

**LAW
ON
PUBLIC PROCUREMENT**
("Official Gazette of RM", No. 46/06 dated 21 July 2006)
with
commentary

I. GENERAL PROVISIONS

Subject of the Law

Article 1

This Law shall govern: the conditions, manner and procedure of procurement of goods and services and award of works in cases where the contracting authority for such procurement is a covered party designated by this Law; the responsibilities of the administrative authority in charge of public procurement activities; the control of legality of public procurement procedures and protection of rights of participants in the public procurement process; the manner of maintaining public procurement statistics and other matters relevant to the public procurement.

In accordance with adopted and common practice in Montenegro, this provision specifies the general contents of the Law and lists the issues governed by it.

By its contents, terminology and nature, this provision does not have the character of a norm, because it does not prescribe any rights and obligations of entities to which the law refers so that the incorporation of this provision in the law does not complement the contents of the Law in any sense. Still, this provision has a justified and reasonable purpose to enable the user, i.e. the reader of the Law, to get a certain, although brief, insight into the law contents and satisfy his/her interest in individual chapters of the Law, which are following the order in which they are listed in this article.

In view of the contents of issues that are the subject of this Law, the legislator has chosen, in this article, to highlight, following their significance and appropriate arrangement chronology, the following issues:

- conditions, manner and procedure of procurement of goods, services and works,
- responsibilities of administrative authorities in charge of procurement and
- control of legality of public procurement procedures and protection of rights of participants in the public procurement process and
- manner of maintaining public contract statistics.

All other issues governed by this Law are of minor significance and, as such, could not be mentioned in this article, and they are defined as "other matters relevant to the public procurement".

Covered parties

Article 2

The procurement of goods and services and the award of the performance of works under this Law must be followed by:

- 1) state authorities, state administration authorities, organizations, institutions and other beneficiaries of the Budget of the Republic of Montenegro (hereinafter: the Republic) 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 the Republic, 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 the Republic or a local self-government unit or other covered party under this Law.**

An administrative authority responsible for public procurement activities shall prepare and publish a list of covered parties that are subject to the application of this Law.

The list of covered parties under this Law, referred to in paragraph 2 above, shall be updated by not later than 31 December each year.

This article identifies the parties covered by the Law which are obliged to carry out the public procurement of goods and service and the award of the performance of works under the procedures foreseen by this Law.

These are cogent legal provisions and the entities listed in this article must conduct public contract procedures solely in accordance with the rules prescribed by this Law. Evident deviation in the use of resources is subject to appropriate sanctions and liability, as laid down in this Law and other laws governing the operations and work of those entities.

This article makes the public law entities that spend budget and other public funds for their work bound to conform the spending of such funds for public contract to the precisely defined procedure and rules, in order to ensure legal and effective utilization of public funds and promote free market competition and prevent discrimination against any participants in that process.

The amounts of funds spent through public contracts are extremely high, which required precise identification of covered parties under this Law. However, since public procurement, as a separate category, is relatively new in Montenegro, it may be stated that public law entities still do not have sufficiently developed awareness of the obligation to spend funds following public procurement rules. On the contrary, a wish to possibly exempt individual entities from the obligation to apply this law is strongly present, which is an indicator of old habits to spend public money under the principles that are opposite to those underlying the Law on Public Procurement.

Accordingly, raising awareness of the obligation to spend public money in the manner provided by this Law is a priority, which should be dealt with by all state authorities that supervise the spending of budgetary and other public funds. Current experience of bodies working on the protection of rights of participants in public procurement procedures indicates that individual parties covered by the Law are frequently dissatisfied by the Law, though, judging by their functions, they would have to show more understanding for the institute of public procurement and for the work of bodies protecting the rights of participants in public procurement procedures, and not, by arbitrary evaluations and observations given through media, try to keep previous, ungrounded positions in the spending of public money.

The provision of Article 2 defining the circle of covered parties is clear enough and any of those parties may identify their positions in the implementation of the Law, by interpreting this provision. Still, in order to avoid any dilemmas or uncertainties, the legislator has foreseen that the Authority competent for public procurement affairs - the Public Procurement Directorate should prepare, publish and update a list of parties covered by this Law. The list of covered parties includes ministries, state administration authorities, local government authorities, public enterprises and public institutions, which also implies entities in the area of utility services - water management, energy, postal services, railway and the like.

The list of covered parties under this Law is to be updated by not later than 31 December each year.

However, it is important to note that if any of the covered parties is not on the list of the Public Procurement Directorate though it meets the conditions specified in article 2, such covered party is obliged to conduct the procurement of goods, services or works under the procedures set forth in this Law. The status of a

covered party is acquired by meeting the conditions prescribed by the law and not by finding itself on the list of covered parties.

In this context, it is important to note that in the EU there is a very rich case law of the European Court of Justice with regard to the interpretation of what enterprises are covered by European public procurement directives (Directive for state sector, 2004/18 and Directive for public enterprises, 2004/17).

In general, from the case law of the European Court of Justice it can be concluded that the broader category of contracting authorities (which includes in addition to state, regional and local authorities, the bodies subject to public law regulation – the latter must always have the status of a legal entity in addition to other conditions they need to fulfill) must be interpreted in a functional way. In the case *Arnhem* (Case C-360/96 *Gemeente Arnhem and Gemeente Rheden v BFI Holding BV* [1998] E.C.R. I-6821), that related to the bodies covered by public law, the European Court of Justice was posed a question if it made any difference that the competencies for which purpose the relevant contracting authority was established, were defined by a law in a formal sense, an administrative decree or administrative act and the like. The Court pointed out that, given the need for the term *contracting authority* to be interpreted in a functional way, the distinction should not be made by referring to the legal form of decrees based on which such entity was established or stating the needs it is to fulfill (see particularly paragraph 62 of relevant court decision). In the case *Connemara* (Case C-306/97 *Connemara Machine Turf v Coillte Teoranta* [1998] E.C.R. I-8761), the European Court of Justice was of the opinion that if there had been no legal provision explicitly envisaging the state control over the award of public procurement contracts for Coillte Teoranta (contracting authority), the state could have conducted such control at least indirectly. In fact, the state established Coillte Teoranta and assigned it specific duties. The state also had authorizations to appoint the senior managers in Coillte Teoranta. Also, the ministerial authorization to issue orders to Coillte Teoranta, and particularly to demand such authority to observe the state policy on forestry and to provide the mentioned services, or provide for facilities, as well as authorization of such Minister and the Minister of Finance for financial issues, facilitated the state to control economic activities of Coillte Teoranta's. Consequently, and given the functional interpretation of the term *contracting authority*, Coillte Teoranta should be considered as a contracting authority covered by the above directive on public procurement (see particularly paragraphs 31-33 and the paragraph 36 of the relevant court judgment with regard to functional interpretation of the term *contracting authority*, also see the case C-237/99 *Commission of the European Communities v French Republic* [2001] E.C.R. 939, para 43.).

Exclusions from the Law

Article 3

This Law shall not apply to:

- 1) contracts for the procurement of weapons, ammunition and other supplies needed for the defence and security of the Republic, which are declared to be secret by a law or other regulation, when their performance must be accompanied by special security measures;**
- 2) contracts for the procurement executed in pursuance of an international agreement or contract signed between the Republic and one or more states and international organizations and covering:
 - a) the delivery of goods, provision of services, performance of works, intended for the joint implementation or exploitation of a project by the signatory states;**
 - b) the stationing and deployment of military forces;**
 - c) the public procurement carried out pursuant to the particular procedure of an international organization;****
- 3) and contracts for:
 - a) the acquisition, development, production or co-production of programme material, intended for broadcasting by broadcasters and contracts for the award of broadcasting frequencies;**
 - b) arbitration and conciliation services, and public notary's services, except for the services listed in Annex I hereto that is an integral part hereof;**
 - c) financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments, in particular transactions by contracting authorities to raise money or capital, and Central Bank of Montenegro services;**
 - d) employment contracts.****

This Law shall not apply to the process of granting concessions and privatisation of the economy, as well as the sale and renting of land, existing buildings or other real estates or the rights deriving therefrom, performed by the covered parties under this Law.

The law, in accordance with Directive 2004/18, identifies the cases in which the Law on Public Procurement is not apply to the procurement procedures performed by the covered parties under the Law.

It is the rule that exemptions from the application of the Public Procurement Law should be interpreted very restrictively. When a contracting authority believes that certain public contract should not be subject to the Public Procurement Law, such authority should request the Commission for the control of public procurement procedures to take legal position, in view of the proper application of the Law.

It should be noted that in view of the EU, the European Court of Justice consistently made it clear that derogation from rules which objective is to ensure effectiveness of rights awarded based on the Treaty Establishing the European Community **must be strictly interpreted** (see e.g. Case C-324/93 *Evans Medical And Macfarlan Smith*, [1995] E.C.R. I-563, para 48, Cases C-20/01 and C-28/01 *Commission v Germany* [2003] ECR I-3609, para 58).

Thus the Law does not apply to:

1) contracts for the procurement of weapons, ammunition and other supplies needed for the defence and security of Montenegro, which are declared to be secret by a law or other regulation, when their performance must be accompanied by special security measures;

This is an exemption known to all EU countries and established in order to ensure confidentiality of the procurement relating to defence and security of the country. This case concerns exclusively the procurement of weapons, ammunition and other supplies needed for the defence and security of Montenegro, which means that it is related to the defence, which is governed by special regulations on defence as well as on the security, which is governed by special laws concerning public and private security. These contracts have been declared confidential (secret) by this law or enabling regulations and they are carried out under special security measures, defined by this law. Regulations related to the activities of the police, state security and defence define the types of public contracts that are not subject to the Law on Public Procurement – Law on Police (Article 97) and Law on Agency for National Security (Article 3, paragraph 1, point 1).

Specifically, with regard to public procurement in the area of defence in the EU context, it should be noted that specific character of defence sector has been recognized even since the establishment of the European Community through the exemption system defined in Article 296 of the Treaty Establishing the EC. In the Directive 2004/18 it is stated that rules of the Community regarding public procurement are related to contracts awarded in the area of defence, with the application of the exemption system defined in Article 296 of the Treaty Establishing the EC. According to Article 296 (1) (b) of the Treaty Establishing the EC“ any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material ...”

The list of such products is included in the Council Decision of 15 April 1958, and they are as follows:

1. Portable and automatic firearms, such as rifles, carbines, revolvers, pistols, sub-machine guns and machine guns, except for hunting weapons, pistols and other low calibre weapons of the calibre less than 7 mm.
2. Artillery, and smoke, gas and flame throwing weapons such as:
 - (a) cannon, artillery, anti-tank guns, rocket launchers, flame throwers;

- (b) military smoke and gas guns.
- 3. Ammunition for the weapons at 1 and 2 above.
- 4. Bombs, torpedoes, rockets and guided missiles:
 - (a) bombs, torpedoes, grenades, including smoke grenades, smoke bombs, rockets, mines, guided missiles, underwater grenades, incendiary bombs;
 - (b) military apparatus and components specially designed for the handling, assembly, dismantling, firing or detection of the articles at (a) above.
- 5. Military fire control equipment:
 - (a) firing computers and guidance systems in infra-red and other night guidance devices;
 - (b) telemeters, position indicators, altimeters;
 - (c) electronic tracking components, gyroscopic, optical and acoustic;
 - (d) bomb sights and gun sights, periscopes for the equipment specified in this list.
- 6. Tanks and specialist fighting vehicles:
 - (a) tanks;
 - (b) military type vehicles, armed or armoured, including amphibious vehicles;
 - (c) armoured cars;
 - (d) half-tracked military vehicles;
 - (e) military vehicles with tank bodies;
 - (f) trailers specially designed for the transportation of the ammunition specified at paragraphs 3 and 4
- 7. Toxic or radioactive agents:
 - (a) toxic, biological or chemical agents and radioactive agents adapted for destructive use in war against persons, animals or crops;
 - (b) military apparatus for the propagation, detection and identification of substances at paragraph (a) above;

- (c) counter-measures material related to paragraph (a) above
- 8. Powders, explosives and liquid or solid propellants:
 - (a) powders and liquid or solid propellants specially designed and constructed for use with the material at paragraphs 3, 4 and 7 above;
 - (b) military explosives;
 - (c) incendiary and freezing agents for military use.
- 9. Warships and their specialist equipment:
 - (a) warships of all kinds;
 - (b) equipment specially designed for laying, detecting and sweeping mines;
 - (c) underwater cables,
- 10. Aircraft and equipment for military use.
- 11. Military electronic equipment.
- 12. Cameras specially designed for military use.
- 13. Other equipment and material.
- 14. Specialised parts and items of material included in this list insofar as they are of a military nature.
- 15. Machines, equipment and items exclusively designed for the study, manufacture, testing and control of arms, munitions and apparatus of an exclusively military nature included in this list.

In Article 296 (1) (b) it is also stated that “.. *such measures shall not adversely affect the conditions of competition in the common market regarding products which are not intended for specifically military purposes.*” In this way, a clear distinction is defined between purely military products/supplies and product/supplies although used in the defence context are not specifically military, so called products of dual use (e.g. computers, food, medications – which may be used for both civilian and defence purposes). The exemption referred to in Article 296 of the Treaty Establishing the EC was the subject of direct interest in the case *Commission v. Spain* (Case C-414/97 *Commission v Spain* [1999] E.C.R. I-5585). In this important case, the European Court of Justice was of the position that the exemption was not

automated, but the member state may apply it only for protection of its essential security interest, and the member state is obliged to provide evidence thereof (see particularly paragraph 22 of the relevant court judgment). It should be noted that due to the misuse of Article 296, the Commission adopted:

- in December 2006, Interpretative Communication on the application of Article 296 of the Treaty in the field of defence procurement (COM /2006/779), clarifying the conditions for application of Article 296.

- in December 2007, proposal for a new directive on the procurement adjusted to specificities of the defence sector. The directive for defence sector shall be applied to public procurement for military, as well as for specific non-military security uses.

2) contracts for the procurement executed in pursuance of an international agreement or contract signed between Montenegro and one or more states and international organizations and covering:

- a) the delivery of goods, provision of services, performance of works, intended for the joint implementation or exploitation of a project by the signatory states;
- b) the stationing and deployment of military forces;
- c) the public procurement carried out pursuant to the particular procedure of an international organization (article 3, paragraph 1, point 2);

In this case, the condition for exemption is the existence of an international agreement envisaging joint implementation or exploitation of a project, i.e. participation of at least two states or Montenegro and an international organization, which have entered into such agreement.

There are many dilemmas in connection to this paragraph, even proposals that all public contracts carried out on the basis of credits given to contracting authorities be exempted from the Law on Public Procurement and be subjected to the rules of the European Bank for Reconstruction and Development or the World Bank and the like. However, the mentioned possibility is not acceptable from the aspect of the Law, particularly considering the fact that only a part of a public contract may be financed from a credit while the rest is financed from the contracting authority's own funds. Therefore, this exemption should be interpreted in a very narrow way. The condition for the application of this provision is an explicit provision in a contract or agreement that the Law on Public Procurement will not be applied.

3) and contracts for:

- a) the acquisition, development, production or co-production of programme material, intended for broadcasting by broadcasters and contracts for the award of broadcasting frequencies;
- b) arbitration and conciliation services, and public notary's services, except for the services listed in Annex I hereto that is an integral part hereof;
- c) financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments, in particular transactions by contracting authorities to raise money or capital, and Central Bank of Montenegro services;
In that, one should have in mind that the activities under items a, b and c are governed by special regulations;
- d) employment contracts, which are regulated by employment and labour regulations (Article 3, paragraph 1, point 3).

The basic legal standpoint on the acquisition of condition for exemption from the Law is given, in accordance with its authorities, the Commission for the control of public procurement procedures.

Concerning the acquisition, development, production or co-production of programme material, intended for broadcasting, this provision is applied by a small number of contracting authorities (e.g., Radio Television Crne Gore). Co-production means that several partners participate in the production of a programme. In production, there is a so-called turn-key arrangement, which means a taped cassette. In that case, it is necessary to determine whether the contracting authority has intended to order exactly defined contents that can be performed or taped by anyone who possesses appropriate technical and other devices, or the product is related to copyright, licences, special equipment etc. The subject of public procurement is probably not executive production that is connected with co-production, where executive producer does not invest his funds, but producer's or co-producer's funds. However, beyond that exemption, programme procurement is relevant. That procurement includes the purchase or lease of cameras, reporter cars, lighting, video-park, software, database and other technical equipment that directly serve the programme production. In the case of equipment lease, it should be determined whether the equipment is leased as such or together with workers – cameramen, lighting persons, programme engineers and technicians, drivers etc. Programme procurement is the subject of the public procurement.

Arbitration and conciliation services, public notary's services, financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments, in particular transactions by contracting authorities to raise money or capital, and Central Bank of Montenegro services are also excluded from the application of the Law on Public Procurement. Like in other countries, arbitration procedure is carried out under different, special rules. Leaving a decision on a dispute to arbitration is an autonomous choice of contractual

parties unless, of course, the rules of procedure stipulate that dispute should be decided by a court only. Arbitrators are selected or appointed under predetermined or ad-hoc rules, as may be agreed. The nature of arbitration, however, excludes the possibility for parties to apply public procurement rules on the selection of arbitrators.

Services of the Central Bank are defined by the law and may not and must not be carried out by anybody else. These services are not subject to market competition as other banking services.

Services arising from employment and labor regulations are subject to employment and labour regulations.

Pursuant to Montenegrin legislation, the procedure of issuing concessions or privatisation of economy, as well as the sale and lease of land, existing buildings or other real estates or the rights deriving therefrom, performed by the covered parties under the Public Procurement Law, are governed by regulations on concessions, privatisation of economy and property. The legislator has foreseen that this Law will not apply to the procedure of issuing concessions or privatisation of economy, and to the sale and lease of land, existing buildings or other real estates or the rights deriving therefrom, performed by the covered parties under this Law. **The reason is that in such cases contracting authority does not spend its funds and such procedures are regulated by other laws (Law on Participation of Private Sector in the Performance of Public Services, Law on Property etc.).** This explicit determination has finally removed the dilemma that existed when the previous Law on Public Procurement was in effect (Article 3, paragraph 2).

