter, border of the area, and the location for which concession is to be awarded, the basic parameters for evaluating the economic justification of

investments; minimum or maximum duration of the concession period; the excerpt from the spatial-planning documentation, ownership structure and manner of dealing with property-legal relations, as well as information on infrastructure and other facilities that are located in the area of concession activity; draft concession contract and other supporting agreements necessary for the implementation of concession; the conditions and manner of concession activity, especially the conditions, manner, scope and quality of customer service; measures of the environment protection and enhancement of energy efficiency in accordance with the regulations; amount of initial concession fees and manner of determining the tariff for the provision of services.

The decision on granting of concession from the aforesaid section and the realization of concession that is carried out on the basis of international agreement or contract signed between Montenegro and one or more states or international organizations, which envisages a joint realization of a concession by the parties to the agreement is issued by the Government, with the consent of the Parliament. If the Parliament does not approve the decision on implementation of the concession carried out on the basis of international agreement or contract signed between Montenegro and one or more states or international organizations, which envisage a joint realization of a concession by the parties, the party submitting the request have no right to compensation for expenses incurred during the preparation of the tender.

The procedure for granting concessions is initiated by the competent authority by creating the Concession Document, in accordance with the annual plan that is issued by the Government or Municipality.

The procedure can be commenced at the initiative of the interested party.

Initiative of the competent authority

The competent authority shall submit the Concession Document to the Government, or to the competent authority of the Municipality, in accordance with Law.

Along with the Concession Document, the following also have to be submitted: analysis of justifiability of achieving the public interest by awarding a concession, containing the indicators that such concession is capable of providing the public interests and the analysis of the possible alternatives in delivering the services concerned; indicators that a planned concession is capable of ensuring an appropriate value for money; analysis of the risk assessments and balance of risks between the Grantor and the Concessionaire; consideration of the need that the Grantor has to have a stake in a concession company concerned (type and scale of such stake; report from the public consultation.

Prior to sending a Concession Document to be adopted, the competent authority shall organize and carry out a public consultation, within 15 to 30 days as of the day of submission of the public notice to such public consultation.

The competent authority may engage professional legal entities or natural persons to deliver support in drafting or for drafting of the proposal for the Concession Document and tender documentation, provided that these persons may not be tenderers in any procedure for awarding concessions for which they have delivered support in development of the Concession Document or they have drafted the Concession Document.

The Concession Document is adopted by the Government, or by the competent authority of the Municipality.

The competent authority shall publish a public notice upon the adoption of the Concession Document.

The Notice is published in the Official Gazette of Montenegro, at least one daily printed media that is circulated within the entire territory of Montenegro and on the web site of the competent authority; and in case a subject matter of concession is of strategic importance for Montenegro in one representative international economic printed media.

The public notice shall include, depending on the subject matter of concession, the following:

- 1) description of the subject matter of the concession; boundaries of the region, district, area and locality whereon the subject matter of the concession is located;
- 2) fundamental elements of the Concession Document;
- 3) address and time-limit for the submission of tenders to a public notice;
- 4) criteria for participation in the public notice and possibility to submit a joint tender;
- 5) rules according to which a public notice is carried out;
- 6) method of submitting tenders;
- 7) possible time for visit to the locality whereon a concessionary activity will be performed;
- 8) date, time and place for opening of the received tenders to a public notice;
- 9) the deadline within which a tender to a public notice may be withdrawn;
- 10) defining the type of the tender (technical and financial, or only financial tenders);
- 11) data on the amount and the format of deposit and guarantee and the period for which are requested;
- 12) requirements, deadline and method of returning deposit and guarantee;
- 13) the amount and the type of the stake of the Grantor and share of the Concessionaire in the ownership structure of a concession company;
- 14) name of a person in charge of giving relevant information during the procedure of public notice;
- 15) time and place where Concession Document and tender documentation can be obtained; as well as the price of tender documentation in the amount of costs of its development.

The public notice may also include a financial support offer to the Concessionaire for performing non-profitable and insufficiently profitable activities of the public interests (payments for activities of the public interests; giving guarantees; financial support; donations, and alike).

The time-limit for submitting tenders is defined according to the time required to prepare tender and shall run as of the day of the publication of the public notice in the Official Gazette of Montenegro and may not be shorter than 30 days.

The authority publishing the notice shall bear the costs of publishing the public notice.

Upon its publication, the competent authority may change a public notice, except for the elements stipulated under a Concession Document.

The change of the public notice must be published in the manner in which the original text of such public notice was published; provided that the deadline for submitting tenders must be extended for the time that has expired since the original public notice was published.

Open procedure public competition

At a public notice, a business organization, other person, entrepreneur or natural person may submit only one tender, independently, under a consortium or other form of business association.

Furthermore, a tenderer is obliged to submit, along with the tender, evidence on money deposit payment or secured bank guarantee, in the amount and for the period that are defined under public notice.

The amount of the deposit and the bank guarantee, and the period for which security is provided, shall be set commensurate with the value of the subject matter of the concession.

The procedure of public competition, based on a public notice, is conducted by an *ad hoc* Tender Commission composed of an odd number of members that are appointed by the competent authority.

In the procedure of public competition, the Tender Commission shall carry out the following procedures: opening of tenders; evaluation and verification of eligibility of the tenderers to participate in the public notice; verification of the authenticity of tenders with regard to the

requirements prescribed under the public notice and tender documentation; evaluation of tenders and composing a ranking list of tenderers.

The Tender Commission consists of a chairperson and a minimum of four members that are appointed from among the professionals in the area dealing with the subject matter of the concession (technical, law, finances, and other professions).

In the public competition procedure, only timely submitted tenders are taken into consideration in a public competition procedure, accompanied by the required documentation. The Tender Commission compiles a ranking list of tenderers, pursuant to the criteria prescribed under public notice.

Tender not submitted in time, as well as tender not accompanied by the documentation required under public notice and by the tender documentation referred to by the Law, is not taken into consideration in public competition and is returned unopened to the tenderer.

The Tender Commission takes the minutes of the course of public competition, which must be signed by the Tender Commission's members and the authorized representatives of tenderers.

Upon completion of a public competition, the Tender Commission advance to the evaluation of tenders, based on the criteria prescribed under public notice and tender documentation, and it compose a ranking list of tenderers.

Prior to the evaluation of tenders, the tenders are checked to determine possible deficiencies and discrepancies in relation to the specific conditions of public notice and tender documentation.

The criteria based on which evaluation of tenders is done, depending on the subject matter of concession, are the following: term of the requested concession, offered amount of the concession fee; offered price or tariff for delivery of services; references of the tenderer (technical and/or financial standing, track record in performance of concession-related activity and alike); quality of service, the level of achievement of the public interest, the extent to which natural wealth will be used, effects on employment, infrastructure and economic development, programme and extent of environmental protection, and measures for improving energy efficiency, the scope and the amount of the expected financial assistance and support of the Grantor, other criteria established by the Grantor.

The Tender Commission evaluates tenders by attributing certain number of points based on each criterion prescribed under tender documentation, and produces a ranking list of tenderers based on the completed evaluation.

The Tender Commission is obliged to deliver to the competent authority a ranking list of tenderers, the report on the conducted procedure with the explanatory notes for the ranking list of tenderers, the minutes on the course of the procedure that must include data on the conformity with the requirements prescribed to be met by a concessionaire and the fundamental elements from tenders as per the structure of criteria based on which the evaluation of tenders was performed, within 30 days as of the day of opening of tenders.

Public notice may set a longer time-limit than 30 days, as well as the competent authority may extend the time-limit, upon the proposal by the Tender Commission.

A ranking list of tenderers is posted on the bulletin board, that is, on the Web site of the competent authority.

The competent authority submits to the Grantor a proposal to award concession with explanatory note, the raking list of tenderers, the report on the conducted evaluation procedure with the explanatory note for the ranking list of tenderers, the minutes of the Tender Commission on the course of the procedure, a proposal for a concession contract, appeals by the tenderers if any, and the decision taken by the Commission upon such appeals. The competent authority is also obliged to submit, upon a request by the Grantor, other documentation.

The Grantor decides on awarding concession within 30 days as of the day of the receipt of the proposal referred to by the Law, if no appeals were presented to the ranking list of tenderers or to the evaluation procedure. If the complexity of a concession requires so, the Grantor may extend

the time-limit for a maximum of 30 days, or 90 days if an administrative dispute has been initiated, of which it informs the tenderers.

If the Grantor abandons the concession award, the Grantor shall be obliged to compensate the first ranked tenderer the actual costs of the participation in the public notice, unless otherwise prescribed under the public notice.

If the first ranked tenderer withdraws from the conclusion of the concession contract or fails to conclude the concession contract within the time-limit stipulated under the decision on awarding concession, the Grantor may call the tenderers, as per the order on the ranking list, to conclude a contract or may annul the public notice.

Within five days as of the day of adoption of the decision on awarding concession, the competent authority shall inform the tenderers in writing of the results of public notice. A decision on concession award or a decision on public notice annulment shall be published in the Official Gazette of Montenegro and on the web site of the competent authority.

If one tenderer submits the tender upon public notice, and the Tender Commission verifies that such tender meets the requirements and criteria of the public notice, the competent authority may annul the public notice or continue the procedure for awarding concession.

Two-stage procedure public competition

The two-stage procedure is conducted in cases of granting a concession for projects which are complex from technical, technical and technological, legal, financial and other aspect, or when a large number of tenderers is expected.

The two-stage procedure includes: public announcement for pre-qualification; pre-qualification procedure, when the Tender Commission evaluates applications for pre-qualification and accepts or rejects applications based on pre-established pre-qualification criteria; submitting Concession Document to qualified tenderers, purchase of tender documentation and submitting tenders by qualified tenderers within given time-limit; evaluation and ranking of tenders received from qualified tenderers; the proposal for awarding concession with explanatory note and selection of a tenderer as a concessionaire.

The competent authority shall set in the public notice for a two-stage procedure public competition, a pre-qualification criteria which must be met by tenderers in order to qualify for the competition procedure. The pre-qualification criteria must be set in an objective, non-discriminatory and transparent manner.

The pre-qualification criteria are determined in line with the subject of the concession and particularly contains the capacity to execute the concession (technical and/or financial requirements), as well as professional references, or experience in carrying out the concessionary activity.

Public notice shall determine documentation which is necessary for pre-qualification, which proves that pre-qualification criteria are met.

The time-limit for submitting documents for pre-qualification cannot be shorter than 20 days, as of the day of publishing of the public notice.

If only one tenderer applies in pre-qualification who meets the pre-qualification criteria, the competent authority may decide to continue with or annul the concession awarding procedure.

Accelerated public competition procedure

Concessions with the term of validity of the award of up to three years are awarded in accordance with the procedure stipulated by the Law on Concessions, whereas in the procedure for awarding concession the public consultation does not need to take place; a Concession Document is prepared which, depending on the subject of concession, includes elements determined by the competent authority; the time-limit for submission of tenders is determined, which cannot be shorter than 15 days as of the day of publication of a public notice in the Official Gazette of

Montenegro, ranking list of tenderers which is determined by the Tender Commission is submitted to the competent authority by no later than 20 days as of the day of opening of tenders.

If the Government, or the Municipality, at the proposal of the competent authority, adopts a model of the draft concession contract for certain subject-matter of concession, initial amounts of concession fee and other elements of importance for awarding concession, the competent authority prepares a Concession Document in line with the elements determined by the Government or the Municipality.

The Law on Concessions (Official Gazette of Montenegro, No 08/09) provides to interested parties an opportunity for negotiations in the competitive dialogue procedure and through the initiative of the party concerned.

Competitive dialogue for awarding concession is carried out if a competent Authority does not have a solution for realisation of technical, technical and technological, legal, financial or other aspects of a complex project, in order to determine the best technical, technical and technological, legal, financial or other solution for the realisation of the project.

The criteria for choosing a tenderer for a competitive dialogue and the subject-matter of concession with necessary elements for its realization for which it is necessary to choose an appropriate solution shall be determined in a public notice for pre-qualification. After carrying out the pre-qualification procedure, qualified Tenderers shall be invited to initiate a competitive dialogue during which an appropriate solution for realisation of the concession will be defined.

The competent authority is obliged to carry out the competitive dialogue in an objective and non-discriminatory manner and must not reveal to other Tenderers, without the approval of the Tenderer, offered solutions and information obtained during such dialogue.

The competent authority shall carry out the competitive dialogue until a solution which matches the needs expressed in a public notice is determined. The competent Authority may determine in the public notice for pre-qualification that the procedure for the selection of an appropriate solution will take place in several stages, throughout which the number of Tenderers can be reduced.

By determining an appropriate solution, the competent authority informs the tenderers that the competitive dialogue is concluded and shall proceed with development of a Concession Document, in line with this Law.

Competent authority shall submit to qualified Tenderers, with whom the competitive dialogue was completed, the Concession Document and purchased tender documentation so that they can submit their final tenders for the concessions, in line with this Law.

The initiative of an interested party

An interested party may submit an initiative to the competent authority to commence the procedure of awarding concession which is not included in the annual plan issued by the Government or Municipalities. The initiative is submitted to the competent authority and contains data necessary for the preparation of a Concession Document.

If the competent authority estimates that the initiative is acceptable it determines the deadline for the party submitting the initiative to deposit the estimated amount for the development of the Concession Document, including the development of tender documentation and draft concession contract, costs for the work of Tender Commission and the costs for carrying out a public consultation.

The competent authority is obliged to, within 15 days as of the day of depositing funds, commence the preparation of documents.

If, in the implemented procedure, a concession is awarded to a tenderer who is not a party that submitted the initiative for awarding concession, the competent authority shall, without a delay, return to the party who submitted the initiative deposited money, decreased by the amount for the

purchase of tender documentation, while the costs for development of the Concession Document shall be collected from the concessionaire.

The tenderers are entitled to examine the documents, within eight days as of the day of the publishing of the ranking list of tenderers on the web site of the competent authority, upon a written request. Tenderer is entitled to lodge an appeal about the ranking list of tenderers within 15 days as of the day of the publishing of the ranking list of tenderers on the web site of the competent authority. The Commission for Concessions of Montenegro, upon the appeal of the tenderer, examines whether the Tender Commission performed properly the evaluation of tenders and ranking of tenderers, and examine whether the Tender Commission applied properly the criteria for evaluation of tenders and ranking of tenderers. If it is established that a violation of the procedure or that criteria were inappropriately applied, the ranking list of tenderers is returned to the Tender Commission for the elimination of the established irregularities.

A legal protection in the area of concessions is provided by the means of an administrative dispute, at the Administrative Court of Montenegro.

6. Please list qualification criteria, which may be deployed in tender procedures.

Qualification criteria which can be deployed in tender procedures are defined by the Law on Public Procurement as mandatory and optional conditions (criteria) for participation in the public tender procedure. Thus, tenderer in the process of competition **must prove (mandatory requirements) that:**

- **has not been convicted for the crimes** envisaged by the Law, **nor subjected to the prohibition of further conduct of business that is the subject-matter of the public contract**;
- **possesses business and professional capacity** and
- **properly fulfils due and payable obligations relating to taxes and contributions.**

The contracting authority **may specify (optional conditions)** in the call for competition and tender documents, that the tenderer should meet, in addition to the mandatory above specified conditions, also the conditions relating to:

- **economic and financial standing** and
- **technical and professional staffing abilities.**

The conformity conditions and types of evidence on the conformity of tenderers are indicated in the call for competition and the tender documents.

Non-conviction in criminal and other proceedings, as obligatory condition, is determined in a manner where the tenderers participating in the public contract procedure are obliged to prove that in the period of two years before the submission of the tender they have not committed criminal offence of participation in criminal organization, corruption, fraud, money laundering or criminal offences related to the professional conduct of their business, and that they have not been imposed a prohibition of the conduct of business activity that is the subject-matter of a respective public contract

Business and professional capacity, as mandatory requirement, is determined in the manner where the tenderers participating in the public contract procedure are obliged to provide certificate of registration for the professional conduct of business activity that is the subject-matter of the public contract, or valid authorization and/or licence issued by a competent authority for the professional conduct of business activity, subject to the public contract procedure and such authorization and/or licence being envisaged by special laws or regulations.

The obligation of paying taxes and contributions, as a mandatory condition is determined in the manner where the tenderers who participate in the proceedings must submit the evidence issued

by the administrative body responsible for tax matters and organization of pension and health insurance that payment of tax liabilities and contributions was carried out.

The contracting authority may specify, in the call for public competition or the tender documents, that the tenderers should meet the following conditions with respect to their economic and financial standing and should prove it by furnishing one or more of the following references:

- 1) the accounting and financial statements - income statement and balance sheet, and/or certified auditor's report in the cases where it is prescribed by the Law on Accounting and Auditing, for the past three years, or for the period since its registration;
- 2) appropriate statements from banks, certificates of statements on financial suitability of tenderers or, where needed, evidence of relevant professional risk indemnity insurance;
- 3) a statement of the overall turnover and, where needed, of turnover in the area covered by the contract for a maximum of the last three financial years available, or for the period since registration.

Evidence of the technical and professional and staffing abilities of a tenderer in the award of public supply contracts, as laid down in the call for competition and in the tender documents, must be proportionate to the nature and subject-matter of public contract and may be furnished by one of the following means:

- a list of the principal deliveries effected in the past two to three years, with the sums, dates and recipients, along with documents in the form of certificates of deliveries made issued by the recipient or if such certificates cannot be ensured for reasons that are beyond the tenderer's control, only by a declaration of deliveries made issued by the tenderer;
- a description of the technical facilities and technical capacity, measures used by the tenderer for ensuring quality and his study and research facilities and capacity;
- an indication of the technicians involved, whether or not belonging directly to the tenderer;
- samples, descriptions and/or photographs of the products to be supplied, the authenticity of which must be certified if the contracting authority so requests;
- certificates drawn up by official quality control agencies of recognized competence attesting the conformity of products clearly identified by references to specifications or standards;
- a statement of any intention and subject of subcontracting.

In the procedure for the award of public service contract, the contracting authority may require the tenderers to furnish one or more of the following means, as evidence of their technical and professional and staffing abilities:

- a list of the main services provided in the past two to three years, with the sums, dates and recipients, along with documents in the form of certificates of services provided issued by recipients or, if such certificates cannot be ensured for reasons that are beyond the tenderer's control, only by a declaration of services provided issued by the tenderer;
- the educational and professional qualifications of the tenderer and/or those of its managerial staff and, in particular, those of the person or persons responsible for providing the specific services;
- an indication of the technicians or technical bodies involved, whether or not directly belonging to the tenderer;
- a tenderer's statement of the average annual manpower of the tenderer and the number of managerial staff for the last three years;
- a statement of technical facilities and capacity and measures used by the tenderer for performing the specific services and for ensuring quality;
- where the services to be supplied are complex or, exceptionally, are required for a special purpose, a check carried out by the contracting authorities or on their behalf by a

competent official body of the country in which the tenderer is registered on the technical facilities and capacity of the tenderer or, if necessary, the means of study and research available to it and the quality control measures it will operate;

- a statement of any intention and subject of subcontracting.

Evidence of the technical and professional and staffing abilities of the tenderer in the award of public works contracts may be furnished by one of the following means:

- a list of the works carried out over the past two to five years, accompanied by certificates of satisfactory execution for the most important works. These certificates shall indicate the value, date and site of the works and shall specify whether they were carried out according to the rules of the trade and properly completed. Where appropriate, the competent authority shall submit these certificates to the contracting authority direct;
- the educational and professional qualifications of the tenderer and/or those of its managerial staff and, in particular, those of the person or persons responsible for managing the specific work;
- an indication of the technicians involved, particularly that/those responsible for quality control, whether or not directly belonging to the tenderer;
- a statement of the average annual manpower of the tenderer and the number of managerial staff for the last three years;
- a statement of technical facilities available to the tenderer for performing the specific works;
- a statement of any intention and subject of subcontracting. .

Tenderers are obliged to prove their suitability for participation in public competitions. Contracting authority may not set suitability conditions and evidence other than those stated in this Law, nor other requirements that bring tenderers into an unequal position. Evidence is submitted in original, in copy duly certified or in electronic format, can not be older more than six months as of the day of invitation issue.

Evidence that the requirements have been met are:

- evidence that the legal person has not been lawfully convicted for a criminal offence of participation in criminal organization, corruption, fraud, money laundering or criminal offences related to the professional conduct of their business, and that they have not been imposed a prohibition of the conduct of business activity that is the subject-matter of a respective public - excerpt from the criminal record certificate or the appropriate competent authority;
- excerpt from the court, professional or trade register of the country where the tenderer has a seat or a valid permit or license issued by the competent authority to perform professional activities;
- proof (certificate, official document) from the administrative body responsible for tax matters and organization of pension and health insurance that payment of tax liabilities and contributions were carried out;

Evidence that the requirements regarding fulfilment of eligibility conditions for the optional conditions are:

- evidence that the legal person is not insolvent or in insolvency procedure - certificate of the court or competent body in the country of the seat;
- evidence that the payments towards the tenderer are not suspended - corresponding bank statements, certificate or statement on financial suitability of the bank where the legal person is the account holder;
- report on accounting and financial condition - balance sheet and income statement, or report of an authorized auditor for the last three years, in cases prescribed by the Law on

Accounting and Audit, or for the period from the registration provided the commercial company has been registered inside that period;

- tenderer's statement on its technical ability: equipment, devices, resources, personnel, capacities, manner of quality assurance and participation of sub-producers and/or sub-contractors;
- appropriate samples and photographs of works carried out and technical capacities.

Should contracting authority request evidence on fulfilling quality requirements and/or certificates and/or licenses, it is obliged to accept equally valid certificates of other authorized bodies of European Union member states or other states. Contracting authority is obliged to accept the proof on fulfilling quality requirements and/or certificates i.e. licenses in another form in case the tenderer offers the evidence that contracting authority have no entitlement to request the respective certificates. In case the tenderer's seat is located in another country, the evidence documentation needs to be certified by a competent body of that country (administrative or judicial body, or Chamber of Commerce), or by the embassy of tenderer's country in Montenegro. If a country of tenderer's seat does not issue requested proofs, such proofs may be substituted by the tenderer's statement under penal and material responsibility, or should that country not have legal provisions related to the statements under penal and material responsibility, by the tenderer's statement given before a competent judicial or administrative body or public notary. Tenderer is obliged, without delay, and at the latest within five days as of the day of change of any data, to advise contracting authority in writing on the change as well as to properly document the same. In case the tenderer fails to submit any of the suitability evidence envisaged in the invitation to tender and the tender documents, its tender will be rejected as incomplete

The contracting authority is authorised to exclude from further public contract procedure any tenderer, for which it has established:

- 1) that the tenderer has been the subject of a conviction by final judgement, in the period of two years before the submission of the tender, for the committed criminal offence of participation in criminal organization, corruption, fraud, money laundering or that related to the professional conduct of its activity, and that the tenderer has not been imposed a prohibition of the conduct of business activity that is the subject-matter of a respective public contract;
- 2) that the tenderer has not been registered or currently licensed or authorized by a relevant authority for the professional conduct of its activity;
- 3) that the tenderer is the subject of liquidation proceedings or has suspended business activities;
- 4) that the tenderer has not fulfilled properly obligations relating to the payment of social security contributions and due taxes, in accordance with the legal provisions;
- 5) that the tenderer is guilty of serious misrepresentation in supplying the information required in the public contract procedure or has not supplied such information.