Definitions

Article 4

Individual terms used in this Law shall have the following meaning:

- 1) «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;**
- 2) «public contract» is a contract concluded in writing between a contracting authority and a tenderer, having as its object the supply of products, provision of services or performance of works;**
- 3) »public supply contract» is a contract concluded in written or electronic form and involving the purchase, lease, rental or hire purchase, with or without option to buy, of products, including necessary siting and installation operations;**
- 4) «public works contract» is a contract concluded in writing, having as its object either the execution, or both the design and execution, of**

works related to one of the activities within the meaning of Annex I, or the realisation of a work corresponding to the terms specified by the contractual parties. A «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;

5) «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 may be:

a) a public 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;

b) a public contract having as its object services and including activities within the meaning of Annex I that are only incidental to the principal object of the contract;

6) «contracting authority» is a covered party referred to in Article 2 above, conducting the public procurement procedure and allocating funds for that purpose;

7) «tenderer» means either a natural or a legal person that submits a tender for supply, services or works;

8) «tender price» means the price specified by the tenderer in his tender under the issued invitation;

9) «abnormally low tender» means the tender price that is so low that it causes doubts in the contracting authority about the ability for carrying out the public contract;

10) «criterion» means an element used in weighing, comparison and evaluation of received tenders;

11) «qualification requirement» means the requirement specified in the invitation that must be fully met in the tender because it is a precondition for determining the tenderer's capacity;

12) «open procedures» are the procurement procedures whereby any interested business organization or entrepreneur may submit a tender;

13) «restricted procedures» are procedures whereby any interested business organization or entrepreneur may request to participate and only those business organizations and entrepreneurs invited by the contracting authority may submit a tender;

14) «negotiated procedures» are the procurement procedures whereby the contracting authority consults the business organizations or entrepreneurs and negotiates the terms of the contract with one or more of these;

15) «design contests» are those procedures which enable the contracting authority to acquire, mainly in the fields of town and country planning, architecture, engineering or data processing, a plan or design selected by a jury after having been put out to competition with or without the award of prizes;

16) «written» or «in writing» means any expression consisting of words or figures that can be read, reproduced and subsequently

communicated. It may include information transmitted and stored by electronic means;

17) «public procurement in electronic form» means the procurement carried out through the electronic system for public procurement;

18) «electronic system for public procurement» means a computerised system in general use accessible via the Internet, which is used with the aim to provide higher efficiency and cost-effectiveness in the area of the public procurement;

19) «electronic tender» means any tender or part of tender, set forth in the conditions of the invitation to tender, which is stored and/or submitted to the contracting authority in electronic form and compliant with safe electronic operation principles under the Law on Electronic Signature, and which unquestionably constitutes a complete and logical unity with other parts of the tender of the same tenderer. The recording form and the manner of submitting the documents or part of the documents in electronic form must be defined by the contracting authority in the tender documents;

20) «electronic means» means using electronic equipment for the processing (including digital compression) and storage of data which is transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means;

21) «participation request» is a request submitted to the contracting authority by each person interested in the restricted procedure;

22) «criteria and conditions update» is temporary adjustment carried out by the contracting authority during the qualification procedure, taking account of market conditions, development and other circumstances;

23) «tender price discount» is a method of pricing that the tenderer may offer only when the contract is awarded in lots, and the contracting authority cannot consider this method as an element for additional privilege;

24. «standard public procurement forms» are the forms determined by the administrative authority responsible for public procurement activities, established under this Law;

25. «public funds» are the budgetary funds and other funds, the bases and sources of which are determined by a law or other regulations;

26. «tender documents» are the documents specifying in more detail the subject of procurement, conditions and procedure of selection, technical specifications and characteristics and other relevant documents, prepared by the contracting authority;

27. «public procurement in lots» is the procurement the subject of which is split into several separate, related lots, and which is designated as such in the call for public competition and tender documents;

28. «framework agreement» means an agreement for a given limited period between a contracting authority and a tenderer, the purpose of which is to establish the framework terms governing contracts to be

awarded during that period, in particular with regard to subject of contract and, where appropriate, the value, volume or quantities envisaged, as well as the price.

The provisions of this Article, as said in its heading, define the terms that are most frequently used in the public procurement procedures.

Public procurement procedure, as a specific procedure for the selection of contractual party for the purpose of entering into a contract that results in the spending of public funds, is carried out with the intention to ensure reasonable use of those funds and facilitate free market contest and competition. All objectives of public contracts are established in relevant documents of the European Community and national legislation of member countries.

This article of our Law is in compliance with the main definitions from the Directive 2004/18/EC, and thereby with appropriate provisions of the laws of individual member states and candidate countries. In that way, public contracts get an international character, which fully conforms to the nature and objectives of putting a public procurement system in place, without knowing the borders and having a trans-national nature and function. Relatively short period of application of the Law on Public Procurement in Montenegro shows that such trans-national component of this law is completely satisfied, because in a large number of cases, after the conducted procedure, a contract is awarded to entities that are domiciled outside Montenegro.

This provision of the Law helps to all participants in the public procurement process to have identical understanding of the meaning and spirit of the Law, which facilitates its adequate and correct application and interpretation.

As seen from the contents of this article, definitions are given for 28 terms that are most relevant for the elaboration and implementation of the Law. Definitions are short, clear, understandable and accessible to all participants in the public procurement process. The proclaimed contents of the definitions oblige the authorities responsible for the control and proper application of the Law to translate such contents into the practical application of the Law.

Basic principles of public procurement

Cost-effective and efficient use of public funds

Article 5

The contracting authority shall ensure, in the process of public procurement and selection of a most economically advantageous tender, that the public funds are used in a cost-effective and efficient way.

The principle of cost-effective and efficient use of public funds (also known as the best value for money principle) basically means that the choice between two or more tenders must be based on the comparison of costs in relation to the obtained result. The obtained result must be:

- a solution that yields the same result, at a lower cost,
- a solution that yields better result, at the same or lower cost,
- a solution that, though at a higher cost, yields better result (provided that such additional efficiency justifies the cost increase).

Efficient use of public funds is one of the objectives of the Law and the very fact that it is mentioned at the very beginning represents a lasting warning to the public officials, as well as parties in the process, that efficiency should be the final goal of the decisions they make.

Competition

Article 6

The contracting authority shall undertake any necessary actions to ensure fair competition among potential tenderers, in accordance with the law.

The contracting authority may not restrict competition among tenderers, particularly potential tenderers, through the unjustified use of restricted procedure or measures favouring individual tenderers.

Entities involved in the preparation of tender documents or individual parts of such documents may not act as tenderers or subcontractors and may not cooperate with tenderers in the preparation of their tenders, if that affects competition.

The principle of competition implies an obligation of the contracting authority to provide competition among potential tenderers, by publishing and advertising in public invitations to tender, in accordance with the Law, and in the case of low value contracts (shopping), by collecting at least three proposals. However, competition does not mean that the contracting authority is obliged to ensure that there are at least two correct tenders to be compared and evaluated. The competition is ensured by issuing a public invitation whereby all potentially interested tenderers become entitled to take part in a subject public procurement procedure. An exemption is the restricted procure, where the legislator has foreseen that the competition principle is ensured by providing at least three qualified tenderers (Article 6, paragraph 1).

For the reasons stated above, the legislator has envisaged that the contracting authority may not restrict competition among tenderers, particularly through the unjustified use of restricted procedure or measures favouring individual tenderers. With a view to achieving this principle, the legislator has foreseen, in

Article 21, strict conditions that have to be met for the contracting authority to become entitled to apply the restricted procedure. Also, the contracting authority may not use measures favouring individual tenderers in the procedure. In that regard, it is important to note that the Law does not know of preferential treatment of domestic tenderers in relation to foreign tenderers and explicitly forbids references to a trademark and logo. Still, there is an exemption here as well, where such reference cannot be avoided. But, in such a case, the contracting authority must mention a trademark or logo in the public invitation or in tender documents as an example only and always adding the words “or equivalent”, which allows tenderers to offer other goods, not only the one with a certain trademark or logo. Thanking to ever larger opening of domestic market, domestic tenderers will be forced to adjust their products and services to the requirements meeting uniform technical norms and standards, while on the other side, such technical adjustments will ensure equal treatment with other tenderers in public procurement procedures (Article 6, paragraph 2).

With a view to providing competition among tenderers, entities involved in the preparation of tender documents or individual parts of such documents may not act as tenderers or subcontractors and may not cooperate with tenderers in the preparation of their tenders, if that affects competition, because that would bring them in the conflict of interest and seriously endanger equality of tenderers. This is a frequent issue, particularly in situations when one tenderer is awarded contract for the preparation of a design, and that tenderer subsequently wants to submit a tender under another public invitation for the award of the performance of works under the design prepared by that tenderer. In connection with that, the legislator has foreseen in Article 14 that the responsible person of the contracting authority, public procurement officer, members of the tender opening and evaluation commission, persons who participated in the preparation of tender documents, as well as tenderers – are obliged to sign an independence statement (Article 6, paragraph 3).

In this context it is interesting to mention that Article 6 paragraph 3 of the Law has been formulated in accordance with the case law of the European Court of Justice, i.e. with the *Fabricom* case (Joined Cases C-21/03 and C-34/03, *Fabricom SA v Belgium* [2005] E.C.R. I-1559). In the case *Fabricom* the European Court of Justice was required to consider the provision of the Belgium law envisaging that no person ordered to conduct research, experiments, studies or development related to public procurement of works, supplies or services is allowed either to participate or to submit a tender for public procurement of such works, supplies or services and that such person is not allowed to prove that under given circumstances the experience it acquired may not threaten the competition. The European Court was the first to acknowledge that the person that participated in specific preparatory works may have advantage in preparation of the tender. This is due to the information related to the subject public procurement that it acquired in conducting such operations, (see paragraph 29 of the relevant court judgment). In addition, this person may face

conflict of interest in terms that this person, even unintentionally, if it is a tenderer for the relevant public procurement, could influence on the conditions of the relevant procurement in the manner suitable to it (see paragraph 30 of the given judgment). The European Court then continued stating that it must be considered that a rule like such a rule in the main proceeding does not allow the person who has conducted specific preparatory activities to have any possibility to demonstrate that in its specific case there aren't any of the above mentioned problems (paragraphs 29 and 30 of the current judgment). Accordingly, the application of such a rule may have a consequence that persons who have conducted specific preparatory activities are prevented from participating in the contract award procedure although their participation in such a procedure implies no risk for competition among tenderers. As a result, the European Court of Justice established that the relevant rule is disproportional and also stated that it was necessary to achieve the goal of equal treatment of all tenderers (see paragraph 33 – 35 of the given judgment). Therefore, it may be said that for the purpose of guaranteeing a fair treatment, the person who has conducted specific preparatory activities must be given an opportunity to prove that under given circumstances there has been no disturbance of the competition before this person would be rejected or before it would be forbidden to participate in the competition procedure).

Transparency

Article 7

The transparency principle means that the procurement procedures must be public, which is provided by publishing notices of public competition and decisions on the selection of the best tender in the manner prescribed by this law and public procurement standard forms.

The tenderers which participated in the public procurement procedure are entitled to review and obtain information about the completed public procurement procedure after having received the notice of contract award, in accordance with this law.

Transparency is the most important principle in the public procurement process, which entails all other principles relevant to public procurement, i.e., cost-effective and efficient use of public funds, competition, and equality of tenderers. A higher degree of transparency results in higher level of competition, lower prices, more advantageous conditions and, finally, in getting the best value for money. Pursuant to this principle, public procurement procedures have to be public, which is, as mentioned above, provided by publishing invitation to tenders and contract award notice under the procedure prescribed in the Law and using more precise standard forms. When public procurement procedures are transparent, i.e., visible and publicly advertised, tenderers have the possibility to prepare their tenders on the basis of pre-defined conditions. The obligation regarding the transparency is particularly underlined for contracts exceeding

EUR 100,000, where the contracting authority is especially bound to ensure transparency, by publishing the procurement plan in advance so that the tenderers may be informed about the planned procurement even before it has been published. In that way, it becomes possible to award the contract to a tenderer which is qualified and capable for discharging the contracted obligations (Article 7, paragraph 1).

Furthermore, the implementation of this principle is ensured through the rights of tenderers which participated in the conducted procedure, to review and get information about the conducted procurement procedure, after the contract award decision has been notified, under the procedure defined by the Law. In that, one should have in mind that the law governing free access to information needs to be applied here as *lex specialis*. Therefore, the procedure and manner of exercising the right to free access to information are regulated by the Law on Free Access to Information and, with respect to public procurement, this right of review is limited in Article 70, paragraph 6 of the Law to the period from receiving the contract award notice to the expiry of complaint period. Right to free access to information, related to public procurement, cannot be exercised without a previous request, submitted in the manner and under the procedure foreseen in the Law on Free Access to Information.

Also, transparency is the basis for the control of the conclusion of contract. Since the contracting authority is obliged to publish the contract award decision, indicating many details, not just the name of the first-ranking tenderer, other tenderers and interested parties have a right, by initiating the complaint procedure, to verify whether the first-ranking tender was really the result of the most favourable selection. That is the way to control the spending of budgetary funds. In addition, the Law envisages sanctions related to the fact that invitations that are not published do not produce any legal effect, which ensures the transparency principle (Article 7, paragraph 2).

Equality

Article 8

The contracting authority must ensure that all tenderers have equal treatment at all phases of the public procurement procedure.

Equality principle is ensured through equal treatment of tenderers, ensured through the unification and standardisation of invitations, accessible to all potential interested tenderers. Further, conditions for participation in the tendering are equal for all, whether natural or legal persons, and regardless of their domicile (local or foreign), and all tenderers have equal treatment in the exercise of their rights during the public procurement procedure.

This principle obliges the contracting authority not to give any tenderer any information that has not been given to other tenderers, both in the phase of invitation and tender documents and during the invitation period, public opening, review, evaluation and comparison of tenders and making decision on the selection of the most favourable tender or the cancellation of the process. In that sense, equality of tenderers is very close to the principle of transparency. It means equality in the broadest sense, i.e., without any territorial or personal discrimination. Montenegrin law has been given positive evaluations in this respect, since it does not know of preferential treatment in favour of domestic tenderers (Article 8).

In the context of the European Union practice it is significant to emphasize the opinion in the case *Concordia Bus* (Opinion of the lawyer of general Mischo given on 13 December 2001 Case C-513/99, *Concordia Bus Finland v Helsinki* [2002] E.C.R. I-7213):

“According to settled case law, the principle of equal treatment requires that comparable situations may not be treated differently and that different situations must not be treated in the same way, unless the different treatment can be objectively justified ” (se paragraph 149 of this Opinion).

Rights of tenderers where most employees are persons with special needs

Article 9

The contracting authority may state in the call for competition and in the tender documents that the contract will be awarded, under equal terms, to the tenderers where most of the employees are persons with special needs who, by reason of the nature or the seriousness of their disabilities, cannot carry on occupations under normal conditions.

The legislator has given the right to the contracting authority to indicate in the invitation to tenders and in the tender documents that contract will be awarded, under equal terms, to the tenderers where most of the employees are persons with special needs, who cannot carry on occupations under normal conditions due to their disabilities (Article 9).

Confidentiality of information and documents and procedure records

Article 10

The contracting authority shall keep all information about the tenderer contained in his tender that are designated as confidential by the law or other regulation.

The contracting authority may demand the protection of confidentiality of information and data made available to tenderers when delivering technical specifications to them.

The contracting authority must keep the names of tenderers and submitted tenders as trade secret until the tender opening date.

The person who received information referred to in paragraph 1 above as confidential must respect their confidentiality.

The contracting authority must record all phases and actions undertaken in the conduct of the public procurement procedure.

The contracting authority shall store the public procurement documentation in accordance with the regulations governing archive activities.

Information about tenderers, contained in their bids and defined, by law or other regulations, as confidential must be kept by the contracting authority in a prescribed manner. The provision allowing the contracting authority to refuse to give information that the tenderer, who provided it in the tender designated as confidential, has been taken from the Directives. It is common for EU member countries that contracting authorities refuse the request received from tenderers to review tenders of other tenderers. But, the information concerned is not about eligibility evidence, since in the business world the data concerning business relations of tenderers with their clients, pricing method, technical solutions etc. have much more worth. Also, a tenderer who has been awarded contracts by that contracting authority before may obtain better conditions and submit more favourable offer, in comparison to tenderers appearing for the first time. In that, it is not just the matter of a lower price, but also of other advantages that are common among entities that have a stable business cooperation and relationships, and these are related to more favourable conditions and manner of payment, delivery periods, better than usual quality, better technical solutions etc.

The confidentiality obligation relates not only to the tender contents as indicated in the submitted tender, but also to the name of business organizations that purchased the tender documents and submitted their tenders. That prevents potential collusion among potential tenderers, such as about price, quality and other requirements. On a small market such as Montenegrin, tenderers in individual sectors know each other, which increases the possibility for mutual collusion and potential extortion and market sharing.

The public procurement documentation is stored in accordance with regulations governing office management and archive activities, which includes the recording, collection, takeover, sorting out, processing, removal, protection, use

and publication of archive materials, as well as other activities foreseen by regulations covering the office management and archive activities.

Language in the public procurement procedure

Article 11

The contracting authority shall prepare the invitation, tender documents and other documents needed in the process of public procurement, and shall maintain the procedure, in the language which is in official use in Montenegro.

The contracting authority may prepare tender documents and individual parts of them in a foreign language that is commonly used in international trade.

The tenderer shall submit a tender in the language designated in the invitation to tender, i.e. in the language in which the tender documents are written.

The contracting authority which, in the process of inspection and evaluation of tenders, finds out that a part of the tender needs to be translated into the language that is in official use in Montenegro shall allow the tenderer a period during which that part of tender must be translated.

In case of a dispute, the version of tender documents and/or tender provided in the language that is in official use in Montenegro shall prevail.

This article foresees that invitation to tenders, tender documents and other documents required in the public procurement process should be prepared and the procedure should be conducted in the language which is in official use in Montenegro – Montenegrin, which is in accordance with Montenegrin Constitution, which envisages that Montenegrin language is in use in Montenegro. However, contracting authorities are responsible to estimate, considering the nature of the subject matter of the public contract and its value, whether the tender documents and its components should be also prepared in a foreign language commonly used in international transactions (English, Russian, French, German, Spanish etc.). Also, the contracting authority is entitled to define in the invitation to tender whether tenderers may also submit their tenders in any of foreign languages commonly used in international practice. In this way, full equality of tenderers is provided, regardless of their domicile. Namely, the insisting on conducting all procurement procedures in Montenegrin may lead to discriminating and repulsing foreign tenderers, particularly in cases when the contracting authority shortens the duration of the public invitation.