The contracting authority may exclude from further public contract procedure any tenderer, for which it has established:

- 1) that the tenderer has entered into bankruptcy proceedings;
- 2) that the tenderer does not fulfil the conditions foreseen in the invitation to tender and in the tender documents, with respect to professional and/or technical and staffing abilities;
- 3) that the tenderer has not regularly met contractual obligations to contracting authorities in previous public contracts.

7. What are the rules/possibilities for defining the technical specifications?

Technical specifications are a mandatory part of the tender documents. Technical specifications must be non-discriminatory to all potential tenderers and must ensure a fair and active competition. The contracting authority defines the technical specifications by references to the laws, technical regulations and standards applied in Montenegro, which are in conformity with European standards. In case of the absence of such technical regulations and standards, the contracting authority refers to European standards or internationally recognized standards, technical regulations or technical reference systems. Technical specifications may include green procurement. The contracting authority may not use or refer to the technical specifications designating supplies, services or works of a specific make or source, or to a particular process, with the effect of favouring certain tenderers or unfairly eliminating the others. The contracting authority may not refer in the technical specifications to any particular trademarks, patents, types or a specific origin or production. When the contracting authority cannot describe in the technical specifications the subject-matter of the contract in the manner that will make the specifications sufficiently intelligible to tenderers, any reference to the elements such as trademark, patent, type or producer must be accompanied by the words "or equivalent". Technical specifications must be precise and clear to allow tenderers to prepare their tenders and to allow the contracting authority to reject supplies, services or works that do not comply with the defined fair requirements. The contracting authority have no have a right to reject a tender on the ground that the products, services or works tendered for do not comply with the specifications to which it has referred with respect to standards indicated in the technical specification, once the tenderer proves in his tender that the solutions which he proposes satisfy in a substantially equivalent manner the requirements defined by the technical specifications or when there are no applicable standards, technical regulations or technical reference systems in terms of performance or functional requirements, that may also include public health and safety and environmental requirements.

8. What are the award criteria used in tender procedures, are they dependent on the type of procedure used? Can you provide us with statistics?

The Contracting authority shall establish criteria, in the call for competition and the tender documents, for the selection of the best tender. The legislator has specified, in line with the Directive 2004/18/EC, that contracting authority may choose between two criteria for the selection of the best tender in the public procurement procedure and they are most economically advantageous tender or the lowest price offered. At the second stage of restricted procedure, to award contract by means of a framework agreement and public procurement procedures of small value, the only criterion to be applied to award the contract shall be the lowest offered price.

Based on the character and specifics of the subject public procurement, contracting authority shall be obliged, in the call for competition and tender documentation, to determine the criterion for selection of the most economically advantageous tender and, if needed, sub-criteria (with the most economically advantageous tender), to provide for the optimal supply. How well the contracting authority understands the market is clearly obvious through selected criteria and sub-criteria. Imprecise designation of criteria and insufficient objectivity often means that contracting authority shall receive worse or invalid bids, or there shall be no bids at all. Bidders shall have the right, during the period of public invitation, to challenge the selection of criteria and sub-criteria, to objection to contracting authority and a complaint to the Commission for Control of Public Procurement Procedure if they think that chosen sub-criteria are neither linked to the content of the public procurement nor clearly enough described i.e. that they are discriminatory. However, conducting the public procurement procedure has nothing to do with comparison of forces between contracting authorities and bidders regarding the regular routing and application of criteria but the selection of the most economically advantageous tender, so it is of extreme importance contracting authority to deal with selection of criteria and its objectivity with special regard. In this respect, contracting authority cannot set absurd requirements before bidders, e.g. regarding abnormally short delivery period, payment deadlines which generate loss for the bidders and similar requests.

Contracting authority shall be entitled to carry out the selection of subject-matter of a contract and selection criteria. However, when selecting the criteria, contracting authority can only select criteria and sub-criteria in line with the Law.

Depending on the subject of contract specifics, the criterion of the most economically advantageous tender shall be especially based on the following sub-criteria:

- 1) quality;
- 2) offered price;
- 3) aesthetic and functional characteristics;
- 4) delivery period, or date of completion of services or works;
- 5) running costs;
- 6) cost-effectiveness;
- 7) technical merits;
- 8) programme and degree of environment protection;
- 9) after-sales service and technical assistance;
- 10) warranty period, type and quality of warranties and warranted values;
- 11) obligations related to spare parts;
- 12) post-warranty maintenance and so on.

In the invitation to tender and the tender documents, contracting authority shall establish the number of points according to each individual sub-criterion on the basis of which the selection of the most successful tenderer will be carried out, in such a way that the total number of points adds to 100. Contracting authority shall carry out the selection amongst the submitted tenders by applying sub-criteria of most economically advantageous tender by ranking them on the basis of these sub-criteria and the number of points determined for those sub-criteria.

For public works contracts, contracting authority shall use, especially the following sub-criteria:

- offered price
- aesthetic and functional characteristics;
- delivery period;
- running costs;
- programme and degree of environment protection;
- cost-effectiveness, and
- post-warranty maintenance.

For public supply contracts contracting authority shall use, especially the following sub-criteria:

- offered price;
- quality;
- aesthetic and functional characteristics;
- delivery period,
- running costs;
- technical merits;
- after-sales service and technical assistance;
- warranty period, type and quality of warranties and warranted values;
- obligation related to spare parts.

For public service contracts contracting authority shall use, especially the following sub-criteria:

- quality;
- aesthetic and functional characteristics;

- delivery period,
- cost-effectiveness,
- technical merits, and
- offered price.

In the opinion of the legislator, being in particular apostrophed in Directive 2004/18/EC, the number of listed sub-criteria in the most economically advantageous tender criteria is sufficient for an objective selection of the best tender deals

In practice, it often happens that contracting authority is trying to conclude a contract with tenderer, whom he, in the previous period, awarded the contracts, because he was known to the supplier, which is so far satisfied with the cooperation with him or he considers that it is notoriously capable supplier. In these cases, contracting authorities are trying to evaluate references of tenderers, whether they are introduced as an additional sub-criterion or in a way that trying to evaluate the quality of reference, judging the quality of the bidder, not the products that they offer the supplier. In this way, contracting authorities are trying to evaluate already established formal and informal relationships, and that is not allowed. Just for this reason, ***the legislator did not provide references as a selection of one of sub-criteria*** for selecting the best offer, because it would be so limited market competition, and the market in Montenegro, which is in development phase, this behaviour is especially detrimental to contracting authorities effect, because it would reduce the number of potential tenderers who wish to participate in public tenders. Introducing additional references as sub-criteria would favour a certain supplier and validate the privileged position of that supplier with the customer.

Exceptionally, offered price, as selected sub-criterion for the procurement of goods, is determined by the dominant number of points, while the remaining number of points divided by into the other sub-criteria, given their importance for selecting the best offer. When the criterion for selection is the lowest offered price, contracting authority shall, on the basis of the review, evaluation and comparison of bids, select the best tender who offered the lowest price. Price as a criterion in practice is used regularly, either as a sole criterion or criteria sub-criterion in the most economically advantageous tender. Depending on the subject of procurement, for selecting the most advantageous tender by the application of the tender price criterion, as the basis for evaluation, submitted by the tenderer whose bids are correct. The maximum number of points according to this criterion shall be awarded to the bidder who offered the lowest price, while other points, according to this criterion, shall be awarded proportionally, in relation to the lowest available price.

In public procurement of goods, in most cases (over 90%) were used the most advantageous economic tender criteria as a criterion for awarding the contract. As sub-criteria within this criterion were used the following: offered prices (in 100% of the cases and with the average number of 61.5 points), quality (in 55% of cases and average number of 29.09 points), delivery period (in 55% cases with average number of 19.54 points), guarantee period (in 40% of cases and the average number of 15 points), post-sales service and technical assistance (in 10% of cases and the average number of 15 points), aesthetic and functional characteristics (in 14% of cases and average number of 22.33 points), technical and technological advantages (in 15% of cases and average number of 24.66 points) and other sub-criteria, such as ongoing maintenance costs, liabilities in respect of spare parts and other (in 5% of cases and the average number of 10 points). A minimum of three sub-criteria were used in the average per procedure.

In procedures for public works contracts, in most cases (over 65%) were used the most advantageous economic tender criteria as a criterion for awarding the contract. As sub-criteria within this criterion were used the following: offered price (in 100% of the cases and the average number of 79.50 points), time period for completion of works (in 100% of the cases and the average number of 16.25 points), economic costs (in 30% of cases and the average number of 17,5 points), aesthetic and functional characteristics (in 5% of cases and the average number of 30 points), post-warranty maintenance (in 20% of cases and the average number of 10 points), programme and degree of environmental protection (in 5% of cases and the average number of 20 points) , ongoing maintenance costs and other sub-criteria (in 2% of cases and the average number of 10 points). A minimum of three sub-criteria were used in the average per procedure.

In public procurement procedures for services, the most advantageous economic tender criteria were used as a criterion for awarding the contract in over 70% of cases. As sub-criteria within this criterion were used the following: quality (in 75% of cases and the average number of 32 points), aesthetic and functional characteristics (in 10% of the average number of 20 points), time period for completion of services (in 50% of cases and the average number of 17.5 points), economic costs (in 15% of cases and the average number of points 16.66), technical and technological advantages (in 40% of cases and the average number of points 20.62), offered price (in 100% of the cases and the average number of 80.5 points), warranty period (in 10% of cases and the average number of 10 points) and other sub-criteria (in 2% of cases and the average number of 5 points). A minimum of three sub-criteria were used in the average per procedure.

9. Does your legislation require that award criteria, other than price, must be linked to the subject matter of the contract?

Criteria for awarding the contract must be related to the subject of public procurement. Criteria and sub-criteria (***sub-criteria – with most economically advantageous tender***) must be described clearly and understandably (in public call and/or in tender documentation), so that every tenderer can interpret them identically, and to be able to understand the work methodology of the Commission for opening and evaluation of tenders when comparing and evaluating tenders. Criteria and sub-criteria must be clearly stated in words and the maximum number of points that can be assigned on the basis of each criterion and sub-criteria, but the total score for the established criteria may not exceed 100 points. Number of points for each sub-criterion, as outlined, is determined depending on the importance of each sub-criterion for public procurement subject, where the contracting authority is obliged to provide the appropriate proportion between the number of points, that are awarded by individual sub-criterion, thereby taking into account the importance and linkage to selected sub-criteria with subject of public procurement and contracting authority motivation for determining sub-criteria. Contracting authority is obliged to provide consistent application of the principle of equality and competitiveness of tenderers in a way that established sub-criteria criteria must not be discriminatory in relation to suppliers and which must be logically linked to the public procurement content. Contracting authority shall apply only those criteria and sub-criteria contained in the text of the invitation to competition and tender documents to assess and evaluate bids, in the manner described in these documents. Therefore, is not allowed to change the criteria and sub-criteria in the stage of public procurement procedure after the public opening of bids, as well as the work methodology of the Commission for opening and evaluating of tenders that could thereby violate the competition principles and equality of tenderers. Contracting authority is, therefore, obliged to carefully select and describe the criteria for selection of the best tender, but the most important is their recognition by order of importance. For the realization of the principles of economy, determining the importance of the criteria is a key stage in the public procurement procedure.

The selection between the submitted tenders, using the criteria of the most economically advantageous tender, contracting authority is conducting by ranking the criteria based on sub-criteria and number of points established for these sub-criteria.

Contracting authority may, exceptionally, determine other sub-criteria (which are not precisely specified in the Public Procurement Law and/or by-law) within criteria for the most economically advantageous tender, thereby required to explain the reasons for introducing supplementary sub-criteria, beside those provided by the Public Procurement Law and the by-law, and to particularly underline the relationship between the supplementary sub-criterion and public procurement subject, as well as the need for its introduction, being the subject of special approval. In the opinion of legislator, the opinion especially underlined in Directive 2004/18/EC, the said number of sub-criteria within criteria of the most economically advantageous tender is sufficient for an objective selection of the best tender. This means that additional sub-criterion may be introduced only in exceptionally justified cases, when the contracting authority is required to justify the need for its introduction by a separate decision, wherein the benefits from its introduction shall be expressed in value, since otherwise the application of additional sub-criteria is, when contracting authority does

not have economic benefits from it, pointless. This is due to the possibility of selection of relevant sub-criteria given in a wide range of goods, services and works, and the practice has proved that the supplementary sub-criterion was, in most cases, introduced in order to favouring a particular tenderer and abuse of the public procurement procedure.

10. Does your legislation require a clear distinction between the qualification and award criteria?

Montenegrin legislation clearly defines the difference between qualification criteria and criteria for the award of contracts in public procurement procedures. Qualification criteria represent the condition that must be fulfilled prior to participation in the further process of public procurement - the process of assessing and evaluating of tenders.

Qualification criteria are clearly determined by the Law and stated in response to a question 6, and the criteria for awarding the contract, also clearly stated in the Law, are in response to a question 7 of this part of Questionnaire. In the public procurement procedures contracting authority has no concerns regarding their use. Compliance of calls regarding the definition of conditions and criteria, in accordance with the Law, at the stage of publication of a call for competition, preventive-instructive advice, shall be provided by authorized officials of the Public Procurement Directorate.

11. Do you have any local, regional or national preferences schemes? What do they consist of?

The Public Procurement Law of Montenegro adhered to the rules and requirements of the European Union with regard to ensuring complete freedom of movement of goods, people and capital. The law does not recognize any preferential treatment for subjects from Montenegro. Pursuant to the Law, all legal and natural persons, as well as tenderers, are allowed to engage in public procurement procedures and/or submit the offer to contracting authorities in Montenegro and obtain a contract, under the same conditions as Montenegrin economic entities or natural persons who perform specific activities. Foreign entities may be registered either in the European Union or in Montenegro. They have the same treatment in public procurement procedures as Montenegrin entities. The principle of freedom of the open market is fully respected.

12. Does your legislation include a specific regulatory framework for the utilities sector, including private undertakings with special or exclusive rights?

Public procurement in the utility sector (procurement in the areas of water management, energy, mining, telecommunications and transport), according to the current Montenegrin legislation is assigned under the same conditions as the public procurement in the classical sector. However, in the framework of IPA 2007 Assistance Program which will last for one year and eight months, starting from mid-2009 is expected to provide assistance in the harmonization of legislation, especially in the area of services sector in terms of procedures for this sector, including private companies with special or exclusive rights.

13. Do you have any plans to modify/integrate existing legislation? If so, please give all relevant details and timetables.

Public Procurement Law (Official Gazette of the Republic of Montenegro 46/06) is essentially in conformity with the Directive 2004/18/EC relating to classical sector public procurement and Directives 89/665/EC and 92/13/EC in the area of protection of rights. Public procurements in the utility sector are awarded under the same conditions as the public procurement in the classical sector.

The obligation in paragraph 2 Article 41 of the Interim Agreement on trade and related issues concerning the harmonization of public procurement legislation with European Union system, in the area of utilities sector (simplification of procedures), shall be fully met by harmonization with all EU regulations and standards, through incorporation into national legislation, by the Law on amendments to the existing Law or adoption of a new Law on Public Procurement for the utility sector, at the end of 2010 or at the beginning of 2011, whereby the national legislation on public procurement shall be complied with the Directive 2004/17/EC. Also, through this conformity it shall be provided the compliance with the new Directive in the area of protection of the rights 2007/66/EC and complete harmonization with Directive 2004/18/EC, which provided for new procedures in the section relating to electronic communications, dynamic purchasing systems and electronic auctions, establishing new limit values of public procurements, scheduling the duration of calls and other public improvements of the text of the Law. Institutions competent to carry out tasks of state administration in the area of public procurement (Ministry of Finance, Public Procurement Directorate and the Commission for the Control of Public Procurement Procedure) started with activities in preparation of professional basis for understanding the needs to complete the harmonization of legislation in the area of public procurement with European Union legislation. Within the IPA Assistance Program 2007 which will last one year and eight months, and which began in June 2009, is expected to provide assistance in the harmonization of legislation, particularly in the area of utility sector in terms of simplification of procedures, given that the existing law applies under the same conditions and for contracts in the classical and contracts in the utility sector. Commencement of personnel training of the Public Procurement Directorate and the Commission for the Control of Public Procurement Procedures as well as training of employees performing tasks of public procurement with covered parties (contracting authorities) and tenderers, auditors and judges, and then provide support to Public Procurement Directorate in the area of technical equipment and personnel training and development of information technologies, spreading information on public procurement and public awareness campaigns in this area.

14. How are corruption/conflict of interest aspects and related questions taken into consideration by existing legislation? Please list the exclusion criteria in tender procedures and state whether they are mandatory or their deployment depends on the contracting authority.

The provisions of the Law on Public Procurement (Official Gazette of the Republic of Montenegro 46/06) in particular underline the principle of anti-corruption rules, that contracting authority and other participants in the public procurement procedure are obliged to adhere to. All of them are obliged to undertake efficient and effective measures preventing corruption activities, starting from those in the narrowest sense like corruption actions. Then, they are also obliged to prevent all other corruptive activities and work on prevention of other corruptive actions and acts which can lead to punishable corruptive criminal actions such as misuse of official position, conclusion of agreements for the purpose of deceiving third parties, provision of false data when submitting tenders and they are obliged to prevent conflict of interests, lack of impartiality and transparency in the conduct of public procurement procedure. To that end, all designated entities are obliged to promote high standards of transparency, efficient internal audit system which is carried out within their, by rule, separately organized units, to develop and affirm open public competition and determine objective criteria of selection and decision-making.

The contracting authority, in the public procurement procedure, is obliged to reject a tender for selecting the most successful tenderer, cancel a public procurement procedure or withdraw from the conclusion of contract if it determines or has reasonable doubt to believe that the tenderer has tried to exert influence on, or has tried to give or has given or has agreed to give, directly or indirectly, to the public procurement officer, member of the Commission for Opening and Evaluation of Tenders, or employee with the contracting authority or any other person, a reward or benefit in any form or any other value with respect to the decision or the conduct of the public procurement procedure, in order to exert influence on the contents of activities and decision of the contracting authority regarding the tender. Herein one should bear in mind that the Criminal Code of Montenegro, in particular defines the criminal offence of receiving and giving bribes, misuse of official position and other criminal acts of corruption. The legislator has specifically underlined the anti-corruptive character of the Law since it is evident that public procurements are especially exposed to corruption. Eventual conviction, e.g. for the criminal offence of receiving and giving bribes results in the nullity of the public procurement contract, if the contract was concluded, and annulment of the decision on contract award and previously conducted public procurement procedure in case where contract was not concluded. Also, every contracting authority shall (is obliged to), in the public procurement procedure, reject a tender for the selection of the most successful tenderer, cancel a public procurement procedure or withdraw from the conclusion of contract in the case of actions of concealing or misrepresenting data in the public procurement procedure.

Every contracting authority shall notify the tenderer and the Public Procurement Directorate on disregard of rules and their violation in the above mentioned term, in writing, on further activities and procedures in line with the Law. This includes the obligation of all subjects who have the knowledge about violation of anti-corruption rules, to report such violations to the competent bodies (Audit Institution, State Prosecutor and obligatory to the administrative body in charge of public procurement – Public Procurement Directorate), for further proceedings, within the competencies of these bodies. In addition, it is important to emphasize the legal determination that every contracting authority is obliged to enable access and provide appropriate information on organization and decision-making process to all interested persons. Thus, the principle of free access to information was underlined which affirms the very development of anti-corruption rules and/or reduction of corruption in public procurement procedures.

The principle of avoiding the conflict of interest, pursuant to the Public Procurement Law of Montenegro provides for elimination of conflicts of interests in public procurement procedures. So, as a basic starting point for compliance with this rule, there is a determined obligation that participants in the public procurement procedure shall be obliged to undertake necessary actions for elimination of the existence of a conflict of interest. This includes that participants in the proceedings must possess highly developed awareness to be able to define in advance the possibility of existence of situations from which conflict of interest may arise, its predicted size and characteristics – features.

Obligation and duties of the public procurement officer, members of the Commission for Opening and Evaluation of Tenders, members of authorities deciding upon submitted requests for the protection of rights in the public procurement procedure and other persons participating, directly or indirectly, in the public procurement procedure, shall notify the contracting authority and the Public Procurement Directorate, in a timely manner, on the actual or potential existence of a conflict of interest.

The Law determines that conflict of interest shall occur, inter alia, if such person:

- is the tenderer itself or the tenderer's legal representative or attorney;
- is a relative in the straight line of kinship, or in the lateral line of kinship up to the fourth degree, or is a marital or extra-marital mate or in-law up to the second degree, regardless of whether the marriage is terminated or not;
- is a guardian, adopter or adoptee of the tenderer, his legal representative or attorney;
- is a shareholder or member of management bodies of the tenderer;
- has direct or indirect interest in the public procurement procedure, which enables personal acquisition of property, by exerting influence on the decision-making process; and
- if there are other circumstances causing a doubt about such person's impartiality.

(Herein, the legislator has left the possibility that contracting authority itself and other participants in public procurement procedure and all interested persons for the outcome of the procedure, point to other circumstances causing a doubt about impartiality of the tenderer, legal representative or attorney).

A person who has prepared tender documents and has any impact on the implementation of the public procurement procedure may not act as a tenderer or sub-contractor and may not cooperate with the tenderer in preparing the tender. Persons, who, on behalf of the contracting authority, perform some of the activities related to a public contract, shall submit a written statement on existence or non-existence of the conflict of interest cases. The signed statement shall make an integral part of the documentation of the respective public contract and more closely specified in the special standard form.

In the case of existence of some of cases of conflict, or if the respective person fails to sign the statements on existence or non-existence of the conflict of interest cases, such person shall be excluded from the public procurement procedure.

In case that the requests or tenders that the contracting authority has received during the tendering procedure cause or may cause any conflict of interest, the contracting authority shall take necessary actions to eliminate such conflict of interest.

General regulations on public administration, local self-government and the Code of Ethics of civil servants and state employees that are applied to employees in local self-government specifically provide for conflict of interest issues and responsibility for violation of conflict of interest.

Institutional set-up (Administrative capacity)

15. Who is responsible for managing the various aspects of public procurement policy (at central and local level)?

The competences in the area of public procurement are performed by the Public Procurement Directorate, the Ministry of Finance as the ministry responsible for the area of public procurement, and the Commission for Control of Public Procurement Procedure in regard to the protection of rights. The Ministry of Finance supervises the legality and effectiveness of public procurement.