Further, this article foresees that if the contracting authority, during the review and evaluation of tenders, finds out that part of a tender needs to be translated into Montenegro, the contracting authority must allow the tenderer certain time to do it.

If tender documents or a tender are prepared both in Montenegrin and in one of foreign languages commonly used in international trade, in the process of protecting of rights, the tender documents or the tender prepared in Montenegrin shall be relevant from the legal point of view.

Finally, it should be noted that previous practice in Montenegro has shown that tenders are mostly submitted in Montenegrin and in English. Tenderers are obliged to prepare tenders in the language specified in the invitation or tender documents, because otherwise it would be a violation constituting a reason to reject the tender as invalid.

Currency

Article 12

The tender price, i.e. value of the public procurement, shall be expressed in EUR.

This article provides that the tenderer must express the tender price, i.e., the value of the public contract, in euros, thereby establishing unification and standardisation with the EU market.

Anti-corruption rules

Article 13

All contracting authorities, tenderers and other participants in the public procurement procedure shall undertake efficient and effective measures preventing corruption, misuse of official position, conclusion of agreements for the purpose of deceiving third parties, provision of false data when submitting tenders, conflict of interest, lack of impartiality and transparency in the conduct of public procurement procedure and, to that end, shall promote high standards of transparency, efficient internal audit systems, and open public competition and in determining objective criteria of selection and decision-making.

The contracting authority shall reject a tender, 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, as well as in the case of actions of concealing or misrepresenting data.

In the cases referred to in paragraph 2 above, the contracting authorities shall notify the tenderer and the administrative authority in charge of public procurement thereon in writing.

The contracting authorities shall provide access and adequate information on the decision-making organization and process in public procurement procedures to all interested parties.

Through this principle, the Law particularly underlines the importance of anti-corruption rules that must be adhered by the contracting authorities and other participants in the process. They are all obliged to take efficient and effective measures to prevent corruption, starting from corruption in the narrowest sense, such as bribe. Then, they are also obliged to prevent other corruptive activities and acts that may result in punishable offences, such as the misuse of official position, conclusion of agreements for the purpose of deceiving third parties, provision of false data when submitting tenders, conflict of interest, lack of impartiality and transparency in the conduct of public procurement procedure. To that end, all the indicated entities are obliged to promote high standards of transparency, efficient internal audit systems, which are applied, as a rule, within their independently organised units, to develop and reaffirm open public competition and to determine objective criteria of selection and decision-making (Article 13, paragraph 1).

Each contracting authority is bound to reject a tender, 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. One should have in mind here that the Criminal Code of Montenegro defines receiving or giving bribe as a criminal act. Due to evident sensitivity of public contract procedures to corruption and the fact that a number of criminal proceedings have been taken on the grounds of misuse of official position or giving or receiving bribe in public procurement process, the legislator has put special focus on the anti-corruption nature of the Law. It is important to note that as a consequence of potential convicting sentence for the criminal offence of giving or receiving bribe, a concluded public contract or a

contract award decision and/or previously conducted procedure, when the final contract has not been concluded yet, becomes null and void. Also, each contracting authority must reject a tender, cancel a public procurement procedure or withdraw from the conclusion of contract due to concealing or misrepresenting data in the public procurement process (Article 13, paragraph 2).

In the cases of non-observance or violation of rules in the context of the previous article (Article 13, paragraph 2), each contracting authorities is obliged to notify the tenderer and the Public Procurement Directorate that will take further actions in accordance with the Law, thereon in writing. This includes the obligation of all entities that are aware of events of violation of anti-corruption rules to report such violations to the competent bodies (State Audit Institution, state prosecutor and, by all means, to the authority in charge of public procurement), for the purpose of further procedure in accordance with the Law (Article 13, paragraph 3).

Each contracting authority shall provide access and adequate information on the decision-making organization and process in public procurement procedures to all interested parties. This provision underlines the principle of free access to information that affirms and promotes the development of anti-corruption rules and reduces corruption in public procurement procedures (Article 13, paragraph 4).

Conflict of interest

Article 14

Participants in the public procurement procedure shall take any necessary action to prevent existence of a conflict of interest.

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 administrative authority in charge of public procurement, in a timely manner, of the actual or potential existence of a conflict of interest.

The conflict of interest referred to in paragraph 2 above shall occur, inter alia, if such person:

- 1) is the tenderer itself or the tenderer's legal representative or attorney;**
- 2) 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;**

- 3) is a guardian, adopter or adoptee of the tenderer, his legal representative or attorney;
- 4) is a shareholder or member of management bodies of the tenderer;
- 5) 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
- 6) if there are other circumstances causing a doubt about such person's impartiality.

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 cases referred to in paragraphs 3 and 4 above. The signed statement shall make an integral part of the documentation of the respective public contract.

In the case of existence of some of the cases referred to in paragraphs 3 and 4 above, or if the respective person fails to sign the statements referred to in paragraph 5 above, such person shall be excluded from conducting 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.

This principle provides the elimination of conflict of interest in public procurement procedures. The starting point for the observance of this rule is the defined obligation for participants in public procurement process to undertake necessary measures to remove the existence of conflict of interest. This means that participant in the process must have a very developed awareness to define in advance any potential situations which conflict of interest might arise, possible scope of the conflict and its nature (Article 14, paragraph 1).

It is an obligation and duty of 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, to notify the contracting authority and the Public Procurement Directorate, in a timely manner, of the actual or potential existence of a conflict of interest (Article 14, paragraph 2).

The Law defines that conflict of interest will 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 of 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.

The legislator has left a possibility for the contracting authority and other participants in the public procurement process, including any parties interested in the outcome of the process, to point to other circumstances that cause a doubt about impartiality of the tenderer, the tenderer's legal representative or attorney (Article 14, paragraph 3).

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 (Article 14, paragraph 4).

Persons who, on behalf of the contracting authority, perform some of the activities related to a public contract, must submit a written statement on existence or non-existence of the cases referred to in paragraphs 3 and 4 above. The signed statement shall make an integral part of the documentation of the respective public contract (Article 14, paragraph 5).

In the case of existence of some of the cases referred to in paragraphs 3 and 4 above, or if the respective person fails to sign the statements referred to in paragraph 5 above, such person shall be excluded from the public procurement procedure (Article 14, paragraph 6).

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 (Article 14, paragraph 7).

Form of conducting public procurement procedure and communication

Article 15

Public procurement procedure may be conducted in written or electronic form.

All communication and information exchange between the contracting authority and the tenderer may be carried out by post, by electronic means or by a combination of those means, according to the choice of the contracting authority, as stated in the call for competition.

The public procurement procedure may be carried out in a traditional way, i.e., in writing, or, where there is a developed system of electronic communication, in electronic form.

Issues related to communication in public procurement procedures are best reflected through the submission of eligibility evidence. These issues are regulated in accordance with EU directives and Montenegro has an obligation in the process of harmonising its procurement legislation with EU law to transpose such provisions in our legal system dealing with public procurement. This obligation refers to all tenderers, regardless of domicile of the company appearing as tenderer, which means that both domestic and foreign companies have equal obligations with respect to proving their eligibility. This is a strictly formal procedure, but the legislator has taken good care to reduce such evidence to a minimum so that the number of documents used as evidence under the current Law is significantly smaller than under the previous one. In the preparation of the Law, rationalisation was taken into account, but smaller number of proofs is not possible because of the obligation imposed by EU directives. Our legislation is not an exemption in that respect, because similar practice exists in all EU countries

It should be noted that the Law foresees that eligibility evidence must be supplied in original, notarised copy or in electronic form. Although the notarisation requires somewhat higher expenses, it should be mentioned that tenderers have a right to submit their tenders electronically as well. Electronic tender has been defined by the Law as every tender or part of a tender, as established by requirements stated in the invitation to tenders, which should be kept and submitted to the contracting authority in an electronic form, in accordance with safe electronic operation rules and electronic signature rules, and which makes an integral and logical whole with other parts of the tender submitted by the same tenderer. The form of recording and manner of submission of documents or part of documents in electronic form must be defined by the contracting authority in the tender documents. The tenderers' right, defined in the Law, to submit their tenders electronically would significantly reduce their expenses in the preparation of tenders and tenderers would thus avoid obligation to notarise their eligibility evidence, which they must do when they submit tenders in written form. However, this requires a high level of IT literacy on the sides of both the contracting authority and the tenderers. This right may be used only if the contracting authority allows it in the public invitation to tenders and the tender

documents. If that is not the case, and the tenderer assesses that it would be much more favourable to the tenderer to submit tender in that way, the tenderer has a right to apply to the contracting authority, during the period of validity of the public invitation, with the request for clarification in that respect or to be allowed to submit tender in electronic form. The tenderer which wants to submit tender in electronic form must submit the whole tender in that way, not just parts of it, or not just eligibility evidence, unless otherwise specified by the contracting authority. With the adoption of regulations tackling electronic operations to a full extent, it will be possible to introduce electronic system of public procurement.

II. PERFORMANCE OF ADMINISTRATIVE DUTIES RELATED TO PUBLIC PROCUREMENT

Article 16

An administrative body responsible for public procurement activities (hereinafter: responsible administrative authority) shall provide conditions for cost-effective, efficient and transparent use of public funds and create competitive and equal conditions for all tenderers.

In order to work in practice, every legal system, including public procurement system, in addition to necessary legal provisions, must have its institutions, which are supposed, through their existence and operation, to make the whole system functioning. Institutions should not be established for their own sake but for the sake of preserving legality and ensuring legal security. The public procurement system in Montenegro involves two state authorities. One is organised within the Government of Montenegro – Public Procurement Directorate/Agency and the other is an independent, controlling and regulatory body – Commission for the Control of Public Procurement Procedures, the second-instance body for making decisions under complaints filed in public procurement procedures. Both the institutions have legally defined scope of responsibilities, without conflict of responsibilities. By performing their duties established by the law, both of them significantly contribute to raising the quality of the public procurement system.

There were multiple reasons for establishing the Public Procurement Directorate and the Commission for the Control of Public Procurement Procedures, but the main one was the harmonisation of Montenegrin public procurement system with EU directives, in accordance with obligations undertaken from the Stabilisation and Association Agreement.

The Public Procurement Directorate was established on 25 November 2006. Before that, these activities were carried out by the Republican Procurement Agency (common service administration for the state authorities). With the establishment of this Agency, an institutional framework for the operation of the public procurement system in Montenegro has been put in place and Montenegro has chosen to have an efficient public procurement system. However, institutions

are not enough for the successful operation of the system and large serious, responsible and in-depth efforts are still needed to continue improving all aspects of public procurement system.

Responsibilities of the responsible administrative authority

Article 17

The responsible administrative authority shall have the following responsibilities, inter alia:

- 1) to participate in the preparation of laws, subsidiary legislation and other regulations concerning public procurement;
- 2) to design appropriate standard forms needed for the application of this Law;
- 3) 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;
- 4) to give prior approval to contracting authorities for the choice of procedure in the cases envisaged by this Law;
- 5) to offer advisory and consulting services in the field of public procurement to contracting authorities, when asked so;
- 6) to participate and cooperate in organizing staff training in public procurement activities;
- 7) to publish invitations to tender and decisions on contract award on the responsible administrative authority's website in the cases foreseen by this Law;
- 8) to enhance the system of keeping contracting authorities and tenderers informed about public procurement regulations and publish and distribute appropriate technical literature;
- 9) to prepare sample tender documents and contracts, for typical public contracts;
- 10) to initiate and encourage the development of electronic procurement and communication practices in the field of public procurement;
- 11) to pursue international cooperation with institutions and specialists in the field of public procurement;
- 12) to notify the Supreme Auditing 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;
- 13) to collect information from contracting authorities and maintain appropriate records;
- 14) to prepare, publish and update a list of covered parties under this Law on its website;
- 15) to prepare uniform bases for establishing records and official lists of tenderers, on the basis of data on undertaken and executed public contracts;

- 16) to monitor the public procurement procedures and ensure that they meet the needs of general interest;**
- 17) to issue public procurement bulletins;**
- 18) to submit to the Government annual reports on the public procurement carried out in the Republic;**
- 19) to perform other duties, in accordance with the law.**

Upon a request from the responsible administrative authority, each contracting authority and tenderer shall make the documentation accompanying the course of the public procurement available for review by an authorized employee of such authority.

The Public Procurement Directorate has been given a wide range of powers and responsibilities, most important of which is the participation in legislative changes in the public procurement system, where the Agency takes part in the preparation of laws, subsidiary legislation and other public procurement regulations.

From the aspect of association with the European Union, an important responsibility is the monitoring and analysis of the performance of the public procurement system, with respect to the compliance with EU law and proposing measures to ensure such compliance. The need for establishing international cooperation and contacts with public procurement authorities in EU countries for the exchange of experience, as well as indirect introduction of best practices in the Montenegrin public procurement system.

Although it is not a practice in developed public procurement systems, the legislator has authorised the Public Procurement Directorate to give prior approval to contracting authorities for the conduct of particular public procurement procedures. During the drafting of the Law, there was a dilemma about whether this authority should be foreseen or not. Finally an idea prevailed that the Agency should be given this authority because the Law has established a completely new system with new procedures, new implementation bodies, new timeframes etc. and that such authority should exist, at least at the beginning to ensure consistent implementation of the Law. However, during the first next amendments of the Law, this authority will need to be erased. Exclusive responsibility for the selection of public procurement procedure and compliance with legal requirements related to that should be borne by the contracting authority, and not the Agency, as it is now. In such a case, higher transparency will be foreseen (publishing decisions on initiating negotiated procedures on the Agency's website, so that interested parties could have a possibility to challenge the meeting of conditions for initiating that type of procedure), as well as stricter sanctions for violations of the Law.

The complexity of public procurement procedures is reflected in enormous variety of goods, services and works that are procured in accordance with positive regulations. Due to the variety of subject matters of public contracts, in

addition to knowledge of positive regulations, a certain level of skill is needed, and the Public Procurement Directorate performs that function through its knowledge of positive regulations and by giving opinion in the provision of advisory and consulting services to contracting authorities, whenever asked.

The complexity of public contracts, the speed of changes in this system, frequent amendments to the law, need for the Commission for the Control of Public Procurement Procedures to provide legal positions and issue decision thereon – all require continuing training of all entities directly or indirectly involved in the public procurement system. For that reason, the legislator has foreseen that the Public Procurement Directorate take an active role and cooperates in organising training for the staff working on public procurement issues, prepare sample tender documents and contracts for typical public contracts and publish public procurement bulletins.

Prior verification and publication of invitations to tenders and contract award decisions on their website www.djn.vlada.cg.yu gives the Public Procurement Directorate the controlling functions too, since before the publication of invitations and decisions the Agency may give suggestions to the contracting authorities with respect to compliance of those acts with the law and possibly to propose measures for the correction.

Also, the controlling role of the Agency is reflected in the obligation of contracting authorities and tenderers to enable review of procurement documentation to an authorised officer of the Agency. This procedure is preceded by the written request.

III. PROCEDURE FOR THE AWARD OF PUBLIC CONTRACTS

1) TYPES OF PROCEDURE

Article 18

In awarding public supply, service or works contracts, the following procedures may be applied:

- 1) open procedure;**
- 2) restricted procedure;**
- 3) negotiated procedure;**
- 4) entering into framework agreement;**
- 5) direct solicitation of tenders (shopping method) and**
- 6) direct agreement.**

When awarding public contracts, contracting authorities shall choose, as a rule, open or restricted procedure.

This article basically determines procedures for the award of public supply, service or works contracts, such as:

- 1) open procedure;
- 2) restricted procedure;
- 3) negotiated procedure;
- 4) entering into framework agreement;
- 5) direct solicitation of tenders (shopping method) and
- 6) direct agreement (Article 18, paragraph 1).

The freedom of choice of one of the mentioned procedures, in accordance with the law, is the right of the contracting authorities and they, as a rule, choose open or restricted procedure. It is because these procedures ensure the highest degree of achievement of basic principles of public procurement – transparency, competition and equality of tenderers, as well as cost-effective and efficient use of public funds (Article 18, paragraph 2).

Value scale

Article 19

Subject to the value of a public contract, the contracting authority shall perform public procurement:

- **in one of the methods referred to in Article 18, paragraph 1, points 1 to 4 above (public call for competition), in all cases when the value of the contract exceeds EUR 10,000 in the case of supply and service contracts or EUR 30,000 in the case of works contracts (Value Grade 1);**
- **in the method referred to in Article 18, paragraph 1, point 5 (shopping method), in all cases when the value of the contract ranges from EUR 2,000 to 10,000 in the case of supply and service contracts or EUR 2,000 to 30,000 in the case of works contracts (Value Grade 2);**
- **in the method referred to in Article 18, paragraph 1, point 6 (direct agreement), in all cases when the value of the contract does not exceed EUR 2,000 (Value Grade 3).**

Different public procurement procedures are carried out depending on the value of a public contract. The legislator has performed the gradation here so that lower value contracts are carried out through simpler procedures and higher value contracts are subject to more complex procedures of selection of a most favourable tender. The defined limits within the value grades are rather low, since the contracting authority must apply complex open, restricted or negotiated procedures for all public contracts exceeding EUR 10,000 for supply and services or EUR 10,000 for works. The EU directives envisage that limits above which public procurement procedures are applied are: for supply and services contracts EUR 162,000 and EUR 249,000 respectively, and for works contracts

EUR 6,242,000. However, on the other side, it is understandable that the legislator wanted to put in place the system that will ensure the control over the spending of budgetary funds, even in this way, by prescribing strictly low limits and obligation to abide by complex procedures. The prevailing belief is that first coming amendments to the law should include the increase of value grades, which would bring Montenegrin legislation in this respect into compliance with public procurement legislation in other Western Balkans countries.

The legislator has defined that, subject to the value of a public contract, the public procurement procedures may be classified into three value grades:

Value Grade 1 – for open, restricted, and negotiated procedure with or without prior call for competition, refers to cases when the value of the contract exceeds EUR 10,000 in the case of supply and service contracts or EUR 30,000 in the case of works contracts;

Value Grade 2 – for low value public contracts (shopping method), refers to cases when the value of the contract ranges from EUR 2,000 to 10,000 in the case of supply and service contracts or EUR 2,000 to 30,000 in the case of works contracts;

Value Grade 3 – for direct agreements, refers to cases when the value of the contract is up to EUR 2,000 (Article 20).

Open procedure

Article 20

Open procedure is the main method of procurement whereby call for competition must be published and in which 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 documents.