Pursuant to the general regulations on state administration in Montenegro and organizational rule, the Government of Montenegro is responsible for policy making in the area of public procurement. The affairs for the Government in this area are carried out by the Ministry of Finance and the Public Procurement Directorate. The Ministry of Finance as responsible for public procurement, in collaboration with the Public Procurement Directorate, performs the state administration duties related to proposing the internal and foreign policy, conducting the development policy and normative activities (preparation of laws and by-laws). Forms and standard forms, as an accompanying part of normative activities are prepared by the Public Procurement Directorate. The control of public procurement procedures is within the responsibilities of the Commission for Control of Public Procurement Procedure, while the Public Procurement Directorate performs continuous monitoring of public procurement, preventive instructional supervision and provide conditions for competitive and transparent operations of all participants in public procurement procedures as well as specialized and general education on public procurement for introduction of electronic system of public procurement.

Public Procurement Directorate was founded by a Decree on amendments and additions to the Decree on organization and the manner of work of the state administration (Official Gazette of the Republic of Montenegro 72/06), and started the work in June 2007.

Public Procurement Commission was founded in October 2001, continued with its operations, in line with the existing law (Official Gazette of the Republic of Montenegro 46/06) under a new name Commission for Control of Public Procurement.

Decentralised system of public procurement has been established in Montenegro, which mean that there are 980 contracting authorities that are subject to the application of the Law on Public Procurement, according to the new official record (a list of covered parties).

Creation and implementation of policy in the area of concessions and private-public partnerships is within the scope of the ministry responsible for economy affairs.

16. What are the tasks and powers of this (these) body (bodies)? Please provide information on the organisation chart and the number of staff.

The Directorate is authorized to participate in the preparation of laws, subsidiary legislation and other regulations concerning public procurement in accordance with Article 17 of the Public Procurement Law and the scope determined by Decree on organization and the manner of work of the state administration (Official Gazette of Montenegro 59/09); to design appropriate standard forms needed for the application of this Law; to monitor and review the implementation of the public procurement system, from the aspect of compliance with EU legislation, and propose measures to ensure such compliance of procedures; to give prior approval to contracting authorities for the choice of procedure in the cases envisaged by this Law; to offer advisory and consulting services in the area of public procurement to contracting authorities, when asked so; to participate and cooperate in organizing staff training in public procurement activities; to publish invitations to tender and decisions on contract award on the responsible administrative authority's website in the cases foreseen by this Law; to enhance the system of keeping contracting authorities and tenderers informed about public procurement regulations and publish and distribute appropriate technical literature; to prepare sample tender documents and contracts, for typical public contracts; to initiate and encourage the development of electronic procurement and communication practices in the field of public procurement; to pursue international cooperation with institutions and specialists in the field of public procurement; to notify the State Audit Institution and file reports to other competent authorities on cases of violation of public procurement procedures, that it has become aware of in the conduct of its tasks and duties; to collect information from contracting authorities and maintain appropriate records; to prepare, publish and update a list of covered parties under this Law on its website; to prepare uniform bases for establishing records and official lists of tenderers, on the basis of data on undertaken and executed public contracts; to monitor the public procurement procedures and ensure that they meet the needs of general interest; to issue public procurement bulletins; to submit to the Government annual reports on the public procurement carried out in Montenegro; to perform other duties, in accordance with the law.

The Rulebook on internal organization and systematisation provides that the Public Procurement Directorate, including director who manages the Directorate, shall have 15 civil servants and employees disposed into two departments: the Sector for Public Procurement Affairs and the Service for Common and Financial Affairs. The first Rulebook was adopted in July 2007, and a new Rulebook was adopted in November 2008, which is then harmonised with a new Law on Civil Servants and State Employees (Official Gazette of Montenegro 50/08), in particular, in the part of the titles of civil servants and state employees where conditions with regard to working experience for individual titles and occupations were changed. New internal organization and systematisation of job posts within Directorate did not change with regard to the number and type of jobs of the organisational units. There are 7 job positions for civil servants (Sector for Public Procurement Affairs) to perform basic activity of the body (including the position of a deputy director who manages the Sector); currently 6 of them are occupied. One position is open, the most complex civil servant position within this Sector. The Service for Common and Financial Affairs (supporting jobs) employs 7 civil servants. The National Programme for Integration of Montenegro for the period 2009 – 2012 planned the increase in number of employees within the Directorate for another six employees in the part for building capacities in the area of training as well as

performing other public procurement operations including statistics and information technologies. The annual budget of the Directorate in 2009 was planned in the amount of EUR 324 189.41 that is sufficient only for realisation of modest minimum of basic functions of this administration body. The increase of budgetary funds is estimated as need for realisation of better results in the ever demanding and complex function of the Directorate over the future period.

Pursuant to the Public Procurement Law, the Commission for Control of Public Procurement Procedure is autonomous and independent body which has a president and two members. President and members of the State Commission shall be appointed by the Government. The Commission is, under Article 93, of the Public Procurement Law, authorised to review complaints of tenderers against public procurement procedures, and make decisions in respect of them; examine the regularity of application of this Law and propose and undertake remedy measures for identified irregularities, providing for competitive behaviour of tenderers and transparency of public procurement procedure; determine general positions for the purpose of uniform application of the law and perform other operations in accordance with this Law. The Rulebook on systematization of professional staff of the Commission for Control of Public Procurement Procedure of 20 November 2008 envisaged 7 job positions for civil servants and employees including the Secretary of the Commission. In accordance with Article 93 of the Public Procurement Law, the secretary of the State Commission shall manage the professional staff. In addition to the Secretary, as per structure, positions of state employees and civil servants are: two Independent Advisors I, one Independent State Employee II, two State Employees IV and one State Employee VI. The Rulebook stipulates that one or more trainees with university degree or secondary education may enter employment in the professional staff of the State Commission, for the purpose of professional training. There are 6 employees currently employed with the Commission, including the Secretary of the Commission, and they are: the Secretary of the Commission, Independent Advisors I – a graduated lawyer, Independent Advisors III - a graduated lawyer, Independent State Employee II – manager, State Employees IV – accountant, and one State Employee IV – technical secretary. Currently, two trainees are being trained with professional staff of the Commission, and there is one civil servant's post vacant. The budget of the Commission for the year 2009, following the revision, amounts EUR 197 735.10.

Publication

17. Where do entities publish tender notices? Do you dispose with an electronic portal, where the procurement opportunities are published?

The covered party that is subject to the application of the Public Procurement Law have to publish invitations to tender and all decisions on contract award on the website of the Public Procurement Directorate, except for value of the contract that does not exceed EUR 2 000.00 that are conducted in the direct agreement procedure. The invitation shall be published in one daily paper issued and distributed at the territory of Montenegro, provided it is not published in the daily newspaper prior to its publication on the website of the Public Procurement Directorate. Invitation to tender may be also published in other media. There are no barriers to the contracting authority to publish a public call in foreign media, in the languages of the European Union countries, which is commonly used in international trade.

On the website of the Public Procurement Directorate are given necessary instructions and drawn attention to the obligations that covered parties are obliged to undertake in accordance with the Law, such as the preparation and publication of the public procurement plan (obligation for the procurement over EUR 100 000.00) by the end of the current year and creation and submission of reports on activities, in the manner prescribed in the standard form, by the end of February of the current year, for the previous year; the essential opinions on the implementation of individual provisions of the Law are published; there are columns with an overview of the Law and secondary legislation and Public Procurement Directive; opinions on implementation of regulations are provided; notices and instructions to contracting authorities and tenderers; information on activities

in international cooperation, seminars, professional literature, newsletters and magazines. Columns relating to performance of general affairs within the competencies of the Directorate are purposely designed, including the free access to information. Since one of the primary activities of the Directorate is to publish the invitation for public tender and a decision on awarding the contract on the website of the Directorate, the activities are completed on preparation of the innovated website of the Directorate, which was put into function in July 2009.

Publication of invitations and decisions, as everyday work, is reflected in constant monitoring and directing the course of the public procurement. In the future, within the IPA Assistance Program for the period 2009 – 2012, among other, depending on the provided funds, it was planned to improve the software solution, particularly for establishment of more modern electronic portal and creation of possibilities for introduction of electronic public procurement system. Through the website, the educational mission of the Directorate is being accomplished as well.

The contracting authority may start the procurement procedure only if the public supply is under the circumstances foreseen by the Law (the public procurement plan of the contracting authority that exceed EUR 100 000.00), included in the public procurement plan and if the contracting authority has allocated appropriate funds for the specific contract which are available for every payment under the contract. Also, criteria for the selection of the most economically advantageous tender have to be specifically and clearly stated and further elaborated in the tender documentation. The task of officers of the Directorate, at the stage of publication of a contract notice, is to monitor and ensure the validity of the invitation to tender in terms of both its formal and content validity, as well as legal determination of criteria and sub-criteria prescribed by the Law and by-laws in the field of public procurement. Interventions in the permanent electronic and telephone communication are everyday activities of the Directorate's officers to eliminate designated irregularities. It is a matter of instructive professional supervision of the Directorate.

18. Please provide us with statistics, in particular the number and type of notices published.

The total value of public procurement in Montenegro in 2008 amounted EUR 537 996 900.38 or 16.11% in the gross domestic product of Montenegro (in relation to 2008 - EUR 3 338 000 000.00).

In open public procurement procedure, the contract value of procurement amounted EUR 387 278 406.21 or 71.99%, in restricted procedure EUR 7 727 819.18 or 1.44%, in negotiated procedure without publication of a contract notice EUR 93 849 796.81 or 17.44%, in negotiated procedure with prior publication of a contract notice EUR 2 101 761.34 or 0.39%, by framework agreement EUR 2 735 300.55 or 0.51%, by awarding of public service contracts by means of design contest EUR 3 818 140.00 or 0.71%, by direct solicitation of tenders (shopping method) EUR 16 211 097.36 or 3.01% and by direct agreement EUR 24 274 578.93 or 4.51%.

Through transparent public procurement procedure, there was contracted 75.03% of total public procurement, which is the high level of success from the standpoint of the appraisal rules of the World Bank.

Within the total public procurement in Montenegro in 2008, according to the object of public procurement, the value of public procurement of goods amounted EUR 191 011 151.45 or 36%, services EUR 55 599 821.88 or 10% and works EUR 291 385 927.05 or 54%.

According to the category of reporting entities, the state bodies and organizations contracted public procurement in the amount of EUR 271 812 162.29 or 50%, state public institutions and public enterprises EUR 160 077 003.15 or 30%, local self-government bodies EUR 90 326 259.54 or 17% and local public institutions and local public enterprises EUR 15 781 475.40 or 3%.

State bodies and organisations contracted the public procurement, by means of an open public procurement procedure, in the amount of EUR 244 099 132.53, by means of negotiated procedure without prior publication of a contract notice EUR 14 267 759.97, in negotiated procedure with prior publication of a contract notice EUR 257 146.83, in framework agreement EUR 309 578.21, in

design contest EUR 3 818 140.00, in shopping method EUR 2 535 954.21 and in direct agreement EUR 6 524 450.54.

State public institutions and state public enterprises, contracted public procurement in the amount of EUR 60 878 522.08 in open public procurement procedure, in restricted procedure EUR 7 703 139.18 in negotiated procedure without publication of a contract notice EUR 74 482 585.98, in negotiated procedure with publication of a contract notice EUR 1 706 147.35, in framework agreement EUR 622 349.28, in shopping method EUR 4 948 932.81 and direct agreement EUR 9 735 326.47.

Local self-government bodies contracted public procurement in the open public procurement procedure in the amount of EUR 73 264 193.35, in restricted procedure EUR 24 680.00, in negotiated procedure without publication of a contract notice EUR 4 207 266.16, in negotiated procedure with publication of a contract notice EUR 138 467.16, in framework agreement EUR 1 803 373.06, in shopping method EUR 6 009 413.94 and by direct agreement EUR 4 878 865.87.