The main method of procurement is open procedure, which implies public advertising of the invitation to tender so that all parties that have legal interest in entering into public contract may submit their tenders, in the manner and under the conditions specified in the invitation and in the tender documents.

This is the primary method of procurement that contracting authorities should always apply, as a rule, since it ensures the respect of all principles from the law to a highest extent. The application of this method allows a largest possible number of tenderers to participate in a tender, which promotes competitiveness and market competition among tenderers. Open procedure is in the interest of contracting authorities because, when compared to restricted and negotiated procedure, lower prices and more favourable conditions are obtained. It is due to

the fact that open procedure does not require pre-qualification, as in restricted procedure, and transparency and competition is not restricted, as in negotiated procedure, by inviting just a number of tenderers to submit their tenders.

Regarding the course of the procedure, legal provisions applicable to open procedure also apply to restricted and negotiated procedure, unless otherwise foreseen by the law.

Restricted procedure

Article 21

Restricted procedure may be applied only in the case when the subject-matter of public contract are:

- **such commodities, services or building works that, considering the technical, staffing and financial capacity, may be supplied, provided or executed by a limited number of tenderers solely,**
- **such commodities, services or building works that are supplied through repetitive and successive contracts where the volume and period of delivery cannot be pre-determined;**
- **such commodities, services or building works for which there is an established market with stable prices and which are not provided under special requirements and conditions set by the contracting authority.**

In the restricted procedure, the contracting authority shall:

1) at the first stage:

- **publish and advertise invitation to tender,**
- **establish the qualification of tenderers on the basis of data evidencing their legal status, business capacity, financial capacity, technical qualifications and staffing qualifications,**
- **select at least three qualified tenderers;**

2) at the second stage, send invitation to tender to all qualified tenderers.

Only the qualified tenderers may submit a tender.

At the second stage of restricted procedure, the contracting authority may apply the lowest offered price criterion only.

The legislator has foreseen restricted procedure as exemption in relation to open procedure and it may be applied only if conditions provided by the law have been fulfilled.

This is a very complex and long procedure and the assumption is that the contracting authorities will choose it only when, in addition to conditions prescribed by the Law, large volumes and extremely important public contracts are concerned.

Restricted procedure is carried out in two stages as follows:

At the first stage, the contracting authority is obliged to publish invitation to tenders, in a manner prescribed by the Law, at the website of the Public Procurement Directorate and in a daily paper issued and distributed throughout Montenegro. The invitation must contain mandatory conditions prescribed in Article 35 of the Law and minimum conditions for establishing qualification. Those conditions are described in detail in the tender documents. Qualification criteria particularly refer to the tenderer's legal status, business capacity, financial capacity, technical and staffing abilities, and the contracting authority is obliged to ensure consistent application of the principle of equality and non-discrimination of tenderers.

After the opening of tenders, the Tender Opening and Evaluation Commission, in accordance with quoted provision, must establish the tenderers' qualification, based on predefined conditions from the invitation and tender documents. To have a successful procedure, the Commission should establish qualification for at least three tenderers, and relevant body of the contracting authority will decide (Article 21, paragraph 2).

At the second stage, the contracting authority must send invitation to tender to all qualified tenderers. This invitation does not require the submission of eligibility evidence, as it has been provided in the previous stage of establishing qualification (Article 21, paragraph 3).

At the second stage of restricted procedure, the contracting authority, when choosing the most favourable tender, may apply exclusively the lowest price criteria (Article 21, paragraph 4).

Article 22

The contracting authority shall notify the tenderers whose request for qualification has been rejected of reasons for the rejection, which may be based on the qualification requirements only.

The contracting authority may exclude a tenderer from the list of qualified tenderers only for the reasons based on pre-determined conditions.

The procedure for the protection of rights of tenderers is provided for restricted procedure as well. The legislator has imposed an obligation on the contracting authority to inform the tenderers whose request for qualification has been rejected of reasons for the rejection. These reasons may rely on the qualification

requirements only. Tenderers may appeal against the decision on rejecting the tenderer's request for qualification within eight days of the day of receiving such decision, as described in detail in the chapter referring to the protection of rights of tenderers and public interest (Article 22, paragraph 1).

If, during the second stage of restricted procedure, a tenderer stops meeting the qualification and other criteria, which were pre-determined in the invitation and in the tender documents, the contracting authority may exclude such tenderer from the list of qualified tenderers. Of course, it is understood that the tenderer is obliged to notify the contracting authority of all changes that have occurred in the tenderer's status or operations, which could have an impact on the qualification and further course of the procedure of selection of the most favourable tender (Article 22, paragraph 2).

Negotiated procedure without publication of a contract notice

Article 23

Contracting authorities may, exceptionally, award public contracts by negotiated procedure without prior publication of a contract notice in the following cases:

- 1) for public works contracts, public supply contracts and public service contracts:**
 - **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 documents are not substantially altered;**
 - **when, for technical or artistic reasons related to the subject-matter of a contract, or for reasons connected with the protection of exclusive rights, the contract may be awarded only to a particular tenderer;**
 - **insofar as is strictly necessary, for provable reasons of extreme urgency brought about 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) for public supply contracts:**

- when the products 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;
 - for additional deliveries by the supplier 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;
 - for supplies quoted and purchased on a commodity market;
 - for the purchase of supplies on particularly advantageous terms, from either a supplier which is definitively winding up its business activities, or the receivers or liquidators of a bankruptcy, through an arrangement with creditors, or a similar procedure;
- 3) for public service contracts, when the contract concerned follows a design contest conducted under Article 73 below and must be awarded to the successful candidate or one of the successful candidates; in the latter case, all successful candidates must be invited to participate in the negotiation;
- 4) for public works contracts and public service contracts:
- for works or services not included in the project initially considered or in the original contract but which have, through unforeseen circumstances, become necessary for the performance of the works or services described therein, when such additional works or services cannot be technically or economically separated from the original contract without major inconvenience to the contracting authorities. However, such contracts may only be concluded with the tenderer to whom the main contract is awarded and the aggregate value of contracts so awarded for additional works or service may not exceed 25% of the amount of the main contract;
 - for works or services consisting in the repetition of similar works or services entrusted to the tenderer to whom the same

contracting authorities 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 authorities.

This procedure may be used only during 3 years following the conclusion of the original contract.

This article defines the cases in which negotiated procedure may be conducted without prior contract notice. It is a specific, shortened procedure related to particular circumstances that must be met and notified to the Public Procurement Directorate by the contracting authority. Prior approval of the Agency depends on whether such circumstance can be proved. But the procedure may be carried out only after obtaining approval of the Public Procurement Directorate. The legislator has foreseen the obligation to provide prior approval because this is the least transparent procurement procedure, where competition and equality of tenderers is restricted, since not all interested tenderers may participate in it, but only those invited. Due to that, risk of corruption and conflict of interest related to this procedure is extremely high, and it is recommended to the Agency to give its approval only in exceptional cases and to all tenderers and other interested parties to take an active role in using the right to file objections and complaints provided in the law. In view of the EU, it is important to mention that the European Court of Justice consistently was of the opinion that since the procedure derogates general principles of the European Community law, grounds/exceptional circumstances that may enable the application of the negotiated procedure without prior notice of contract must be strictly interpreted and that it is up to the contracting authority to prove that such extraordinary circumstances have been really fulfilled (see e.g. case C-394/02 Commission v Greece [2005] E.C.R. I-4713, para 33). Also, the requirement of the European Commission is explicit that this procedure should be applied to the least extent possible, while the strictness and rigidity of the Directorate are required in the process of prior approval issuing.

Negotiated procedure without prior contract notice is the procedure in which the contracting authority negotiates with one or more invited tenderers on terms and conditions of the contract, without a need to publish prior contract notice. This procedure is not directly open to competition, like other three methods mentioned above.

Negotiated procedure is foreseen for application in exceptional cases only, as strictly defined in the law.

This procedure starts by sending invitation to negotiations to tenderers. Sending invitations to all the tenderers who have submitted tenders under previously cancelled invitation is a pre-condition for the legal conduct of the procedure, because such invitation precisely defines conditions for the new procedure, taking into account basic conditions and criteria laid down in the original invitation to tenders.

Tenderers are invited, on the basis of their tenders given under the previous invitation to start negotiations on legal, technical and financial issues.

By acting in that way, i.e., by sending invitation of the same contents to all tenderers, the principle of equality of tenderers, one of the fundamental principles of the Law, is ensured.

Also, the invitation gives the possibility to tenderers to state whether they will participate in that procedure and whether the conditions specified in the invitation are acceptable to them.

It is only after the completion of negotiations with tenderers that the contracting authority will start evaluating of elements of the tender reached through the negotiations, through the application of criteria mentioned in the previous invitation. The tender opening and evaluation commission is obliged to take minutes of the review, evaluation and comparison of tenders in the manner prescribed by the Law and to send a special report on the conducted procurement procedure. Such minutes should, inter alia, include explanation for the awarded score, comparative evaluation and analysis of tenders, list of enclosures to the minutes and the enclosures, date of the minutes, signatures of all commission members and identifies the ranking list of tenderers, in descending order.

The Commission is also obliged, pursuant to Article 70 of the Law, to make a separate report on the public procurement procedure, which should be forwarded to the responsible officer of the contracting authority, as a basis for making decision on the most favourable tender.

The contracting authority then, in accordance with Article 73 of the Law, decides on the choice of the most favourable tender and must publish that on the website of the Public Procurement Directorate.

It should be noted that in view of the EU, the European Court of Justice provided some clarifications related to interpretation of some of the grounds/exceptional circumstances that may justify the application of the negotiated procedure without prior contract notice based on European directives for state sector and for public utility companies. Further, some of the examples of this case law are analyzed:

- Only one potential supplier due to technical or artistic reasons or due to the reasons related to the protection of exclusive rights (which essentially corresponds to Article 23, paragraph 1, item 2, bullet 2 of the Law on Public Procurement).

- Technical reasons

With regard to technical reasons, in the case C-394/02 Commission versus Greece – already mentioned – (see particularly paragraph 34.), the European Court of Justice upheld the position taken in the previous case law by stating that this ground requires two cumulative conditions to be fulfilled: 1) that there are technical reasons related to works that are the subject of procurement and 2) that due to such technical reasons it is absolutely necessary to award the contract to a specific supplier (to that end also see the case C-57/94 *Commission v Italy*, [1995] E.C.R. I-1249 para 24, and Case C-385/02 *Commission v Italy*, [2004] E.C.R. I-8121 paras 18, 20 i 21). The case C-394/02 *Commission v Greece* related to procurement for the construction of a transmission system of a power plant in a megalopolis. In October 1997, DEI (State Energy Company) submitted to the competent authority (the Ministry of Environment, Urban Development and Public Works) a project on installing the system for removal of sulphur, stabilization, transport and depositing of solid waste from the thermal power plant in the megalopolis for the purpose of environmental impact assessment. This Ministry issued the approval of the project, provided that from one side the DEI submits the request for final approval of the removal of waste produced by such energy plant within 9 months and from the other to install the conveyance system for transport of ashes between the power plant and the mine Thoknia where the ashes are processed, within 12 months. Taking these deadlines into account, DEI decided to apply the negotiated procedure without prior contract notice and invited the consortium Koch/Metka and company Dosco Overseas Engineering Ltd ('Dosco') to provide their tenders. However, the latter said it didn't want to participate in the procedure. After a few months of negotiating, the contract for construction of the conveyance system for transport of ashes between the thermal power plant in the megalopolis and the mine Thoknia was awarded to the mentioned consortium. The European Court of Justice seems to have accepted the opinion of the general lawyer that due to specific features of the transported product (ashes) as well as the land below the surface and the need for conveyance systems to be connected to the current system represent sufficient technical reasons in terms of the directive (the Directive for Public

Companies). However, the European Court emphasized that neither special features of the transported product nor instability of land nor the need for the system to be connected to the current one are proving by themselves that this consortium of companies is the only supplier in the EC with required professional knowledge for carrying out the relevant works. The European Court further stated that since DOSCO was **not** invited to tender, DEI itself considered that some other supplier would in principle be capable to perform such works (see particularly paragraphs 35 to 37 of the relevant judgment). The case C-385/02 *Commission v Italy* is also important. *This case related to the construction of a pool for retaining flood waters. Generally speaking, Italy alleged that the application of the negotiated procedure without prior contract notice was justified for the reason of continuity (espeacially with regard to difficulties in identifying responsibilities of various suppliers), and that only the supplier who previously carried out the same project of defending from floods may perform such construction works for the mentioned pool. The European Court accepted that the provision of continuity of works in a complex project related to safety of a region from flood is a technical reason which must be recognized as significant. However, it furhter emphasized that the fact that Italy only stated that one package of works is complex and difficult is insufficient to establish that such package may be entrusted to only one supplier (see particularly paragraphs 20 to 22).*

- Exclusive rights

In this context, it is interesting to consider the case C-328/92 *Commission versus Spain* [1994] E.C.R. I-1569. This case related to challenging of a Spanish regulation that imposed the application of one tender procedure for procurement of pharmaceutical products and specialties for the social insurance system. Spanish Government argued for the exemption with regard to protection of exclusive rights. In paragraph 17, the European Court of Justice says that it is not sufficient that relevant pharmaceutical products and specialties are protected by exclusive rights, but it must be possible that they are produced or delivered by only one specific supplier. The European Court added that since this requirement is fulfilled only for those products and specialties without competition in the market, this specific exemption could in no way justify general and non-discriminatory reach for one tender procedure for procurement of all pharmaceutical products and specialties.

Therefore, it is important to point out that for obtaining this exemption it is not sufficient that the contracting authority shows that it wants to buy a specific product or service protected by exclusive rights, but it also must prove (like in the case of technical reasons) that there is no corresponding equivalent product to be offered by another supplier (and that therefore there is no competition). If, for example, these rights were assigned to other suppliers, it could not be alleged that there is no competition. Also, it should be mentioned that directives do not define what is implied by »exclusive rights«. However, they are usually related to intellectual property rights and industrial property rights such as patents, trademarks, copyrights, know-how etc.

- *Extreme urgency (which substantially corresponds to Article 23, paragraph 1. item 3 of the Law on Public Procurement)*

Firstly, it should be mentioned that the European Court of Justice consistently considered that all conditions defined in this respect for derogation must be cumulatively fulfilled and if therefore one of the conditions is not fulfilled, the contracting authority may not seek the derogation (see for example the case C-382/92 *Commission versus Spain – above mentioned – paragraph 18.*, Case C-24/91 *Commission v Spain* [1992] ECR I-1989, paragraph 13). Therefore, the contracting authority must prove that the derogation is: 1) strictly necessary, 2) caused by extreme urgency reasons, 3) caused by events unforeseeable for the contracting authority, 4) that the timeframes for application of open, restricted or negotiated procedure with prior contract notice may not be fulfilled and 5) in case of the state sector itself (not applicable to the sector of public service providing companies) that the given circumstances that justify the extreme urgency may in no case be attributed to the contracted authority.

With regard to extreme urgency, in the case C-24/91 *Commission versus Spain, University Complutense from Madrid* decided to apply the negotiated procedure without prior contract notice for construction of an annex and reconstruction of one of university buildings. They alleged that it was justified since the works needed to be completed prior to the beginning of the next academic year given the anticipated large number of new students (what made the performance of works urgent according to claims). The European Court did not discuss whether this situation could justify the reason of extreme urgency but it rather established that there was a breach, since there was sufficient time available for the tender to be organized in

accordance with the accelerated procedure (see particularly paragraphs 14-16 of the given judgment). The case Case C 107/92 *Commission v Italy* [1993] E.C.R. I-4655 is also interesting, which related to negotiated procedure without prior contract notice for the construction of an avalanche protection dam. Italy claimed that there was extreme urgency. The Commission considered that Italian Government failed to demonstrate the existence of the grounds for extreme urgency imposed by extraordinary events (it has been more than three months since the competent state authorities received the report by the geologic department of the Ministry of Environment that recommended urgent actions and commencement of works, and there haven't been any avalanches since 1975). In accordance with the standpoint of the Commission, the European Court was of the position that Italian Government failed to demonstrate the existence of extreme urgency and that Italian Government was in no way prevented to meet the timeframes of accelerated procedure in this case, as envisaged by the directive (see particularly paragraph 9 and paragraphs 13-14 of the given judgment).

The issue of urgency is generally linked with the foreseeability of events (if an event is foreseeable or should have been foreseen by the contracting authority, in practice this means that it can no longer be considered as extremely urgent). In this context it is interesting to shortly review e.g. the case Ems (Case C-318/94 *Commission v Germany* [1996] E.C.R. I-1949). This case related to the procurement of works for digging through the River Ems. The European Court of Justice emphasized that derogation requires, inter alia, the existence of causality connection between the unforeseen event and extreme urgency arising from it (see paragraph 14 of the given judgment and see also the case C-107/92 *Commission versus Italy* already mentioned paragraph 12). The European Court considered that in this case the condition of unforeseeability was not fulfilled since the possibility for the authority that had to approve the project to file an objection is something that is foreseeable in the plan approving procedure. Therefore, the European Court rejected the argument of Germany that the refusal of the competent authority to approve the project of digging through the river was fully unexpected (see particularly paragraphs 15-16 and 18-19). In that context the case *La Spezia* (Case 194/88R *Commission v Italy* [1988] E.C.R. 4547) should also be mentioned. It related to the application of the negotiated procedure without prior notice of contract for reconstruction of the plant for solid waste burning that was closed until the completion of renovation works. The President of the Court, at request for passing interim measures, established that the chronology of facts indicated that irrespective of the urgency of

renovation works, the urgency was not caused by unforeseen events since it was known that the renovation was required for a long time, but no steps were undertaken (see particularly paragraph 14.).

Negotiated procedure with prior publication of a contract notice

Article 24

Contracting authorities may award their public contracts by negotiated procedure, after publication of a contract notice, in the following cases:

- 1) when no tenders or no orderly and acceptable tenders have been submitted in response to an open or restricted procedure, provided that the initial subject-matter of contract and contents of tender documents are not substantially altered. Call 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, supplies, or services or the risks attaching thereto do not permit prior overall pricing;**
- 3) in the case of services, inter alia services within category 6 of Annex I, and intellectual services such as services involving the design of works, insofar as 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 public works contracts, for works which are performed solely for purposes of research, testing or development and not with the aim of ensuring profitability or recovering research and development costs.**

In the cases referred to in paragraph 1 above, and to seek out the best tender, contracting authorities shall negotiate with tenderers the tenders submitted by them in order to adapt them to the requirements which they have set in the contract notice, the tender documents and additional documents, if any.

During the negotiations, contracting authorities shall provide equal treatment of all tenderers and shall not provide information that gives advantage to individual tenderers.

Contracting authorities 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 stated in the contract notice or the tender documents. The contract notice or the tender documents shall indicate in that case that recourse has been had to this option.

Negotiated procedure with prior publication of a contract notice is also an exemption in relation to the application of open procedure, and it may be applied in the following cases:

- 1) when no tenders or no orderly and acceptable tenders have been submitted to the contracting authority in response to an open or restricted procedure, provided that the initial subject-matter of contract and contents of tender documents are not substantially altered. Call 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, supplies, or services or the risks attaching thereto do not permit prior overall pricing;
- 3) in the case of services, inter alia services within category 6 of Annex I, and intellectual services such as services involving the design of works, insofar as 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 public works contracts, for works which are performed solely for purposes of research, testing or development and not with the aim of ensuring profitability or recovering research and development costs (Article 24, paragraph 1).

After publishing the call for competition and opening the tenders, and to seek out the best tender, contracting authorities negotiate with all tenderers the tenders of which have been evaluated as orderly submitted. Negotiations are allowed only for the part defined in advance in the public call and in the tender documents, for the purpose of adjustment to the specified requirements and additional documents, if any (Article 24, paragraph 2).

During the negotiations, the principle of equal treatment is emphasised and contracting authorities may not provide information that gives advantage to individual tenderers. Also, it is not allowed to modify the subject-matter of the negotiations subsequently, in order to favour certain tenderer, nor to ask questions during the negotiations in the way leading the tenderer indirectly to an expected answer for the purpose of either favouring them or discriminating against them (Article 24, paragraph 3).

When this procedure is applied, contracting authorities 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 stated in the call for competition or the tender documents. The call for competition or the tender documents must indicate in that case that recourse has been had to this option (Article 24, paragraph 4).

Framework Agreement

Article 25

The contracting authority may conclude a framework agreement after completing open or restricted procedure only, in accordance with this Law.

On the basis of the framework agreement concluded in accordance with paragraph 1 above, the contracting authority shall be entitled during the whole contracted period to conclude contracts with the successful tenderer with respect to each of the contracts awarded under the framework agreement.

The contracting authority may consider the award of the framework agreement only in one or more of the following circumstances:

- a) when the subject-matter of the contract are daily services or consumer goods that have not been classified as durable assets;**
- b) when the subject-matter of the contract are goods or services where the price and delivery terms are frequently altered;**
- c) when the subject-matter of the contract are regular repairs or maintenance works;**
- d) when the contracting authority is to award several equal contracts within 1 year and the framework agreement would reduce the procurement costs.**

Once a framework agreement has been concluded, its provisions may not be amended.

Contracting authorities may not use framework agreements improperly or in such a way as to prevent, restrict or distort competition.

The term of a framework agreement may not exceed 4 years, save in exceptional cases foreseen by regulations.

Where a framework agreement is concluded with a single tenderer, contracts based on that agreement shall be awarded within the limits of the terms laid down in the framework agreement.

For the award of those contracts, contracting authorities may consult the tenderer party to the framework agreement in writing, requesting it to supplement its tender as necessary.

Where a framework agreement is concluded with several tenderers, the latter must be at least three in number, insofar as there is a sufficient number of tenderers to satisfy the selection criteria and/or of admissible tenders which meet the award criteria.

Contracts based upon such agreements, concluded with several tenderers, may be awarded either:

- **by application of the terms laid down in the framework agreement without reopening competition, or**
- **where not all the terms are laid down in the framework agreement, when the parties are again in competition on the basis of the same 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 authorities shall consult in writing the tenderer capable of performing the contract;**
 - (b) contracting authorities 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 shall be submitted in writing, and their content shall remain confidential until the stipulated time limit for reply has expired;**
 - (d) contracting authorities shall 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.**

Framework agreement means an agreement for a limited period between a contracting authority and a tenderer, the purpose of which is to establish the framework terms governing contracts to be awarded during that period, in particular with regard to subject of contract and, where appropriate, the value, volume or quantities envisaged, as well as the price.

In the mentioned definition, the subject of contract to be awarded and the price are the basic elements, which are to be determined in the framework agreement for future contracts itself. This means that the competition takes place during the time when the framework agreement is concluded, and not during the application of the agreement, as the base for concluding public contracts.

The framework agreement, by itself, does not define the contract on public procurement as such. It does not even imply the obligation of the contracting authority to require from tenderers to submit tenders or the selection of the best

tender in a subsequent procedure, within the framework agreement, or concluding of the contract. It only implies, if the contracting authority needs the subject of the framework agreement, that the contracting authority will conduct the procedure for selecting the best tender.

Framework agreements are broadly applicable. The agreement regulating provision of transport services may be mentioned as one of examples of framework agreements. The exact time and volume of needs for transport services for a contracting authority are not known, but the framework agreement has been concluded based on prices and conditions related to usual needs for transport maintenance during e.g. 12 months. When the contracting authority has the need for transport services, after the contracted services are provided in accordance with previously concluded contract, and after an open or restricted procedure of public procurement is completed, it will invite tenderers to submit tenders, in line with the terms envisaged in the framework agreement.

The framework agreement is concluded for a specified time period and is restricted with regard to the subject of public procurement and time for which it is concluded.

Open or restricted procedure (after which the framework agreement may only be concluded), which objective is the conclusion of the framework agreement is initiated and undertaken in accordance with the rules that the Law on Public Procurement prescribed for such procedures. During the evaluation procedure, pre-determined criteria and sub-criteria will be applied for selection of the best tender, which ensures the value for money.

Important effect of the concluded framework agreement is the fact that the contracting authority has the right during the contracted period to conclude contracts with the best tenderer, without re-advertising and re-publishing of public invitation to tender, within each contract envisaged by the framework agreement.

In case that one contracting authority conducts a public procurement procedure in its own name and on its own behalf, as well as in the name and on behalf of other contracting authorities for one subject of public procurement, contracting authorities in whose name and on whose behalf the public procurement procedure (which requires the conclusion of a framework agreement) is conducted, have the right, during the validity period of the framework agreement, to select the best tenders with tenderers that are included in the framework agreement, unless otherwise defined in advance.

The framework agreement may be concluded within the specified goods, services or works, if the subject of the procurement was sub-divided into lots, and the Public Procurement Directorate previously approved the conclusion of the framework agreement for each lot which makes the subject of the public procurement.

The application of the framework agreement is justified in the following cases:

- if the subject of the contract are daily services or consumer goods, not classified as durable assets (maintenance of business premises, maintenance of office equipment, accounting services, construction works and ancillary services, procurement of consumer goods – food, medications, spare parts for machines or equipment etc),
- if the subject of the contract are goods or services which prices and delivery requirements are frequently altered (supplying of fuel or heating),
- if the subject of the contract are regular repairs or maintenance works (painting services of business premises, maintenance of roads and other.) Agreed prices may be unit prices,
- framework agreement may be concluded when a contracting authority is to award several identical contracts during one year and framework agreement would facilitate the reduction of costs of public procurement, since only one public procurement procedure is conducted. In this case the subject of the framework agreement may be goods considered to be durable assets (cars, IT equipment and other). Identical contracts imply contracts with the same subject and not always the same volume, quantity or place of delivery (Article 25 paragraph 3).

After the framework agreement is concluded, it's provisions may not be amended (Article 25 paragraph 4).

The framework agreement will be applied in accordance with terms and conditions defined by the tender documentation for conduct of public procurement procedure, which precedes the conclusion of a framework agreement. This implies that all contracts concluded during the validity period of the framework agreement must be in accordance with terms and conditions defined by the framework agreement. In case that, due to very justified reasons, it is necessary to make core amendments to the framework agreement, it must be annulled, and thereupon a new public procurement procedure will be initiated. Thereby, it should be taken into consideration that a framework agreement may not expand outside the subject of public procurement, predefined in the public invitation in the tender documentation.

The argument against the conclusion of a framework agreement is that such agreement concluded for a specified time period prevents competition for the contracting authority during that time period in relation to other potential tenderers. This, firstly, means that all framework agreements will be limited in respect of time and may not exceed, from the competition aspect, reasonable time period.

Prior approval

Article 26

The contracting authorities which intend to award public contract by applying:

- **negotiated procedure without prior publication of an invitation to tender,**
- **negotiated procedure with prior publication of an invitation to tender and**
- **contract award by means of a framework agreement**

must, before commencing the procedure, obtain prior approval from the responsible administrative authority of the fulfilment of conditions for carrying out that type of the procedure.

The prior approval shall be requested by a written application specifying the legal grounds, reasons and rationale of the choice of that method of procurement, evidence of having met the conditions for the application of the chosen method of procurement, source of financial funds, contract amount and other data about the procurement.

The responsible administrative authority may ask the contracting authority to supplement the request for prior approval and furnish documents within a specified time.

The responsible administrative authority shall decide on the contracting authority's request within 8 days after the date of the receipt of the request, i.e., the receipt of documents and supplement to the request.

The prior approval for commencing the procurement procedure shall be valid until the end of a budgetary or financial year.

If the responsible administrative authority fails to furnish approval within the time specified in paragraph 4 above, the contracting authority may proceed with the procurement procedure.

For the purpose of establishing efficient public procurement system, proclaimed principles of public procurement and proper application of the Law on Public Procurement, the legislator envisages the authorisation of the Public Procurement Directorate to issue prior approvals on fulfilment of conditions for application of the following:

- negotiated procedure without prior publication of an invitation to tender,
- negotiated procedure with prior publication of an invitation to tender;
- contract award by means of a framework agreement
- in case of a special case of contract award – consulting services (Article 27 paragraph 1).

The application for requesting prior approval is submitted to the Directorate for Public Procurement in written form and includes the legal grounds for approval,

with rationale of the choice of a specific method of procurement, evidence of having met the conditions for the application of the required method of procurement, evidence on fulfilment of prescribed conditions for application of the required method of procurement, evidence on the provided financial funds for the subject public procurement in the public procurement plan, or that the financial funds have been provided otherwise, and other data about the procurement (Article 27 paragraph 2).

If the Public Procurement Directorate finds that required documentation and evidence enclosed to the application are not complete, it is entitled to ask from the applicant to supplement and furnish suitable documentation and evidence within the time line that it discretionally specifies (Article 27 paragraph 3).

The Public Procurement Directorate is responsible to make a decision with regard to the application of the contracting authority on fulfilment of requirements for issuance of prior approval within eight days from the day of receipt of the application or a supplement to the application and documentation and evidence requested to be supplemented (Article 27 paragraph 4).

Prior approval for the commencement of a procurement procedure that the contracting authority obtains from the Public Procurement Directorate shall be valid until the end of a budgetary or financial year (Article 27 paragraph 5).

The legislator envisages the right of the contracting authority to, if the Public Procurement Directorate fails to furnish the approval or adopt an act on non-existence of conditions for issue of the prior approval within the time line of eight days prescribed by law, commence the subject procurement procedure as if the approval had been issued (Article 27 paragraph 6).

As already mentioned this authorisation of the Public Procurement Directorate was exceptionally introduced in the Law, for the purpose of establishing an efficient procurement system. The Directives of the European Union do not envisage that an authority should issue prior approvals to contracting authorities to conduct procurement procedures. This is due to the necessity for establishing a system where the authorisation and responsibility for selection of the procurement procedure are assigned to contracting authorities exclusively. Delegating of the authorisation to another authority to issue prior approvals for conduct of procurement procedures implies that the responsibility is transferred from the contracting to that authority, which, from the system aspect is not good, since in these cases there is a higher risk of abuse and corruption related to issue or non-issue of these approvals. Namely, contracting authorities may feign the existence of conditions, which actually do not exist, for the purpose of avoiding competition and equality of tenderers, and furnish evidence to the Public Procurement Directorate on fulfilment of conditions, which legally are not valid and are not true. The issue of proving the responsibility in these cases would be very complex. Due to the mentioned reasons, our view is that it would be

necessary at the occasion when the first amendments are made to the Law to delete the provisions related to authorisation of the Public Procurement Directorate to issue prior approvals and to take over solutions of comparable legislations envisaging that the contracting authority is obliged to publish on the website of the Public Procurement Directorate the intention to conduct this procedure, and in case that none of the potential tenderers tries to dispute this decision, proceeds with the conduct of this procedure.

2) COMMENCING THE PROCEDURE

Public procurement plan and allocation of funds for public contracts

Article 27

The contracting authority may start the procurement procedure only if:

- **in the cases foreseen by this Law, a public contract has been included in the public procurement plan of the contracting authority;**
- **appropriate funds are allocated for that contract and are available for every payment under the contract.**

Every contracting authority which intends to carry out public procurement in the following budgetary and commercial year, the amount of which exceeds EUR 100,000, shall adopt and publish, in the manner envisaged by this Law, a public procurement plan, by not later than the end of the previous year.

The funds allocated for public procurement shall mean the funds foreseen in the budget or ensured in other manner provided for by the law.

If the Republic's Budget, the budget of a local self-government unit or the financial plan of another contracting authority has not been passed, the contracting authority may commence the public contract procedure only up to the amount of funds planned in accordance with the regulation on temporary financing.

For capital investments, the contracting authority must previously prepare and adopt a feasibility study according to the methodology for the preparation, evaluation and execution of feasibility studies.

If a public contract procedure lasts for a number of years, obligations that will become due in the following years must be contracted in the amounts envisaged in regulations governing the budget execution for each individual year.

The contracting authority may start the procurement procedure provided that the following conditions are fulfilled cumulatively:

- that the public contract, in cases envisaged by law (exceeding 100.000 Euro) is defined in the public procurement plan and
- that the contracting authority provided appropriate funds for that public contract that are available for every payment under the contract (Article 27 paragraph 1),

The obligation of the contracting authority is to provide adequate funds for each contract to be available for each payment under the contract as a guarantee to tenderers that the contracted amount will be paid to them for goods delivered, services provided or works performed. For that purpose, the legislator envisaged that the Decision on initiating and conducting public procurement procedure should also include the provision with regard to existence of provided funds for the subject contract, in the sufficient amount.

The contracting authority is obliged to pass and publish on the website of the Public Procurement Directorate, the public procurement plan, if the public contract exceeds the value of 100.000 Euro, no later than the end of the previous year for the following year. The provisions of the Law on Budget and the Law on Local Self-government Finance shall be applied accordingly in this case. Publishing of the public procurement plan of all contracting authorities at one place – website of the Public Procurement Directorate facilitates all potential tenderers to be informed about public contracts in the value exceeding 100.000 Euro in due time, so they may adjust their business activities and plans in accordance with their interest in specific public procurement procedures. In this way there are benefits for both contracting authorities and tenderers, which results with favourable delivery dates, payment terms, better quality of products tendered, lower prices and other (Article 27 paragraph 2).

If the conduct of the public procurement procedure takes longer than a year, the obligations that are to become due in the subsequent years must be contracted in the amounts envisaged in regulations governing the budget execution for each individual year, which in practice means that the contracting authority, e.g. a ministry, is obliged to provide to the Ministry of Finance an opinion that during the subsequent years (during the time of the public contract) the funds will be provided in the budget for execution of all contracted obligations (Article 27 paragraph 6).

Here it should be taken into consideration that potential failure to envisage a public contract in the public procurement plan is the ground for annulment of the procedure. Namely, it happens in practice that contracting authorities fail to publish public procurement plan by the end of previous year for the following year, or that they enter a public contract in the value exceeding 100.000 Euro in the plan, by amending it immediately prior to publishing and advertising public invitation to tender in which way they evade the meaning of this institute and disable tenderers to timely get informed about the needs of the contracting authority and its intention to conduct public procurement procedure. In such

situations, in respect of complaints filed, the Commission for control of public procurements used to annul the public procurement procedure in whole.

Decision on initiating the procedure

Article 28

Before starting the procurement procedure, the contracting authority shall issue a decision on initiating and carrying out the procurement procedure.

The decision referred to in paragraph 1 above shall indicate, inter alia:

- 1) details of the contracting authority (name, head office, address, identification number), reference number of the public contract,**
- 2) the subject, method and time for carrying out the procurement procedure,**
- 3) evidence that the public contract is included in the public procurement plan, in the cases prescribed in Article 26, paragraph 2,**
- 4) estimated value of the public contract,**
- 5) time limit for the completion of works in cases when the subject of the public contract is the performance of works,**
- 6) source of funds allocated for the public contract and conditions and method of payment,**
- 7) other conditions of procurement.**

The decision shall be made by head of the body, or the competent body of the contracting authority.

Prior to the initiation of the public procurement procedure, the contracting authority is obliged to make the decision on initiating and carrying out the public procurement procedure. The decision on initiating and carrying out public procurement is an internal act of the contracting authority, which is a constituent part of documents of the subject public procurement, but which is not presented to tenderers for insight, unless they explicitly ask for it, using their right envisaged by this Law and the Law on Free Access to Information. (Article 28 paragraph 1).

The Law envisages the minimum requirements that the Decision on initiating and carrying out of the public procurement procedure is to contain. At the same time when this decision is adopted, it is necessary that the head of the authority or responsible authority of the contracting authority adopts the decision on establishing a commission for opening and evaluating tenders.

If the contracting authority commences the public procurement procedure without a previously adopted decision on initiating and carrying out the public procurement procedure, such procedure produces no legal effect. Also, if the decision on initiating and carrying out the public procurement procedure fails to include all elements prescribed by law or if it is not adopted by the head of the

authority or responsible body of the contracting authority, this is a ground for potential annulment of public procurement procedure.

Subject of procurement and subdivision of subject of procurement

Article 29

The subject of procurement shall be determined by the contracting authority and it must be described in a clear, intelligible and unambiguous manner, so that all tenderers may offer suitable supplies, services and works according to the type, quality and prices, as well as other required qualities and conditions.

The subject of procurement referred to in paragraph 1 above may be subdivided in several lots, so that each lot may be contracted separately.

The tenderer shall indicate in his tender whether it refers to the overall procurement or particular lots only.

In the case that the tenderer submits a tender for all the lots, the tender must be sub-divided so that it can be evaluated for each lot separately.