Local public institutions and local public enterprises contracted public procurement in the open public procurement procedure in the amount of EUR 9 036 558.2, in negotiated procedure without publication of a contract notice EUR 892 184.70, by means of shopping method EUR 2 716 796.40 and in direct agreement EUR 3 135 936.05.

There were 3.51 tenders submitted in one public procurement procedure in average (without small value procedures), that is in accordance with the principle of transparency, publication and competitiveness in public procurement.

In order to award 3 248 public supply contracts in basic public procurement procedures (small value contracts are not included – shopping method and direct agreement) concluded in 2008, there were conducted 2 084 public procurement procedures. For the public supply of goods, there were conducted 876 procedures or 42%, for services 4955 procedures or 24%, and for works 713 procedures or 34.2%.

During 2008, there were awarded 514 contracts, which value amounted over EUR 100 000.00 (state bodies and organizations – 188 contracts, state public institutions and state public enterprises - 156, local self-government bodies - 119 and local public institutions and local public enterprises - 51 contracts). During 2007, there were 409 contracts awarded, which value amounted over EUR 100 000.00.

The overall contractual value of public procurement in Montenegro in 2007 amounted EUR 406 663 039.20 which in total gross domestic product of Montenegro (in relation to 2006 that was 2 billion 148 million and 900 thousand euro, according to the official data of the Statistics Office), amounts 18.92%.

In open public procurement procedures, there were contracted procurements in the amount of 356 258 553.03 euro or 87.6%, and in other procedures 50 404 486.25 euro or 12.4%, so in accordance with the measurement principles of the World Bank, the principle of transparency of public procurement in Montenegro is at the highest level (over 75%, in relation to all total public procurements).

According to the Report on Public Procurement in Montenegro for 2007, the total number of conducted procedures, in relation to the type of the procedure (small value procedures not included – shopping and direct agreement), amounted 1 535 as follows: in open public procurement procedure 1 368, restricted procedure – 0, negotiated procedure without publication of a contract notice – 90, negotiated procedure with prior publication of a contract notice – 4, framework agreement – 51, design contest – 22. There were 753 procedures for supply of goods, 345 for services and 437 for works.

III. Remedies

19. Please outline the Montenegrin review and remedies system, including the appeal bodies. What review procedures are available in the event of an infringement of public procurement rules? When and to whom are they available?

Protection of rights of tenderers and public interest is regulated by the Law on Public Procurement (Official Gazette of the Republic of Montenegro 46/06). Public procurement procedures in the Montenegrin legislature are decentralised and are conducted by contracting authorities themselves i.e. covered parties applying the Law. Contrary to public procurement procedures, the protection of subjective rights is organized in two ways: at the stage of an objection, in the first instance – decentralised according to contracting authorities, and at the phase of the complaint, in the second instance – centralised before the State Commission.

In accordance with Article 87(3) and (4) of the Law on Public Procurement, **objection shall be submitted to contracting authority**, in writing, in three copies, directly or by registered mail with return receipt. The objection shall indicate irregularities in a public procurement procedure, facts and evidence for committed infringements and a proposal for removal of the infringements. The legislator has prescribed, in the quoted article, that the complaint may be lodged, in case of irregularities, during the whole public procurement procedure, as well as parties to procedure and competent authorities must quickly and efficiently resolve disputes arising from public procurement procedures. The Law on Public Procurement gives the active legitimating for submission of the objection to any tenderer and any person to whose rights and legal interests procurement procedure refers to (interested person), which gives the opportunity to interested parties who have not participated in the public procurement procedure to initiate proceedings for the protection of their rights. The Law recognizes the legitimacy of competent State Prosecutor, competent administrative authority, Directorate and other competent bodies in cases where public interest has been threatened.

Based on the aforesaid, the subject of the complaint procedure are decisions of the contracting authority in the broadest sense, starting from the public procurement plan, the contract award decision and decision on the most economically advantageous decision or decision on cancellation of public tendering. In practice, it is often the case that tenderers or interested persons submit objections to the content of invitation to tender and tender documentation. This is an important instrument for ensuring the legality of the implementation of public procurement procedure, because the tenderers and interested parties have the right to point to possible irregularities and illegal acts of contracting authority during the implementation stage, which allows the objection and complaint in relation thereto, at the stage of execution of public procurement, to cancel the whole or a part of such act. In this way, one of the most important principles of public procurement has been realized – the principle of urgency.

According to Article 88 paragraph 1 of the Law, the objection shall be submitted within 8 days from the day of adoption of the decision or committed action that infringed rights or undertaking of other measures or actions infringing rights under the procedure. To that end, ensuring the appliance of the principle of equality of tenderers and transparency of public procurement, the quoted provision lays down that the contracting authority shall inform all the participants in a public procurement procedure on submitted objection, within three days upon the receipt of the objection.

Submitting objection and complaint have *ex lege* suspensive effect until the final decision of the Commission. Submitting objection deters all further activities of contracting authority in the public procurement procedure. The contract concluded contrary to the evidently prescribed legal norm, is null and void.

Therefore, submitted objection and/or complaint, according to the Law itself (*ex lege*) have suspensive effect – it deters further activities of contracting authority in the public procurement procedure. Contracting authority, upon objection submitted, shall not perform technical proceedings, nor make decisions, and already initiated procedures shall be stopped and/or deterred. Article 89 of the Law, lays down the time-limit of the suspensive limitation of the

procedure until decision-making of the Commission and resolving the situation, which is in most of the cases known in practice, and relate to the obligation of contracting authority to inform all the participants in a public procurement procedure on submitted objection.

If the contracting authority does not deter all activities in public procurement procedure, but continue with the procedure, he commits an infringement. This infringement makes the ground to tenderers to seek compensation for damages in property-legal proceedings and escaped profit due to such acting of the contracting authority.

Contracting authority is obliged to consider objection submitted in good time and adopt a decision, within 8 days upon the receipt of the objection.

Contracting authority may adopt two types of decisions in respect of submitted objection, as follows:

- 1) a conclusion, by which an objection will be rejected that is unlawful, untimely and presented by an unauthorised person.
- 2) a decision, by which
 - the objection may be adopted in whole or in part and the decision on selection of the best tender may be altered,
 - the objection may be adopted as grounded and the public contract award procedure may be annulled, in whole or in part, or
 - the objection may be rejected as groundless.

So, contracting authority shall by conclusion, reject an objection which is unlawful, untimely and presented by an unauthorised person.

The objection is unlawful where:

- presented procedure is not the public procurement, within the meaning of Article 2 of the Law, or
- the procedural presumption for its submission is not fulfilled.

The objection is untimely when:

- objection submitter is not provided with the decision within the time limit laid down in Article 88 paragraph 1 of the Law, i.e. within 8 days from the day of receipt of the objection, and/or committed action infringing rights or undertaking of other measures or actions infringing rights under the procedure.

An objection is presented by an unauthorised person when contracting authority determines indisputably that the person who submitted objection is not properly legitimated in terms of Article 87 (1) and (2) of the Law (any tenderer and any person the rights and legal interests of which the public procurement procedure refers to (interested person), a competent state prosecutor, Public Procurement Directorate, the Supreme Auditing Institution and other competent bodies).

Decision on objection must have a rationale, and/or contain precisely specified data to be adopted or rejected, in whole or in part. Thus, the contracting authority is obliged to assess each of the reasons stated in the objection that challenge the procedure and acts in public procurement procedure.

Contracting authority is obliged to submit the decision to the submitter of the objection no later than 3 days from the day of adoption of the decision. If objection submitter is not provided with the decision within the said time limit, the submitter may continue the procedure for protection of its right as if its objection was rejected. We emphasize that the legislator applied here by analogy the legal institute "silence of administration" of general administrative procedure, in order to ensure the protection of rights of tenderers, whereby, in relation to an urgent character of public procurement, which is in particular reflected in the procedure for protection of rights of tenderers, the period is shortened.

At the second instance, procedure for the protection of rights of the tenderer and public interests, under the Law, is centralised and it is realized before the Commission for Control of Public Procurement Procedure. According to provisions of the Article 91 of the Law, a complaint may be

lodged against the decision that the contracting authority made in respect of a submitted objection, or in case that the contracting authority, fails to make a decision within the specified period, in the meaning of Article 90, paragraph 4 of this Law, to the **Commission for Control of Public Procurement Procedure** within 8 days from the day of receipt of the decision made in respect of submitted objection.

The legislator stipulated in Article 97 the obligatory content of the complaint as follows:

- 1) decision of the contracting authority challenged by the complaint;
- 2) description of irregularities made by contracting authority in public procurement procedure;
- 3) reasons for challenging the decision, and
- 4) basic data on the complaint submitter.

The quoted provision lay down that the Commission for Control of Public Procurement Procedure may, when assesses that the submitter of a complaint has not provided these elements in the complaint, demand the supplement to the complaint. Furthermore, it is laid down that if the submitter of the complaint does not provide the supplement to the complaint within the specified time-period, the Commission for Control of Public Procurement Procedure may continue the procedure and make a decision in accordance with available data and circumstances.

In accordance with the dispositive principle, the Commission for Control of Public Procurement Procedure makes a decision within the limits of the request submitted in the complaint, and in the case where the basic principles of public procurement have been breached it can perform all evidence that, in his opinion, may contribute to making a lawful and correct decision. The Commission for Control of Public Procurement Procedure, by obeying the limits of the complaint content, decides with regard to those infringements of public procurement procedure which are laid down by the Law that could significantly influence public contract award.

Therefore, the Commission for Control of Public Procurement Procedure is obliged, according to the Law, upon presented complaint, to examine the regularity of the whole public procurement procedure ex officio. Thus, during the procedure, in addition to the administrative act, which is the subject of procedure, those actions and/decisions that are performed in the stage prior to announcement of the invitation to tender may be examined (Decision for initiation and implementation of public procurement procedure, existence of formally provided means for implementation of public procurement procedure, announcing the public procurement plan et.al.)

The Commission for Control of Public Procurement Procedure shall give a written rationale in its decision on the presented complaint and instructions to the contracting authority for regular implementation of the public procurement procedure, in the part which is annulled.

The Commission for Control of Public Procurement Procedure may, by means of a conclusion:

- 1) reject a complaint, if the complaint is unlawful, untimely and presented by unauthorised person;
- 2) deter further procedure, by receiving a written notice from submitter of the complaint on abandonment of the submitted complaint.

The Commission for Control of Public Procurement Procedure may, by means of a decision:

- 1) reject complaint as groundless;
- 2) adopt a complaint as grounded and annul the public procurement procedure and the adopted decisions partly or wholly, notify the contracting authority of the irregularities made and order a renewed public procurement procedure or decision making, or take necessary steps to eliminate the irregularities made.

The Commission makes decisions by majority vote of present members. Meetings of the Commission, when deciding upon complaints, as well as the procedure itself, are not open to the public. A special minutes regarding discussion and voting during the meeting is taken and signed by the President, members and Secretary of the Commission. The Commission shall make decisions within 15 days, which period may be extended in specifically justified cases for another

10 days, so that the longest period for making a decision is 25 days only. Such a short deadlines for decision-making highlight the exceptional efficiency in the work of the Commission.

The contracting authority is obliged to act in accordance with Commission for Control of Public Procurement Procedure's directions contained in the decision upon complaint presented by the unsatisfied tenderer. If the Commission determines that contracting authority has not implemented its decision, it shall inform the Government of Montenegro or local self-government unit thereof, and propose initiation of a proceeding for determining liability. Such a decision enables the Government to take measures against the contracting authority acting contrary to the Law. In any case, the contract concluded contrary to the decision made by the Commission is null and void.

Decisions of the Commission for Control of Public Procurement Procedure are of the obligatory character and they have a status of final and executive acts. It is not allowed to appeal against them, but within 30 days as of the delivery of the decision to the parties, an **administrative dispute might be initiated before the Administrative Court of Montenegro**. Also, unsatisfied tenderer may demand compensation before the competent court.