Already at the occasion of adopting the public procurement plan, the contracting authority must ensure that the subject of public contract is the same type of goods, works and services, whereby the same type implies the same classification, title, records, purpose and qualities. The contracting authority is obliged to define the subject of public contract in the identical manner in the public procurement plan, in the decision on initiating and carrying out of public procurement procedure, in the public invitation to tender and in the tender documentation, whereby it is obliged to take into consideration that the subject of public contract is defined and described in the way that all tenderers may offer comparable goods, works or services by type, quality, price and other required features and conditions. (Article 29 paragraph 1)

If the specific qualities of a subject of the public contract require, the contracting authority is entitled to sub-divide the subject of the public contract in several separate lots, according to business lines, vocational areas, type, quantity and time of delivery (e.g. the subject of public contract is food, which is sub-divided in the following lots: fresh meat, smoked and cured meats, bread, pastry, milk, cheese and other). One lot includes objects of the same, related or similar qualities or purpose, which enables several small or medium tenderers to participate. The contracting authority must not restrict or condition the right of offering in lots and must determine lots in the way that tenderers may submit tenders for one, several or all lots. Here it is important to emphasise that the contracting authority is not allowed to determine lots in the way that the subject of the contract be goods, services and works which are not related and connected.

This is due to the reason that such acting of the contracting authority might mislead tenderers in respect of conditions of the tender and the manner of submission of the tender, as well as criteria and sub-criteria for selection. Namely, the contracting authority may not in a single invitation determine that it sub-divided the subject of the public contract in lots, that for example, one lot is the selection of the best tenderer to perform construction works, the second lot is procurement of office supplies, and the third is the procurement of software services. In this case the contracting authority would be obliged to advertise three public invitations with clearly defined subject of public procurement and conditions and criteria defined for such subject of public procurement.

If the contracting authority sub-divided the subject of public procurement into lots, it is entitled to determine in the public invitation and in tender documentation the evidence on eligibility joint for all lots and to determine for each lot individually additional, optional evidence on eligibility that tenderers are obliged to submit, in order for their tenders to be evaluated as proper.

In case that subject of public procurement is sub-divided in lots, the tenderer will submit a tender for each lot individually, each lot will be evaluated individually and a separate contract will be awarded for each lot.

3) CARRYING OUT THE PUBLIC CONTRACT ACTIVITIES

Public procurement officer

Article 30

Each covered party under this Law shall appoint its public procurement officer.

A person employed by the contracting authority and, as a rule, with university degree shall be appointed as the public procurement officer.

The public procurement officer shall have the following duties: to prepare the public procurement plan; to prepare text of the decision on initiating public contract procedure; to give tender documents to tenderers; to perform professional and administrative tasks in the conduct of the public contract procedure; to carry out and be responsible for the procedure of awarding public contracts of small value; to keep documentation; to maintain records of public contracts and prepare and submit reports on completed contracts to the head of a body, or to the competent management body.

The legislator envisages the obligation for every contracting authority to appoint a public procurement officer.

This is a person employed with the contracting authority who, by rule, has a university degree. In this respect, the Public Procurement Directorate keeps records of public procurement officers, which is published on the website of that authority (Article 30 paragraph 1).

Public Procurement Officer performs the following activities: prepares the public procurement plan, the text of the decision on initiating public procurement procedure, gives tender documentation to tenderers, performs professional and administrative tasks in the conduct of the public contract procedure, carries out and is responsible for the procedure of awarding public contracts of small value, keeps documentation, maintains records of public contracts and prepares and submits reports on completed contracts to the head of the body, or to the competent management body (Article 30 paragraph 2).

Taking into consideration the clearly defined duties of public procurement officers and the commission for opening and evaluating tenders and strictly designated tasks, public procurement officers should not be members of the commission for opening and evaluating tenders (Article 30 paragraph 3).

Commission for opening and evaluation of tenders

Article 31

For the preparation and conduct of public contract procedures, except for public contracts of small value, the contracting authority shall establish, simultaneously with making decision on initiating the public contract procedure, the Commission for the opening and evaluation of tenders.

The Commission for the opening and evaluation of tenders shall consist of at least three members. At least one member shall be a graduated lawyer. As members of the Commission for the opening and evaluation of tenders may be appointed specialists with expertise in the area which is the subject of public contract, on condition that at least one member must be employed with the contracting authority.

Exceptionally from paragraph 1 above, the Commission for the opening and evaluation of tenders may be appointed for the period of 1 year, subject to the needs of the contracting authority and specific nature of subject of the public contract.

The Commission for the opening and evaluation of tenders shall prepare and conduct the public contract procedure by ensuring that the tender documents be prepared in accordance with the needs of the contracting authority and provisions of the law, preparing the text of the invitation to tender, giving explanations of the text of the invitation to tender and tender documents, carrying out the public opening of tenders, evaluating the

conformity of received tenders with requirements specified in the invitation to tender and tender documents, determining the suitability of tenderers, performing inspection, evaluation and comparison of received tenders, drawing up report on the opening and evaluation of tenders and proposing the contracting authority the award of contract to the tenderers whose tenders have been evaluated by the largest number of points.

The contracting authority is obliged to, simultaneously with making decision on initiating and carrying out the public procurement procedure, for the purpose of preparing and conducting public procurement procedure (with the exception of the procedure for public contracts of small values) establish a commission for opening and evaluating tenders (Article 31 paragraph 1).

The Commission for opening and evaluating tenders has no less than three members, where, in case that the number of members is higher than three, the number has to be odd. Legal conduct of the public procurement procedure implies that at least one of appointed members of the commission for opening and evaluating tenders should be a graduated lawyer. The number and selection of members of the commission for opening and evaluating tenders will exclusively depend on the subject of public contract, which means that it is desirable that the commission should include lawyers as well as economists, engineers or other experts in accordance with the subject of the public contract. The requirement that no less than one member of the commission for opening and evaluating tenders should be a graduated lawyer is justified by the necessity for procedural rules to be followed. The chairman of the commission for opening and evaluating tenders should be the person of high professional and ethical integrity, with sufficient professional experience and knowledge to manage the overall procedure. The provision envisaging that at least one member of the commission for opening and evaluating tenders should be a person employed with the contracting authority is justified from the aspect of small contracting authorities (Article 31 paragraph 2).

The contracting authority is obliged to define in the decision on establishing the commission for opening and evaluating tenders the chairman and members of the commission for opening and evaluating tenders, activities that the commission for opening and evaluating tenders should complete, deadlines for their completion, obligation of signing the Statement on independence of members of the commission for opening and evaluating tenders and professional services and/or experts for specific areas which are the subject of public procurement, engaged by the contracting authority, at proposal of the commission for opening and evaluating tenders, required authorizations, for the purpose of completing defined activities and other issues of significance for establishment of the commission for opening and evaluating tenders.

The Commission for opening and evaluating tenders reports to the contracting authority for completion of assigned activities and performs only those activities and tasks which the contracting authority submits it in writing.

In exceptional cases, the commission for opening and evaluating tenders may be, depending on the specific needs of the contracting authority and specific nature of the subject of the public procurement, appointed for the time period to one year. However, it would be desirable that the commission for opening and evaluating tenders should be ad hoc – of temporary character, due to the specific features of each subject of the public procurement (Article 31 paragraph 3).

The commission for opening and evaluating tenders is obliged to: ensure the tender documentation to be prepared in accordance with the needs of the contracting authority and the provisions of the law, prepare the text of the invitation to tender, give rationale of the text of the invitation to tender and tender documentation, conduct public opening of tenders, evaluate compliance of received tenders with the requirements given in the text of the invitation to tender and tender documentation, determine eligibility of tenderers, inspect, assess and compare submitted tenders, draw up report on opening and evaluating tenders and propose the contracting authority what decision to make with regard to contract award to the tenderer whose tender is evaluated with the highest number of points (Article 31 paragraph 4).

The contracting authority that assigns the public procurement officer to be the chairman of the commission for opening and evaluating tenders or a member of the commission, is violating the provisions of the Law which strictly define the duties of the commission and duties of the public procurement officer. Namely, in Article 30 of the Law, the activities that the public procurement officer performs within the application of the Law are specified, and such activities do not include the authorisation for performance of duties of a member of the Commission for opening and evaluating tenders.

The authorisations of the commission for opening and evaluating tenders are prescribed by Article 31 of the Law. From such provisions the responsibilities clearly arise to confirm the incompatibility of functions of the public procurement officer and the commission for opening and evaluating tenders, and due to the nature and character of activities that he/she performs, the public procurement officer may not at the same time be appointed as a member of the commission for opening and evaluating tenders, since in that case their duties would be doubled.

The Commission for opening and evaluating tenders in the public procurement procedure makes decisions to determine whether the tenders are complete and correct, whether there are minor deficiencies and other by simple majority of votes which implies that the number of members is odd. In fact, even number of members of the Commission for opening and evaluating tenders excludes the

possibility for making decisions in the public procurement procedure by simple majority. The very procedure of evaluating of proper tenders is performed individually, by each member of the commission for opening and evaluating tenders, however, evaluation of tenders is only one of the phases in the public procurement procedure.

4) DETERMINING THE PUBLIC CONTRACT VALUE

Article 32

The contracting authority shall indicate the estimated value of a public contract in the invitation to tender.

The contracting authority shall observe the conditions and methods of procurement prescribed by this Law according to the determined values and may not, during a budgetary or financial year, subdivide the subject of a public contract that represents a single whole, with the intention to avoid the application of this Law and the prescribed procurement procedure.

More detailed conditions and method of determining the value of a public contract shall be specified in public procurement standard forms, issued by the responsible administrative authority.

The contracting authority is obliged to present the estimated value of public procurement in the invitation to tender. The estimated value of public procurement is calculated and determined with value added tax included. The indication of the estimated value is a mandatory part of the invitation to tender and the absence of this element is the reason for annulment of the public tender procedure (Article 32 paragraph 1).

The contracting authority is also obliged to observe the conditions and the manner of public procurement determined by this Law, according to established values and may not, during a budgetary or financial year, sub-divide the subject of the procurement which represents a whole, with the intention of avoiding the application of this law and prescribed procurement procedure (Article 32 paragraph 2).

Detailed conditions and manner of determining the value of public procurement are established by standard forms of public procurement, adopted by the Public Procurement Directorate (Article 32 paragraph 3).

Estimate of the value of public procurement contract

Calculating of estimated value of a public procurement contract is (equals to – is based on total fee) the total fee to be paid by the contracting authority for all

goods, services, works, real estate and other objects covered by procurement, in the amount including VAT, as estimated by the contracting authority.

In case when it is justified, it may be expected that the proposed contract will be extended, renewed or followed by a new contract for new goods, services and works - the base for calculation of the estimated value of such proposed contract is the highest possible total fee to be paid for a proposed contract, including the highest possible total fee to be paid for potential extension, renewal or a new contract.

The estimated value of goods, services and works is their estimated value at the time of renewal of the tentative content of public procurement plan – prior information notice, i.e. invitation to tender, in accordance with law (in accordance with Article 33 of the Law).

The selection of the method for calculating estimated value of the public procurement contract must not be performed with the intention of avoiding the application of the public procurement procedures envisaged by Law.

In cases when due to proposed works, procurement of services or goods, several public procurement contracts are simultaneously awarded in lots, the total estimated value of such lots will be taken into consideration.

If total value of all lots equals to or exceeds the value bands envisaged by Law, the procedure envisaged by law with regard to such value bands will be applied for each lot individually.

Estimating value of contracts for public procurement of goods

In case of public procurement contracts which are periodical by nature, or which are to be repeated in a specified time period, the calculation of estimated value of the contract is based on total actual value of identical successive contracts awarded during the previous 12 months or a financial year which, if possible, is adjusted as to take into consideration the changes in quantity or value that are to take place within the period of twelve months after the master contract, or, in another case the calculation of estimated value of the contract is based on total estimated value of successive contracts awarded during the period of 12 months after the first delivery, or during a financial year if it exceeds 12 months.

In case of contracts for leasing, lease or rental purchase of goods for which the total value is not indicated, the value that is taken as the base for calculating estimated value of the contract is, for the public procurement contract with specified period of duration, if such period is less than or equals exactly twelve months, the total estimated value for the period of the duration of the contract or, if the duration of the contract is longer than 12 months the total value including estimated value of the remaining part, and for public procurement contracts

without specified duration period or to the period which may not be determined the monthly value multiplied by 48.

Estimate of the value of public procurement contract for services

In case of public procurement contracts which are periodical, or which are to be repeated in a specified time period, the calculation of estimated value of the contract is based on the total actual value of identical successive contracts awarded during the previous 12 months or previous financial year which, if possible, is adjusted as to take into consideration the changes in quantity or value that are to take place within the period of following twelve months after the master contract or, in another case according to the total estimated value of successive contracts awarded during the period of 12 months after the main delivery, or during a financial year if it exceeds 12 months.

In case of public procurement contracts for services in which the total price is not indicated, the value to be taken as the base for calculating estimated value of the contract is:

- in case of the contract with specified period of duration, if such period is less than or equals exactly 48 months- their – its total value for the overall period;
- in case of contracts without specified period of duration or which are determined to the period exceeding 48 months - their monthly value multiplied by 48.

For the purpose of calculating estimated value of public procurement contracts for services related to services of insurance, banking and other financial services, or project-related services, in cases when possible, the following should also be taken into consideration:

- in case of insurance services – premium to be paid and other forms of fee;
- in case of banking and other financial services - fees, commissions, shares and other types of payments;
- in case of project-related services – fees, commissions to be paid and other forms of payments.

Estimate of public procurement contracts for works

In case of calculating estimated value of contracts on public works, the price of works as well as total estimated value of goods required for performance of works that the contracting authority makes available to the supplier of works must be taken into consideration.

Estimate of the value of public procurement contracts in case of options

If the proposal contract includes an option, the base for calculating estimated value of the contract is the highest possible total amount of purchase, leasing,

lease, rental, including all other potential amounts that may mature for payment due to execution of the clause related to the option.

Estimate of the value of a framework agreement

With regard to framework agreements, estimated value of the contract – framework agreement is the maximum estimated value, including VAT, of all contracts envisaged for the whole period of the framework agreement.

Establishment of a database on prices, maintained by the Public Procurement Directorate.

The estimate is made based on prices valid on the day of making the decision on initiating and carrying out of the public procurement procedure.

5) TRANSPARENCY OF PUBLIC CONTRACTS

Publication

Article 33

For accomplishment of the transparency principle, the contracting authorities shall make known, in the manner specified in this Law:

- **the tentative contents of the public procurement plan - prior information notice,**
- **the invitation to tender and**
- **the decision on contract award.**

Transparency of public procurement implies publishing of the contents of public procurement plan, invitation to tender and the decision on contract award in the public procurement procedure. In this manner the realization is ensured for one of the basic principles – transparency principle of public procurement proclaimed in Article 7 of the Law.

Publishing in respect of this Article of the Law implies the obligation of the contracting authority to publicly, for the purpose of realization of the transparency principle, in the manner envisaged by Law, subsidiary legislation acts or standard forms, publish on the website of the Public Procurement Directorate the tentative contents of the public procurement plan – prior information notice, invitations to tender, as well as decisions on contract award in the public procurement procedure. This ensures that all potentially interested tenderers may find any information related to public procurements at one place, whereby the savings for overall public procurement system are realized. It would be desirable that the Directorate for Public Procurements provides for English translation of as much information as possible that is posted on its website, as to facilitate equal

accessibility to information and possibility to participate in public tenders to foreign tenderers, particularly in case of tenders of higher value (Article 33).

Prior information notice

Article 34

Every contracting authority that is obliged to adopt a public procurement plan, pursuant to Article 27, paragraph 2 above, shall publish a prior information notice at the website of the responsible administrative authority indicating the main details and information from the public procurement plan, the type, subject-matter, planned value, quantity and conditions of the public contracts that are included in the public procurement plan.

The prior information notice referred to in paragraph 1 above shall be published by not later than the end of the previous year for the following year.

This provision is in direct connection with the provision of Article 27 of the Law, which regulates conditions and manner of publishing the public procurement plan. Even, according to our assessment, here there is overlapping and repetition of the obligation to adopt and publish public procurement plan, which is here referred to as prior information notice, which in fact by its contents and character is a public procurement plan.

Invitation to tender

Article 35

The contracting authority shall publish invitation to tender on the website of the responsible administrative authority and advertise it in one daily paper issued and distributed at the overall territory of the Republic.

The contracting authority shall publish or advertise the invitation to tender referred to in paragraph 1 above:

- 1) in the case of awarding a public contract in the open procedure;**
- 2) at the first phase of the restricted procedure;**
- 3) in the case of awarding a public contract in the negotiated procedure with prior publication of contract notice and**
- 4) in the case of awarding a public contract by means of the conclusion of a framework agreement.**

The invitation to tender shall contain data about the contracting authority, the subject-matter of the contract, estimated value of the contract,

conditions for participation, criteria, time and place for the review of tender documents, time limit and place for the submission of tenders and for the public opening of tenders, date of making decision on the public contract award, as well as the name of contact person that will supply additional information.

The invitation to tender may also contain other details necessary for informing tenderers more fully about the subject-matter of the public contract.

More detailed contents, format and sample of the invitation to tender, i.e. contract notice, shall be fixed by the responsible administrative authority by means of a special form.

At the phase of publication, the responsible administrative authority shall check and ensure the conformity of the text of the public invitation with conditions prescribed by the public procurement regulations.

The invitation to tender that has not been published and advertised in the manner prescribed by this Law shall not produce any legal effect.

The obligation of publishing and advertising public invitation arises from one of the basic principles of the Law – transparency principle in use of public media. Exactly with regard to this principle, it is envisaged that the publication of the invitation to tender implies the obligation of the contracting authority to, in cases prescribed by law, submit in electronic form the invitation to tender to the Public Procurement Directorate to assess its compliance with the conditions determined by the regulations related to public procurements and publishing on the website of that authority. Here is particularly emphasised the control function of the Public Procurement Directorate which is obliged to bring to the attention of the contracting authority possible deficiencies in the invitation to tender and its inconsistencies with law. However, the Public Procurement Directorate is not given the authorization not to publish an invitation to tender on its website if it identifies deficiencies in such invitation. The Directorate is obliged to bring to the attention of the contracting authority the identified deficiencies and propose it the remedy measures. However, if the contracting authority insists on publishing of the invitation in the form and contents in which it was submitted, the Directorate is obliged to publish such invitation, but here there is a remedial mechanism, i.e. the Public Procurement Directorate and all potentially interested tenderers are entitled to file complaints to the contracting authority on such text of the invitation to tender within eight days from the day of publishing. (Article 35 paragraph 1).