Court protection of right in public procurement procedure, is secured, in accordance with the Law on Public Procurement (Official Gazette of the Republic of Montenegro 60/03), in an administrative dispute. In the administrative dispute, the court shall decide upon the legality of administrative act and legality of other individual act, if not specified in the Law. The administrative act, in terms of this Law, is an act by which a state authority or a local self-government authority, institution or other legal person, in exercising public authority, decides in administrative matters on rights, obligations or legal interests of a natural or legal person.

The right to institute an administrative dispute shall have any natural or legal person, who believes that some of his/her rights or legally based interests have been violated by an administrative or other act. Furthermore, a state authority, organization, a settlement, group of persons or other, who do not have the attribute of a legal person, may institute an administrative dispute, if they may be holders of rights and obligations decided on in an administrative or other procedure. The Law on Administrative Dispute has, also, stipulated that if by an administrative or other act the Law has been violated to the advantage of a natural person, legal person or other party, an administrative dispute may be instituted by the state prosecutor or other competent authority. Also, an administrative dispute may be instituted by the state prosecutor or other competent authority when by an administrative or other act the Law has been violated to the prejudice of the state, a local self-government unit, institution or other legal person.

Pursuant to Article 102 of the Law on Public Procurement, against the final decision of the Commission for Control of Public Procurement Procedure, it is possible, for the purpose of establishing its legality, to undertake an administrative dispute procedure before the Administrative Court of Montenegro within 30 days as of the delivery of the decision. Also, if the Commission for Control of Public Procurement Procedure did not adopt a decision in respect of submitted complaint within the period laid down by the law of 25 days, nor in the following seven days, upon the repeated request, the party may institute an administrative dispute, as if the complaint has been rejected. In this process, the legality of the decision made by the Commission for Control of Public Procurement Procedure shall be evaluated. Practically, all legal issues may be the subject of court control, regardless of those matters concerning the preparation and documentation of public procurement, publishing the invitation to tender, criteria and sub-criteria for the selection of the most economically advantageous tender, evidence of capabilities, technical specifications, implementation of selection rules laid down by the contracting authority, or application of substantive law in relation to the Law on Public Procurement and implementation of procedural rules.

Decision of the Commission for Control of Public Procurement Procedure (decision or conclusion), may be challenged for violation of the rules of procedure, because of wrongful and incorrectly determined factual situation and wrongful implementation of substantive law. It is important to point out that there is no irregular implementation of regulations if the competent body is resolving disputes according to principle of free evaluation, on the basis and within the limits of authorisation granted by regulations and in accordance to the purpose of authorisation given.

A complaint, as a rule, shall not prevent the execution of a decision made by Commission for Control of Public Procurement Procedure. However, upon request of the plaintiff, the authority whose act is executed, i.e. the authority competent for the execution - if the act in question has been issued by an organization that is not authorized for the execution, shall delay the execution pending the validity of the court decision, if the execution might incur a damage to the plaintiff that could hardly be redressed, and if the delay is not against the public interest or would not cause any major irreparable damage to the opposing party. In addition to the request for delay, it is required to enclose a proof of the complaint filed. The competent authority shall pass a decision upon the request within three days from the receipt thereof at the latest.

Complaints shall be resolved by the Administrative Court in a panel of three judges.

It is required to include in the complaint the name and family name, profession and place of residence, respectively name and headquarters of the plaintiff, the act against which the complaint is filed, the cause of action, as well as the suggested direction and extent of nullification of the administrative act. The original or transcript of the act, against which the complaint is filed, shall also be enclosed in the complaint, as well as one transcript each of the complaint and of the enclosures for the charged authority and for each interested party, if there are any.

The plaintiff may recede from the complaint until the passing of the resolution by the Administrative Court, in which case the court shall terminate the procedure by a decision.

The Administrative Court shall reject a complaint by a decision, if it should establish:

- that the complaint has been filed untimely or earlier than determined;
- that the act disputed by the complaint is not an administrative or other act;
- that it is evident that the administrative or other act, disputed by the complaint, does not interfere with the right of the plaintiff or his/her legal interest;
- that it was possible to appeal the administrative or other act disputed by the complaint, and it was not appealed at any time or only untimely;
- that a legally binding court decision, passed in an administrative or other dispute on the same matter, already exists.

Otherwise, in administrative disputes, the Administrative Court shall decide:

- in an oral hearing, if so requested by the party in his/her complaint or in the answer to the complaint
- in a closed session only if during a preliminary hearing it was ascertained that the facts have been established accurately and wholly in an administrative or other procedure, i.e. that they are not disputable.

The Administrative Court shall examine the legality of a disputed administrative or other act in the scope of the claim in a complaint, yet it shall thereby not be bound by the cause of the action. The Administrative Court shall pay notice to the nullity of an administrative or other act ex officio.

The complaint shall be accepted or refused as unsubstantial by a judgment. If the complaint is accepted, the Administrative Court shall nullify the disputed act.

When found that the disputed act is to be nullified, the Administrative Court may, if the conditions allow so and if the established facts offer a reliable ground for it, settle the matter by a judgment. Such a judgment shall substitute the nullified act in all.

By the judgment nullifying the disputed act, the Administrative Court shall decide as well on a claim of the plaintiff for restitution of objects or for compensation of damage, if the established facts offer a reliable ground for it. Otherwise, the court shall instruct the plaintiff to realize his/her claim in a lawsuit.

The following extraordinary legal remedies may be filed against a legally binding decision of the Administrative Court:

- a request for extraordinary reconsideration of a court decision;
- a request for retrial of the procedure.

As a rule, the court shall decide on extraordinary legal remedies in a closed session.

The following institutions are responsible for the audit of public procurement procedures (audit procedures available in case of violation of public procurement rules):

- 1) The Commission for Control of Public Procurement Procedure
- 2) The Administrative Court of Montenegro
- 3) The State Audit Institution

These audit bodies have the following competences:

1. The Commission for Control of Public Procurement Procedure may adopt a decision wherein:

- By a conclusion:
 - 1) reject a complaint, if the complaint is unlawful, untimely and presented by unauthorised person;
 - 2) deter further procedure, by receiving a written notice from submitter of the complaint on abandonment of the submitted complaint.
- By a decision:
 - 1) reject complaint as groundless;
 - 2) adopt a complaint as grounded and annul the public procurement procedure and the adopted decisions partly or wholly, notify the contracting authority of the irregularities made and order a renewed public procurement procedure and decision making, or take necessary steps to eliminate the irregularities made.

2. The Administrative Court of Montenegro may adopt a decision whereby:

- 1) the complaint was accepted and a decision of the Commission for Public Procurement dismissed,
- 2) the complaint was refused as unsubstantial, and
- 3) the complaint was rejected.

3. External audit – performed by the State Audit Institution in accordance with the Law on the State Audit Institution. The State Audit Institution controls the regularity, effectiveness and efficiency of the audit subject.

The Institution shall, without delay, inform the audited entity if reasons for claiming damages have been found.

If any activity of the audited entity has caused damage to state property, the Institution shall, without delay, inform the public prosecutor.

The Institute shall, without delay, bring criminal charges, if during the audit procedure it determines that there is reason to suspect that criminal offence has been committed.

Protection of tenderers' rights and public interest may be initiated by filing an objection and complaint (legal remedies) in case of irregularities during the whole public procurement procedure.

The active legitimacy to initiate proceedings for the protection of tenderer's rights and public interest shall have the wide range of persons, as follows:

- every tenderer and every person whose rights and public interest are in relation to the public procurement procedure (interested person)
- competent state prosecutor,
- Public Procurement Directorate,
- Supreme Audit Institution, and
- other competent bodies.

The submitted objection, as well as complaint has suspensive effect throughout the public procurement procedures, which means that used legal remedies shall suspend all actions in the

public procurement procedure, until the final and executive decision of the Commission for Control of Public Procurement Procedure was made.

The Law on Public Procurement has, because of the character of public procurements i.e. urgent by its nature, set short deadlines, as follows:

- 8 days to submit an objection,
- 8 days for a decision that the contracting authority made in respect of a submitted objection,
- 8 days to lodge a complaint to the Commission for Control of Public Procurement Procedure,
- 15 days for the Commission to make a decision, which period may be extended for another 10 days, the submitter of the complaint and contracting authority shall be notified thereof.

The legislator has set out the extended number of entities that may submit a complaint which gives a possibility to interested persons, that did not participate in the public procurement procedure, because they did not meet the requirements established by contracting authority on a discriminatory manner, or they were not allowed to participate in the procedure by the contracting authority, thus violating the Law, to initiate a proceeding for the protection of their rights.

Here, one should bear in mind that non existence of the procedural presumption on the side of the submitter of legal remedy (objection and complaint), shall result in adoption of a conclusion on the rejection of legal remedy (objection and complaint).

The submitter of legal remedy has no active legitimacy for the submission of objection and complaint in the cases where:

- 1) Persons who, because of their status or organizational form, can not conclude a contract on public procurement. These are different professional associations or chambers of commerce, which are not actively legitimized for filing objections and complaints in the name of person who filed the offer or potential tenderer (often a member of theirs), unless they themselves do not act as tenderers.
- 2) Subcontractors, because they do not conclude a contract as a contractual party, and they are only mentioned in the contract (as well as in the offer), so that the contracting authority was familiar with all those entities that will participate in the implementation of public procurement.
- 3) Persons who did not submit an offer before the expiry of the time limit. Such persons, in the case of filing the objection after the expiry of time limit for submission of offers, would no longer have an interest in concluding the contract.
- 4) Tenderer for challenging the contracting authority actions undertaken in segments for which that tenderer did not submit an offer i.e. application.

A complaint, in the procedure for rights protection, may be lodged against the decision that the contracting authority made or in the case of silence of administration, or in case that the contracting authority fails to make a decision in respect of a submitted objection or fails to submit a decision made to the objection submitter within 3 days from the day of receipt of the decision made (Article 91 of the Law on Public Procurement).

Decisions of the Commission are of obligatory character and they have the status of the final and executive acts. Namely, it is not allowed to appeal against the decision of the State Commission, but within 30 days from delivery of decision to the parties, an administrative dispute may be initiated before the Administrative Court of Montenegro. Also, dissatisfied tenderer may demand compensation before the competent court.

External audit – performed by the State Audit Institution in accordance with the Law on the State Audit Institution (Official Gazette of the Republic of Montenegro 28/04, 27/06, 78/06 and Official Gazette of Montenegro 17/07). Namely, Articles 6 and 7 of the Law on the State Audit Institution, the audit is conducted in order to provide essential information concerning audited entity's management of the budget, property and economic activities, the legality of the audited entity's action, the improvement of its ability for successful performance of tasks and the prevention of unlawful acts.

The Institution shall submit to the Parliament of Montenegro the overview of its findings on the budget and state property, pointing out into the causes and consequences of any major faults and irregularities and proposing measures for their elimination.

Within its rights and responsibilities set out by this Law and other regulations, the Institution shall provide its expert assistance to the Parliament, the Government of Montenegro and other state bodies in reaching decisions.

In accordance with Article 5 of this Law, the Institution shall audit documents and activities of the audited entity, which have or may have financial effect on:

- 1) revenues and expenditures;
- 2) state property;
- 3) debt level, granting of guarantees and super-guarantees;
- 4) efficient use of funds allocated to the audited entities.

20. What bodies are responsible for the review procedures in the field of public procurement? Are they of administrative or judicial character? Is their independence from the contracting authorities ensured, and how?

At the first instance, and in accordance with Article (3) and (4) of the Public Procurement Law, the objection shall be submitted to **contracting authority**, in writing, in three copies, directly or by registered mail with return receipt. The objection shall indicate irregularities in a public procurement procedure, facts and evidence for committed infringements and a proposal for removal of the infringements.

At the second instance, the procedure for the protection of rights of the tenderer and public interests under the Law is centralised and it is realized before the **Commission for Control of Public Procurement Procedure**. Namely, the complaint, in the procedure of protection of rights, may be lodged against the contracting authority's decision or in the case of silent administration, when the contracting authority fails to make a decision in respect of submitted objection or fails to submit the decision to the submitter of objection no later than three days from the day of adoption of the decision. The complaint may be submitted within eight days.

At the third instance, it is not allowed to make a complaint against the decision made by the Commission for Control of Public Procurement Procedure, but the administrative dispute may be initiated before the Administrative Court of Montenegro within 30 days as of the delivery of the decision to the party submitting the complaint. Also, unsatisfied tenderer may request the compensation of damage before the competent court.

The contracting authorities and/or bodies obliged to conduct procedures for the procurement of goods and services and the award of the performance of works as provided for in Article 2 of the Public Procurement Law, are:

- 1) state authorities, state administration authorities, organizations, institutions and other beneficiaries of the Budget of Montenegro and of other public funds;
- 2) local self-government authorities, local administration authorities and organizations and institutions that are beneficiaries of the budget of a local self-government unit and of other public funds;
- 3) obligatory social security organizations, established in accordance with laws governing these types of insurance;
- 4) undertakings and other legal persons in which Montenegro, a local self-government unit or other covered parties under this Law hold more than 50% of shares or stake in their ownership and have more than a half of members in their management body, and which perform activities in the general interest, not having an industrial or commercial character;

- 5) legal persons that, in awarding public contracts, use the funds provided, as a subsidy or as a guaranty, by Montenegro or a local self-government unit or other covered party under this Law.

Therefore, the above mentioned entities have to conduct the public procurement exclusively in accordance with the rules laid down by the Public Procurement Law. The evident variation in the use of funds is subject to appropriate sanctions and liabilities, regulated by this and other laws that regulate business and the work of these entities.

Lest any doubt and uncertainty, the Law provided the obligations of the Directorate of Public Procurement to prepare, publish and update a list of covered parties applying the Law on Public Procurement. The list of covered parties includes ministries, state administration bodies, local authorities, public enterprises and public institutions, which includes subjects in the sector of utilities - water, energy, postal services, railways and others. In fact, if a covered party is not in the list of the Directorate of Public Procurement, although it meets the requirements specified in Article 2 of the Law (listed above), it is obliged to implement procurement of goods, services and assignment of works according to procedures established by the Law. This is because the status of the covered party is received by fulfilling the conditions prescribed by the Law, and not depending on whether an entity is included on the covered party's list.

The **Commission for Control of Public Procurement Procedure** is separate, autonomous and independent state body, which task is to provide legal protection of tenderers and the public interest in all phases of public procurement procedure. The Commission, in its operation and organisation apply the basic principles of public procurement, namely the principle of legality, public transparency and efficiency. In accordance with above mentioned principles, the Commission was established by the Law on Public Procurement, as an independent and autonomous state body. Independence of the Commission is reflected in the work and decision-making, which are closely regulated by Rules of Procedure of the Commission. In terms of appointment, the Law stipulates that the President and members of the Commission are appointed by the Government as follows: president at the proposal of the Ministry in charge of justice, one member on the proposal of the Ministry in charge of Finance and one member of the Board on the proposal of the Community of Municipalities. Here it should be noted that the legislator prescribed requirements for the appointment which are similar to conditions for the selection of judges, in a manner which stipulates that for the president of the State Commission, eligible appointment may be a law school graduate with bar examination passed, with no less than 15 years of relevant work experience, while for a member of the Commission may be appointed person with tertiary education and no less than 10 years of relevant work experience.

Confirmation of the Commission's independence is reflected in the fact that:

- 1) The president and members of the Commission may terminate the mandate, that is, can be dismissed only in cases prescribed by the Law (if convicted of a criminal act to effective prison term for the period of no less than six months or if convicted of a criminal act making them unworthy for performance of the function, in case of death or permanent loss of health capability for performance of the duty; if they get appointed for and if they commence performing a function incompatible with the duty in the State Commission; if they resign or demand to be released from duty; if without justifiable reason they do not perform their duties in the State Commission for the period longer than three months).

- 2) The Commission is an independent budget user.

In addition to members, the Commission has a professional service, which is managed by the Secretary. The regulations on civil servants and employees apply to employees in professional services.

The manner of work of the Commission is closely regulated by the Rules of Procedure, which stipulates that the Commission operates and decides on the session.

The Commission at its sessions:

- 1) reviews complaints of tenderers against public procurement procedures, and makes decisions in respect of them,

- 2) examines the regularity of application of the Law and proposes and undertakes remedy measures for identified irregularities, providing for competitive behaviour of tenderers and transparency of public procurement procedure,
- 3) determines general positions for the purpose of uniform application of the Law,
- 4) discusses the application of laws and other regulations in the jurisdiction of the Commission,
- 5) makes rules of procedure,
- 6) adopts the work report, upon the proposal of the President of the Commission,
- 7) performs other duties established by Law and the Rules.

The Commission is, pursuant to Article 93 of the Law, given the authority to:

- discusses and decides on appeals in the public procurement procedure,
- in order to realize their responsibilities and authorities, the Commission in the process of reviewing complaints and determining the unique positions, examines the regularity of the implementation of the Law and propose and take measures to correct the irregularities identified, to ensure competitive behaviour of tenderers and transparency of public procurement,
- for the purpose of unified application of the law, determines the principal positions at the request of interested parties (contracting authorities, tenderers, government bodies and other institutions and persons who provide evidence to have a legal interest in making principal position of the Commission) and
- perform other duties in accordance with the Law.

The Commission shall take decisions by majority vote at meetings of members present. Sessions on which the Commission considers on appeals, as well as the process of decision making are not public. A special report on the proceedings and voting is prepared and signed by the President, Members and Secretary of the Commission. The Commission shall make decisions within 15 days, which, in particularly justified cases, may be extended for another 10 days, so that the longest period for decision-making is just 25 days. Therefore, short deadlines for decision-making entail exceptional efficiency in the work of the Commission. Decision-making in such short time periods allows that the public procurement process is not stopped, which would increase costs for the contracting authority, but it would indirectly create a burden for the state and the public interest, particularly in cases of public procurement which are of great importance for the state and where there is strongly expressed public interest. Aforementioned provides the answer to the question of why on disputes on public procurement does not decide the regular court, but a specialized body, such as the Commission. Such a solution is accepted in the European Union countries, as well as in countries that are in our region (Slovenia, Croatia, Bosnia and Herzegovina, Serbia, Macedonia, and Albania).

In establishing the Commission the European Union Directive and some judgments of the European Court of Justice, were used as the basis for the establishment of a new type of state body, located between the administrative and judicial authorities.

EU Directive 89/665 provides that bodies responsible for review procedure must be based on the following rules:

- decision made by such body in the control of public procurement procedure must be in writing with an explanation of reasons for making such decisions,
- judicial protection against the decisions of such bodies, must be available to the parties in the proceedings,
- body must be independent,
- members of the body are appointed and dismissed under the same conditions as the representatives of the judicial branch (the conditions for appointment of judges),
- members of the body are appointed to carry out the specific mandate,

- President of such body must meet the same legal and professional qualifications as members of the judicial authorities,
- a body conducts the proceedings applying the debate principle of hearing the parties,
- decisions of such body must be legally binding.

When it comes to judgments of the European Court of Justice, the most important is C-54/96 Dorsch Consult Ingenieurgesellschaft mbH v. Bundesbaugewerkschaft Berlin mbH from 1997, in which the Court, in addition to deciding on the request, determines the conditions that the state body for control of public procurement procedure must meet, if that control is not carried out by judicial authority, to qualify for the right of posing the previous question to the European Court of Justice. This verdict is of great importance for the legal system of Montenegro, given that the control of public procurement is performed by the Commission, not the court.

The requirements listed in the quoted judgment must be cumulatively met, relating to:

- body shall be established by law, not by secondary legislation act,
- body must be established as a permanent body, not ad hoc,
- must have binding authority,
- must perform *inter partes* procedure,
- must apply the legislation,
- must be independent.

The quoted directives, as well as judgments of the European Court of Justice have repeatedly stated that the decision of the competent body to decide on remedies of tenderer against the decision of the contracting authority is left to member states. In many such cases, the courts do not decide on the request for legal protection but specific *prima facie* non-judicial bodies (with the exception of the compensation request, which, as a rule, is in the jurisdiction of the courts). The reasons for such arrangement should be sought in the necessity of providing emergency procedure and suspensive effects of submitted remedy - the urgency that the competent authority decide on the submitted legal remedy as soon as possible. The nature of the public procurement and competencies of the administrative authorities in cases of legal protection (the possibility of nullifying a decision on selection of the best tender, or whole public procurement procedure) does not allow that complaints from the public procurement procedure to be in court on the same line of waiting with other requests, since such a manner of legal protection is ineffective. Nevertheless, directives require that in cases where the bodies competent for deciding on the legal protection are not judicial bodies, each decision must be explained in writing. In this case, the states must ensure that the allegedly unlawful decision of the competent body of legal protection or any failure in carrying out its powers may be subject to judicial protection or verification by other body that the court or tribunal, pursuant to Article 234 of the Treaty of Amsterdam, and which is independent of the contracting authority and the body for verification of regularity of public procurement procedure. Organization of legal protection, whereby specialized bodies decide upon requests is also promoted by the European Commission, and the same suggestion can be perceived in the new Directive 2004/17/EC (Article 72) and 2004/18/EC (Article 81).

Among the reasons to regulate status in details, authority and function of the Commission for Control of Public Procurement Procedure in more detail by the Law on Public Procurement, was the requirement to comply with the directives of legal protection, which, except for general guidelines, do not contain detailed provisions on the bodies responsible for decision-making in public procurement procedures.

The operation and organization of the Commission for Control of Public Procurement Procedure apply the basic principles of public procurement, namely: the principle of legality, openness, transparency and efficiency. In accordance with these principles, the Commission for Control of Public Procurement Procedure has been established by the Law on Public Procurement, as an autonomous and independent state authority. Independence of the Commission for Control of Public Procurement Procedure is reflected in the work and decision-making, which are closely

moderated by the Rules of Procedure of the Commission for Control of Public Procurement Procedure.

Confirmation of the independence of the Commission for Control of Public Procurement Procedure is reflected in the fact that:

- 1) Term of office of the president and members of the Commission for Control of Public Procurement Procedure may be terminated mandate i.e. they may be released from duty only in cases prescribed by Law (if convicted of a criminal act to effective prison term for the period of no less than six months or if convicted of a criminal act making them unworthy for performance of the function, in case of death or permanent loss of health capability for performance of the duty; if they get appointed for and if they commence performing a function incompatible with the duty in the State Commission; if they resign or demand to be released from duty; if without justifiable reason they do not perform their duties in the State Commission for the period longer than three months),
- 2) The Commission for Control of Public Procurement Procedure is an independent budget user.

21. What powers are conferred on these review bodies?

The Commission for Control of Public Procurement Procedure has been given the authority to:

- 1) review complaints of tenderers against public procurement procedures, and make decisions in respect of them;
- 2) examine the regularity of application of this Law and propose and undertake remedy measures for identified irregularities, providing for competitive behaviour of tenderers and transparency of public procurement procedure;
- 3) determine general positions for the purpose of uniform application of the Law,
- 4) perform other operations in accordance with this Law.

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