In addition to the obligation to publish the invitation to tender on the website of the Public Procurement Directorate, the legislator also envisages the obligation of advertising the invitation to tender in one of the daily papers published and distributed at the overall territory of the state. The introduction of this obligation is

justified, from the aspect that the level of IT literacy in Montenegro is not such that it may be expected that all potential tenderers will have the opportunity to regularly visit and get informed about invitations to tender on the website of the Public Procurement Directorate (Article 35 paragraph 2).

This Article envisages mandatory contents of the invitation to tender, while the standard invitation to tender form is defined by subsidiary legislation.

It is important to emphasise that invitation to tender does not produce legal effect unless it is published and advertised in the manner prescribed by the Law and regulations related to public procurement, which is decided in the procedure for protection of rights of tenderers and public interest. This is also the reason for public procurement procedure to be annulled.

Notice of contract award

Article 36

The contracting authority shall publish on the website of the responsible administrative authority:

- **decision on contract award under the published invitation to tender,**
- **decision on contract award in the negotiated procedure without prior publication of the contract notice,**
- **decision on public contracts of small value and**
- **decision on cancellation of public tendering.**

Contents, format and sample of the decisions referred to in paragraph 1 above shall be fixed by the responsible administrative authority by means of a special form.

The Law envisages the obligation of the contracting authority also to publish on the website of the Public Procurement Directorate the following:

- decision on contract award under all invitations to tender;
- decision on contract award in the negotiated procedure without prior publication of the invitation to tender;
- decision on contracts of small value;
- decision on cancellation of public tendering.

The obligation of publishing the specified decisions is important from the aspect of ensuring protection of rights of tenderers and public interest, since all persons that have active identity cards have the right to initiate the procedure for protection of their rights within eight days after the publishing of the decision by submitting an objection to the contracting authority.

The publishing of the mentioned decisions is important for overall public procurement system, since it enables the Public Procurement Directorate to keep

records on the public procurement procedure carried out, tenderers participating in those procedures, the amounts of tender prices, suppliers with which the contracting authorities conclude contracts and the like, which then may provide clear indicators with regard to potentially realised savings in the public procurement procedures, the participation of local and foreign tenderers, the movement of prices at market, and the like.

The publishing is carried out in accordance with the content, format and sample of the above specified decisions, which are determined by standard forms published in the Official Gazette of Montenegro.

6) TENDER DOCUMENTS

Contents of tender documents

Article 37

The contracting authority shall prepare the tender documents pursuant to this Law and subsidiary legislation, so that the tenderers may prepare admissible tenders on the basis of them. The tender documents shall offer complete information about the conditions and requirements to be fulfilled by each tenderer.

The tender documents shall contain, inter alia, as chosen by the contracting authority:

- 1) name of the contracting authority,**
- 2) evidence of the existence of formally appropriated funds for the public contract, sources of financing, estimated value of the public contract expressed in euros;**
- 3) the award procedure chosen and indication of whether the conclusion of framework agreement is envisaged;**
- 4) form of the statement of tenderer's acceptance of the terms from the invitation and the tender documents;**
- 5) form for establishing qualification and an instruction for proving tenderer's qualification;**
- 6) selection of criteria establishing minimal conditions for the qualification of tenderers and information for making such assessment;**
- 7) description of required supplies, services or works;**
- 8) quantity specifications and/or technical specifications, terms of reference;**
- 9) place of delivery;**
- 10) revised project, prepared by authorized persons, with maximum deviation of +/-10%;**
- 11) indication of possible tender submission in lots;**
- 12) completion time limits;**

- 13) alternative tender option;
- 14) criteria and/or sub-criteria for the selection of the best tender;
- 15) conditions of the proposed contract;
- 16) period of tender validity;
- 17) obligation to provide tender guarantee; performance guarantee; advance payment guarantee;
- 18) instrument issued by the contracting authority about the method of regular payment of obligations due under the public contract, presented at the time of concluding the contract;
- 19) place, date and time for the receipt of tenders;
- 20) place, date and time for the opening of tenders;
- 21) language requirement;
- 22) draft contract to be concluded;
- 23) right of objection.

Standard forms of tender documents shall be prepared by the responsible administrative authority and they shall be published on its website.

Tender documents are prepared by the contracting authority in accordance with the Law and subsidiary legislation, so that tenderers may submit admissible tenders based on fully and completely prepared documents. Tender documentation represents the basis for each tender and the assumption for their legal and successful carrying out. Tender documentation must be clear and understandable and contracting authorities give therein complete information on the conditions and requirements that each tenderer has to fulfil so tenderers are enabled to offer the subject of the public procurement in accordance with the requirements of the contracting authorities, as well as to prepare and submit valid tenders, among which the contracting authority will select the tender of such tenderer that has demonstrated its capability and met all the requirements necessary for its tender to be evaluated as valid and has determined the lowest price or economically best tender as the criterion. The contracting authority is obliged to plan the public procurement and provide resources for meeting all of the contractual obligations, determine the subject of the public procurement and has the right to demand the appropriate quality in accordance with the committed funds and determine evidence by which tenderers should prove their capability. The contracting authority will provide for a free market competition with proper and non discriminatory evidences on the capability and also eliminate the tenderers that have not submitted evidence confirming that they are really able to realise the subject of the public procurement. In addition, it should be taken into consideration that this Article of the Law only envisages the tentative content of the elements of tender documentation, and the contracting authority is responsible to select, at its discretion, as it is explicitly prescribed by the law, the elements to be included in tender documentation that will ensure the obtaining of the best value for money (Article 37 paragraph 1).

Subject to the decision of the contracting authority, the tender documentation includes but is not limited to:

- 1) name of the contracting authority (Article 37 paragraph 2 item 1),
- 2) - evidence of the existence of formally committed funds for the public contract,
 - sources of financing,
 - estimated value of the public contract expressed in Euros with VAT included, where the estimated value of the public procurement should be expressed in the Decision on initiating and carrying out the public procurement procedure, in the Public Procurement Plan in cases prescribed in the Law (when the estimated value of the public procurement exceeds EUR 100.000), as well as in public invitation and advertisement (Article 37 paragraph 2 item 2),
- 3) the award procedure chosen and indication of whether the conclusion of a framework agreement is envisaged, which implies that the contracting authority will indicate one of the following procedures specified in Article 18 of the Law: open procedure of public contract, restricted procedure of public contract; negotiating procedure with or without previous announcement of the invitation to public tender, with the obligation to indicate if the conclusion of the framework agreement is envisaged. If the conclusion of the framework agreement is envisaged, the constituent part of the public procurement documents must also be the evidence that the contracting authority has obtained the prior approval to conclude a framework agreement from the Public Procurement Directorate (Article 37 paragraph 2 item 3),
- 4) a form of the statement of tenderer's acceptance of the terms from the invitation and the tender documentation. The form of the statement represents the constituent part of the standard public procurement forms published in the Official Gazette of Montenegro. Tenderer is obliged to submit, along with its tender, the form of the statement signed by the authorised person and verified with the stamp (Article 37 paragraph 2 item 4),
- 5) a form for establishing qualification and an instruction for proving tenderer's qualification. The contracting authority fills this form out only when it conducts restricted procedure of public procurement, i.e. only in the first stage of the restricted procedure of public procurement (Article 37 paragraph 2 item 5),
- 6) selection criteria establishing minimum conditions for qualification of tenderers and information for making such assessment. These criteria are established by the contracting authority only in the restricted procedure of public contract, i.e. in the first stage of the restricted procedure of public contract (Article 37 paragraph 2 item 6),
- 7) description of required supplies, services or works, where the contracting authority is obliged to provide detailed description of the subject of the public procurement, as to ensure full equality of tenderers, giving complete and accurate information on the subject of the public procurement, without

- discriminating tenderers and favouring a specific tenderer or producer by indicating the description that may be satisfied only by the specific tenderer (Article 37 paragraph 2 item 7),
- 8) quantity specifications and/or technical specifications, terms of reference (Article 37 paragraph 2 item 8),
 - 9) place of delivery. The contracting authority is obliged to indicate the place of delivery or performance of works or provision of services, since the place of delivery, performance of works or provision of services does not have to correspond to the address or main office of the contracting authority. The contracting authority may also determine the obligation of tenderers to make an on-site visit to the place of delivery, performance of works or provision of services before submitting tenders, which may influence the determination of the final tender price (Article 37 paragraph 2 item 9),
 - 10) revised project, prepared by authorized persons, with maximum deviation of +/-10% (Article 37 paragraph 2 item 10),
 - 11) indication of possible tender submission in lots, if the subject of the public procurement is divided into lots, by indicating the right that the tenderer may submit the tender for one, several or all lots. Offering the discount in case a tenderer submits a tender for several lots is allowed only if the subject of the public procurement is the selection of contractors and the subject of the public procurement is divided into several lots (Article 37 paragraph 2 item 11),
 - 12) completion deadlines. The contracting authorities should bear particularly in mind that the tenderers tend to offer unrealistic short time limits as to obtain the deal although they are fully aware that they cannot meet the tendered time limits. Therefore, our recommendation is that the contracting authority determines in advance the shortest time limit for completion, below which a tenderer cannot submit its tender. The time limit for completion may be determined as the condition that has to be met by each tenderer or as one of the sub-criteria within the criteria for economically best tender (Article 37 paragraph 2 item 12),
 - 13) possibility for submission of alternative tenders (Article 37 paragraph 2 item 13),
 - 14) criteria and/or sub-criteria for selection of the best tender (Article 37 paragraph 2 item 14),
 - 15) conditions of the proposed contract, basic elements that a contract will contain, which will be presented in more details in the draft contract (Article 37 paragraph 2 item 15),
 - 16) period of tender validity, where the contracting authority is obliged to indicate the period of tender validity of no less than 60 days from the day of public opening of tenders (Article 37 paragraph 2 item 16),
 - 17) obligation to provide tender guarantee; performance guarantee; advance payment guarantee. It is in exclusive competence of the contracting authority to determine, depending on the specifics of the subject of the public procurement and its needs, whether the tenderer will be required to

- submit tender guarantee and whether the first ranked tenderer – supplier will be required to submit the performance guarantee and advance payment guarantee (Article 37 paragraph 2 item 17),
- 18) instrument issued by the contracting authority about the method of regular payment of obligations due under the public contract, presented at the time of concluding the contract (Article 37 paragraph 2 item 18),
 - 19) place, date and time for the receipt of tenders (Article 37 paragraph 2 item 19),
 - 20) place, date and time for opening of tenders (Article 37 paragraph 2 item 20),
 - 21) language requirement, as explained in the comment to Article 11 of the Law (Article 37 paragraph 2 item 21),
 - 22) draft contract to be concluded (Article 37 paragraph 2 item 22),
 - 23) right of objection, in accordance with Articles 87, 88 and 89 of the Law (Article 37 paragraph 2 item 23).

The standard public procurement form – form of tender documentation (for supplies, works and services) is determined by the Public Procurement Directorate and is published in the Official Gazette of Montenegro, on the website of the Public Procurement Directorate and Commission for Control of Public Procurement Procedure (Article 37 paragraph 3).

Technical specifications

Article 38

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 shall define the technical specifications by references to the laws, technical regulations and standards applied in the Republic, which are in compliance with European standards, and in the absence of such technical regulations and standards, by reference to European standards or internationally recognized standards, technical regulations or technical reference systems.

Mandatory part of the tender documents contains technical specifications specified by special laws, subsidiary technical regulations and accepted standards harmonised with the European standards (Article 38 paragraph 1).

Technical specifications must be prepared in the way that provides fair and active competition during the public procurement procedure and they must be non-discriminatory to all tenderers in that procedure (Article 38 paragraph 2).

One of the most frequent deficiencies of the tender documents is imprecise or irregular technical specification. The provisions of this law specify that the contracting authority should apply and correctly indicate technical regulations and standards, where the contracting authority avoids long and unnecessary technical descriptions, and it facilitates to tenderer the preparation of the tender in accordance with the description of the tendered supplies, services or works, when it confirms meeting of norms and standards. The Law obliges the contracting authority, to indicate in tender documents, correct technical specifications of supplies, services and works subject to the contract award. It is done by indicating which of the valid technical norms and standards tenderer must take into account when preparing its tender. The Law, also, guides to the application of the international norms and standards and thereby indirectly indicates that all regulations from the technical area are adjusted to international norms and standards. On the other hand, by harmonising rules in technical area both contracting authority and tenderer are forced to adjust their requirements to the existing international technical norms and standards, which raises the competitive capability of local tenderers and their adjustment to European norms. From that aspect, public procurements have strong development effect on local economy, which will, due to the initiated harmonisation process with the legal system of the European Union, have to adopt appropriate European norms and standards.

Use of technical specifications

Article 39

The contracting authority shall 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 shall 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".

Article 40

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 shall not 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.**

Article 39 of the Law determines negative enumeration of using technical specifications. Therefore, the contracting authority must not use or refer to technical specifications which designate supplies, services or work of a specific product, source or building, if such designation could give the advantage to a specific tenderer or if in such way the contracting authority might unjustifiably eliminate other tenderers. This is due to the fact that the contracting authority acting in this way would violate the principle of equality of tenderers, which would result with the annulment of the public procurement procedure in the process of protecting the rights of tenderers and public interest (Article 39 paragraph 1).

Technical specifications represent the part of tender documents where the contracting authority gives exact description of the subject of the public procurement. The description must be as precise as possible, in order for tenderers to be able to prepare their tenders without asking additional questions. The contracting authority must specify, besides the quantities, the technical characteristics of the subjects of the public procurement in the description of the subject of the public procurement.

However, besides the principle of transparency, the contracting authority must also honour the other public procurement principles. Respecting the principle of transparency means that the overall description of the subject of the public procurement must be given in advance. Subsequent additions and changes to the subject of the public procurement are not allowed, save in the exceptional cases which are subject to the verification of legality through submission of the objection to the contracting authority or filing of a complaint to the Commission for Control of Public Procurement Procedure.

The realisation of the competition principle primarily means that the contracting authority must not indicate neither any individual trademark, patent, or type, nor specific geographic origin or production of supplies, services or work so that it would not favour individual tenderers. There have been procedures of contract award known in practice in which the contracting authority described the subject of the public procurement (e.g. car, hardware or building material) that it was

procuring and which specification pointed only to one desirable producer. The specifications determined in such way result, in most cases, from the fact that one of the tenderers assists the contracting authority in preparing tender documents or a part of the tender documents that includes technical description of the subject of the public procurement. In order for the contracting authority to be able to prepare a technical specification as objectively as possible, it should be familiar with almost all technical regulations from the area of the subject of the specific public procurement or, if it does not possess such knowledge, it should engage independent and impartial experts from that area.

Legislator also envisages an exception, when the contracting authority is not able to describe the subject of the public procurement in tender documents so that specifications are sufficiently understandable to tenderers, it is obliged to give the explanations for indicating the trademark, patent, type or producer and to indicate that tenderers may submit tenders that contain supplies, services or work of such trademark, patent, type or producer or its equivalent. The contracting authority thereby shows that mentioning of the trademark, patent, type or producer does not mean that the contracting authority has reached in advance the decision and that the tenderer that offers subject of the tender mentioned as an example has advantage in relation to others.

In view of the European Union, it should be pointed out that one of the effects of the Treaty Establishing the EC and rules on free movement is to forbid authorities to formulate technical specifications in the way to be discriminatory particularly towards suppliers from other member countries. Further is given the main case law of the European Court of Justice related to technical specifications. The Case *Dundalk* (Case C-45/87 *Commission v Ireland* [1988] E.C.R. 4929) related to the procurement contract that one Irish municipality was to award for construction of a water supply pipeline to transfer water from the river spring to the processing plant then to the current city supplying system. The specifications of this contract required the asbestos cement pipes certified in accordance with Irish standard to be used in the construction. The Irish municipality rejected one tender for the reason that the offered pipes, produced in Spain, were not in accordance with the mentioned Irish standard. Irish Government claimed that the application of that standard was necessary to insure compatibility with the pipes in the existent network. The European Court rejected this argument stating that such clause automatically excludes all tenders based on other technical standards recognized in other member states as equivalent guarantors of safety, functionality and reliability. Therefore, the court stated that Irish authorities could verify the compatibility with technical conditions – without immediately restricting to tenderers that propose only Irish materials – by allowing tenderers to deliver pipes that meet the Irish standard or its equivalent standard (see particularly paragraphs 21 and 22 of the given

judgment). The case *UNIX* (Case C-359/93 *Commission v Netherlands* [1995] E.C.R. I-157) is similar. In this case the Dutch authorities announced the invitation for delivery and maintenance of a meteorological . Tender documents required the deployment of UNIX as an operational system for connecting several computers of various brands used in the project. UNIX is the name of a software system developed by the Company Bell Laboratories of ITT (USA). The original directive for procurement of supplies (which is applicable in this case) forbids (as well as the new directive 2004/18) stating of brands unless they are followed by the words »or equivalent«. One of the requirements for stating this phrase is that the subject of the procurement may not be described differently in specifications which are sufficiently clear and fully understandable for everybody. The Dutch government claimed that the UNIX system, in the area of information technology must be considered as a technical specification generally recognized by traders and therefore it was not necessary to add words »or equivalent«, although it acknowledged that the UNIX system was not standardized and that it was the name of a specific manufacturer of a specific product. Although the specification does not favour products from the Netherlands, the European Court considered that the fact that the word UNIX was not followed by »or equivalent« not only could prevent economic operators using systems similar to UNIX to participate in the tender, but it could represent a restriction in trade within the community which is in breach of Article 30 of the Treaty Establishing the EC (currently Article 28 – related to free movement of supplies), by reserving the procurement solely for suppliers intending to use the specifically mentioned system. Therefore, the contracting authority should have added the words »or equivalent« after the term UNIX, as required by the then applicable directive (see particularly paragraphs 27 and 28 of the given judgment). In the case *Mousten* (Case C-59/00 *Bent Mousten Vestergaard v Spottrup Boligselskab* [2001] E.C.R. I-9505), the European Court considered that even in the case of procurement falling below the threshold defined by the applicable directive, Article 30 of the Treaty Establishing the EC (currently Article 28) prevents the contracting authority to include in the tender documents the clause requiring the use of products of specific brand (in this case windows of a specific national producer) for carrying out the contract, if the clause does not include the words »or equivalent«, see particularly paragraph 26 of the given judgment).

Purchase of tender documents

Article 41

Since the day of publication of the invitation to tender, the contracting authority shall allow all interested tenderers to review and take over the tender documents direct or shall deliver the documentation by post, fax or e-mail within 2 days after receiving such request from a tenderer.

In the case referred to in paragraph 1 above, the contracting authority shall charge the cost of copying and distributing the tender documents only.

The contracting authority may not restrict the time limit for the submission of requests for the delivery of tender documents.

The contracting authority is obliged to enable all interested parties to have insight into, takeover or purchase tender documents, starting from the day of publishing and announcing the invitation to public tender. Besides, the contracting authority is obliged to submit the tender documents by post, fax or email to all interested parties within two days after the reception of relevant requests. The contracting authority is obliged to provide, in this stage of the public procurement procedure, the existence of evidences on parties that have shown the interest to have insight into tender documentation or its takeover or purchase. This is due to the reason that only parties that have taken over or purchased tender documents have the right to appear as tenderers in the public procurement procedure (Article 41 paragraph 1).

If the contracting authority decides to issue tender documents, with the obligation of an interested party to previously submit evidence on the payment made on behalf of delivery costs of tender documents, such amount may only be up to the amount of costs of copying and distributing tender documents. It happens in practice that the contracting authorities wish to discourage small tenderers from participating in the public procurement procedure by setting up a high price for purchase of tender documents, which is not allowed. This may also be the subject of complaint, and the Commission for Control of Public Procurement Procedure has cancelled several public tenders in which the amount of purchase of tender documents was determined as unrealistically high for the purpose of discriminating the tenderers and restricting the competition (Article 41 paragraph 2).

Tender documents are issued to interested parties during the period of validity of invitation to public tender and the contracting authority does not have the right to limit the timeframe for submitting requests to insight into the tender documentation or its takeover and purchase, or submission (Article 41 paragraph 3).

Amendments to tender documents

Article 42

The contracting authority may amend the tender documents on condition that such amendments are made available to interested tenderers on the same day, but not later than 5 days before the expiry of the time limit for the submission of tenders. If such amendments mean any substantial alteration, the time limit for the submission of tenders shall be extended for 7 days.

The decision on extending the time limit shall be published in the same manner in which the invitation to tender was published and advertised.

The contracting authority has the right to make changes and additions to the tender documents, no later than five days before the expiration of the timeframe which is determined in the public invitation as the final timeframe for the submission of tenders, whereas the determined changes and additions to the tender documents must be available to all interested parties on the same day when they are made. Changes and additions to the tender documents are made in the form of amendments, so that the amendments are published on the website of the Public Procurement Directorate and advertised in one of daily newspapers published at the territory of Montenegro. If changes are of such character to impose additional obligations to tenderers during their preparation of tenders, the contracting authority is obliged to extend the final timeframe for the reception of tenders for no less than seven days. The tenderers should bear in mind that they have the right to submit the objection to the contracting authority against amendments and a complaint to the Commission for Control of Public Procurement Procedure.

Clarification of tender documents

Article 43

The contracting authority shall, on request for clarification of tender documents, furnish explanation to all tenderers who have taken over the tender documents, without indicating details of the tenderer who submitted such request.

Upon the submission of the request for explanation – clarification of tender documents, the contracting authority is obliged to submit the explanation simultaneously to all tenderers that took over tender documents. When submitting explanations, the contracting authority does not state the data about the submitter of the request that would reveal its identity. Stating the data about the submitter of the request that reveals its identity to other interested parties, potential tenderers, violates the principle of equality of tenderers (Article 43).

Guarantees

Article 44

The contracting authority may require, in the invitation to tender, the tender guarantee for the purpose of protection from trivial tenders, the performance guarantee, the advance payment guarantee or other guarantee aimed at the protection from breach of the contract.

The tender guarantee shall not be for more than 2% of the tender amount, and the performance guarantee shall not exceed 5% of the contract value.

When concluding a contract, the contracting authority shall issue suitable instrument providing regular payment of due obligations under the public contract.

The format, contents and manner of issuing the instrument referred to in paragraph 3 above shall be prescribed by the Ministry of Finance.

For the purpose of the protection from trivial tenders, the legislator envisages that the contracting authority has the right to require from the tenderer, by invitation to public tender, the submission of the tender guarantee and to envisage that the first ranked tenderer – supplier will be obliged to submit performance guarantee, advance payment guarantee or other guarantee in respect of the Law on Contracts and Torts for the purpose of protecting from violation of the contract. The tender of the tenderer that fails to submit the requested guarantee in full amount will be rejected as invalid (Article 44 paragraph 1).

The legislator restricted the amount of guarantee, in the manner that the tender guarantee may not exceed 2% of the value of the tender, and that the performance guarantee may not exceed 5% of the value of the contract.

Tender guarantee should be in specified percentage – fixed amount of total tender price, in the form of banking guarantee without right to recourse, payable at first written call and issued by the prime bank. The contracting authority may specify that tenderers may submit a promissory note or a blank bill of exchange instead of a bank guarantee.

The tenderer will lose tender guarantee if it:

- revokes or replaces its tender before the expiry date for submission of tenders,
- fails to sign the public contract,
- fails to submit the performance guarantee.

Tender guarantee will be returned to the tenderer after the completion of the procedure of concluding the contract.

Performance guarantee without right to recourse is payable at first written call and issued by the bank in specified percentage – fixed amount of the value of tender, thereby it may not exceed 5% of the value of the contract. Tenderer submits within its tender the letter of intent of the bank to issue such a guarantee if its tender is selected as the best and if it has been awarded with the contract, and the performance guarantee itself will be submitted by the first ranked tenderer – supplier within the timeframe specified by the contracting authority. The contracting authority will call the performance guarantee if the supplier fails to act in accordance with the contract or fails to eliminate the identified deficiencies in the agreed timeframe in respect of the execution of the contractual obligations (the quality of the works performed, delays concerning timeframes or if it fails to remove deficiencies within the specified timeframe from the delivered supplies or fails to replace inadequate supplies) (Article 44 paragraph 2).

For the purpose of tenderer protection, the legislator envisages that the contracting authority, when concluding a contract, issues suitable instruments which will provide regular payment of due obligations arising from the concluded public contract. In that respect, it is important that the document ensuring regular payment of due obligations referred to in public tender makes a constituent part of tender documentation (Article 44 paragraph 3).

The format, contents and manner of issuing of the instrument ensuring the regular payment of due obligations referred to in public tender are prescribed in a special subsidiary regulation of the Ministry competent for finance activities, which in fact is a rulebook published in the Official Gazette of Montenegro (Article 44 paragraph 4).

7) CONDITIONS AND CONFORMITY OF TENDERERS

Mandatory and optional conditions of participation in tendering procedure

Article 45

The tenderers must fulfil the following conditions in the process of competition:

- **they have not been convicted in a criminal proceeding nor subjected to the prohibition of further conduct of business that is the subject-matter of the public contract;**
- **they possess business and professional capacity and**
- **they have properly fulfilled the due and payable obligations relating to taxes and contributions.**

The contracting authorities may specify, in the invitation to tender and tender documents that the tenderers should meet, in addition to the conditions referred to in paragraph 1 above, also the conditions relating to:

- **economic and financial standing and**

- **technical and/or professional and staffing abilities.**

The conformity conditions and types of evidence on the conformity of tenderers shall be indicated in the invitation to tender and the tender documents.

The institute of the tenderer's capability serves, along with the technical specification, the definition of the subject of the public contract and criteria for selection of the best tender, to the fairness of the requirements of the contracting authority, then individualisation and selection of the tenderer until the very act of the selection of the best tender. The required level of the subjective characteristics of the future supplier is determined through the institute of the tenderer's capability.

The tenderer's capability is a subjective criterion based on the subjective characteristics of a tenderer.

The tenderer's capability represents the sum of characteristics, features, capacity of the tenderer as a business entity related to its business activities in general or business activities with regard to the subject of the public contract, through which the possibility of execution of the public contract is determined.

There are several dimensions of the tenderer's capability – legal, business, staff, financial, professional and the aggregation of all the mentioned dimensions that the contracting authority requires gives the tenderer the qualifications of a capable tenderer, which after that goes into the second part of the selection to the selection of the best tender for conclusion the contract.

The best tender may only be the tender of a capable tenderer. It is normal that the capability of the tenderer appears in the opposite role in the institute of inability and irregularity of the tender.

By setting up the type and value of the capability of the tenderer, the contracting authority determines the profile of the tenderer with which it wishes to conclude the contract, in respect of its potentials, capability and certainty for execution of the public contract.

In the area of capability there is no competition and therefore the gradation of the capability to capable, more capable and the most capable cannot be determined. There are only two categories of tenderers: capable and incapable. The only instrument for determining capability is the documents based on law. The example in which the contracting authority would prescribe a complex procedure for determining capability by generating a list of the capable, from which it would take into consideration the best ranked, would be an example of illegal application of the institute of capability of the tenderer, since in doing so, the contracting authority would indirectly use the capability as a selection criterion,

which is not allowed. Thus, there is no competition in proving the capability of the tenderer. Therefore, the requirements for capability cannot be used as additional sub-criteria for selection of the most advantageous tender.

In view of the European Union and given the case law of the European Court of Justice, the distinction between the phase of qualitative selection (which objective is establishing the capability of economic operator/tenderer to carry out the contract) from one side, and the phase of contract award (which goal is to establish the tender representing the most favourable solution), from the other side, was for the first time treated by the European Court in the case *Beentjes* (Case C-31/87, *Gebroeders Beentjes v State of The Netherlands* [1988], E.C.R. 4631). In this case (see particularly paragraphs 15 and 16) the European Court emphasized that the verification of suitability of suppliers (in this case the supplier of works) to carry out the awarded contract and award of the contract represent two distinct operations in the procedure of public procurement contracting which are subject to different rules (although the possibility of their simultaneous taking place is not excluded). In paragraphs 17 and 18, the European Court further states that suitability of the supplier for realization of the contract should be verified based on their financial and economic condition as well as professional knowledge and capability, while the award of contract may be based either on the criterion of lowest price or the criterion of economically most favourable tender (which may include price, completion date, current costs, technical benefits etc.). Accordingly, we may add that while the phase of qualitative selection is related to economic operators – tenderers, the award phase is related to tenders. The principles presented in paragraphs 15 and 16 of the case *Beentjes* (i.e. quality selection and award are two separate phases regulated by different rules) are also repeated by the court in the subsequent case law (see e.g. the case *GAT* (Case C-315/01 *Gesellschaft für Abfallentsorgung – Technik GmbH (GAT) vs Österreichische Autobahnen und Schnellstrassen AG*, E.C.R. [2003] I – 6351, paragraphs 59 and 60; as well as the recent case *Lianakis* - Case C-532/06, *Lianakis AE and Others v Alexandroupolis and Others*, which has not been published yet but can be found at the website: www.curia.europa.eu, para 26). With regard to the case law of the European Court of Justice about the relation between the criteria of qualitative selection and award criterion, see the comment related to Article 66.

A capable tenderer is the one that has all features prescribed by the law in the description and to the extent as optionally determined by the contracting authority in accordance with its needs. The contracting authority ensures, through the type

and the value of the evidence on the capability, the certainty of the qualitative execution of the public contract, so that the conditionality and connectivity of those values by the very subject of the public procurement is important. Therefore, the requirements concerning the capability of tenderer in public procurements are significantly connected with the subject of the public contract and cannot be determined beyond that.

The contracting authority is obliged, in accordance with the principle of transparency and prohibition of discrimination, to clearly indicate evidences and the manner of proving capability of tenderers in documentation for procurement (public invitation and tender documents). By precisely determining the subject of capability and its value, then evidence of funds, enabled is the transparency of its requirements and tenderers are enabled to prove their features by using any evidences which will prove the required features. Poor definition of the subject of capability and evidences sometimes invalidates the procedure of proving the capability.

The requirements related to capability must be completely and fully met and they are of suspenseful nature, i.e. in case of failure to meet the requirements, the tenderer is pronounced incapable, and its tender is not considered in the selection.

The requirements related to capability of tenderer represent the threshold that tenderers should cross to be competitive for obtaining a public contract.

The requirements related to capability are sine qua non for the participation in the selection procedure for the best tender.

The legislator envisages that each tenderer in the procedure of public tender, particularly in the open public procurement procedure, in the restricted public procurement procedure, in the first stage of the procedure and in the negotiated procedure with or without previously advertising of the invitation to public tender must prove the following:

- it has not been convicted in a criminal proceeding nor subjected to the prohibition of further conduct of business that is the subject of the public contract;
- it possesses business and professional capacity and
- it has properly fulfilled the due and payable obligations relating to taxes and contributions (Article 45 paragraph 1).

These are mandatory evidences of eligibility that the tenderers are obliged to submit with their tenders. If the Commission for opening and evaluating tenders in the procedure of review, assessment and comparison of tenders determines that some tenderers have not submitted all of the mentioned mandatory evidences of eligibility in the manner and form prescribed by the Law, it is obliged to reject the tender of such tenderer as incorrect. It is not allowed that the

Commission for opening and evaluating tenders qualifies a deficiency in a tender concerning evidences of eligibility as a minor deviation and asks for clarification and supplement to the tender from the tenderer, since in doing so it would severely violate the principle of equality of tenderers and legality of the public procurement procedure.

As optional conditions for the participation in the public contract procedure, besides mandatory conditions, the contracting authority in the invitation to tender and tender documents, may envisage that the tenderer should also meet the conditions relating to:

- economic and financial standing and
- technical and/or professional and staffing abilities (Article 45 paragraph 2).

The contracting authority is obliged to indicate the conformity conditions and types of evidence on the conformity of tenderers in the invitation to tender and tender documents. It is not allowed for the contracting authority to determine different evidences on the conformity of tenderers in the invitation to tender and tender documents since it would mislead the tenderers in respect of the procedure and manner of proving their capability. Also, it is not allowed that the contracting authority in the procedure of review and assessment of tenders subsequently requires particular evidences on capability that it has not previously envisaged in the public invitation and tender documents for the purpose of discrimination of the tenderers (Article 45 paragraph 3).

Non-conviction in criminal and other proceedings

Article 46

The tenderers participating in the public contract procedure shall prove that they have not been the subject of a conviction by final judgement, in the period of 2 years before the submission of the tender, for the committed criminal offences 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.

Submission of the evidence that the tenderer is not convicted in criminal or other proceedings is the first of the obligatory conditions for participation in the public tender procedure. Namely, the tenderers that participate in the public tender procedure are obliged to prove that they have not been the subject of a conviction by final judgement, in the period of 2 years prior to the submission of the tender, for the committed criminal offences 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 the business activity that is the subject of a

respective public contract. The Criminal Code, Law on Criminal Procedure and the Law on Accountability of Legal Entities for Criminal Offences are applied in the process of proving of the mentioned conditions.

Business and professional capacity

Article 47

The tenderers participating in the public contract procedure shall furnish 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.

Submission of evidences that the tenderer possesses business and professional capacity represents the second of the obligatory conditions for participation in the public tender procedure. It includes that proving that the tenderer is registered for professional performance of the activity that is subject of the public tender. When proving the above mentioned condition the Law on Business Organisations and the Law on Non-Governmental Organisations are applied. In addition, the tenderer is obliged to prove that it has valid license, or approval of the competent authority for professional conduct of business activity, depending on the public tender procedure if the issuance of such license and/or approval is envisaged by special regulations. In the subject of the public contract (e.g. civil engineering works) includes the submission of the appropriate license, the contracting authority is obliged to indicate precisely in public invitation and in tender documents which type of license is required by the tenderer (Article 47).

Economic and financial standing

Article 48

The contracting authorities may specify, in the call for 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 3 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 3 financial years available, or for the period since registration.**

The submission of evidence that the tenderer has economic and financial standing is one of the optional conditions for participating in the public tender procedure, which the contracting authority may anticipate in the invitation to public tender and in tender documents. It includes that the tenderer is obliged to prove that it meets the conditions in respect of economic and financial standing by submitting one or several of the following statements:

- 1) 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 maximum the past 3 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) statement of the overall turnover and, where needed, of turnover in the area covered by the contract for a maximum of the last 3 financial years available, or for the period since registration.

In the procedure of proving, the Law on Accounting and Auditing and the Law on Banks or other corresponding regulations are applied (Article 48).

Technical and/or professional and staffing abilities

Article 49

Evidence of the technical and/or 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 2 to 3 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/or professional and staffing abilities:

- a list of the main services provided in the past 2 to 3 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 statement of the average annual manpower of the tenderer and the number of managerial staff for the last 3 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/or 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 2 to 5 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 3 years;
 - a statement of technical facilities available to the tenderer for performing the specific works;
 - a statement of any intention and subject of subcontracting.

The submission of evidences that tenderer has technical, professional and staffing capability is the second optional condition for the participation in the public procurement procedure, which the contracting authority may envisage in the invitation to public tender and tender documents.

Technical capability represents the feature of the tenderer concerning owning of specific premises, technical furnishing in specific aid devices, equipment, premises, services, installations, resources for work and is related to the building facilities, rather than personal characteristics of the employees with tenderers.

Staffing capability includes the subjective factor, staff capable to meet the obligations under the contract by quantity, number, quality, professionalism, as well as the number of professional staff organising the process of work, administrating and managing of the organisation.

The contracting authority's powers in the assessment of tenderers' suitability

Article 50

The contracting authority shall 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 2 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 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.

In the aforesaid Article, the legislator has envisaged the cases in which the contracting authority is obliged to exclude from further public contract procedure any tenderer for whom it undeniably establishes that they:

- 1) have been the subject of a conviction by final judgement, in the period of 2 years before the submission of the tender for the committed criminal offence of: participation in criminal organization, corruption, fraud, money laundering, related to the professional conduct of its activity or they have been imposed a prohibition of the conduct of business activity that is the subject-matter of a respective public contract;
- 2) have not been registered or currently licensed or authorized by a relevant authority for the professional conduct of its activity;
- 3) are the subject of liquidation proceedings or have suspended business activities;
- 4) have not fulfilled properly obligations relating to the payment of social security contributions and due taxes, in accordance with the legal provisions;
- 5) have not submitted the information required in the public contract procedure or have not supplied such information (Article 50 paragraph 1).

In addition, the contracting authority may exclude from further public contract procedure any tenderer for whom it has established that:

- 1) they have entered into bankruptcy proceedings,
- 2) they do 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) they have not regularly met contractual obligations to contracting authorities in previous public contracts (Article 45 paragraph 2).

The legislator also lists all cases in which the contracting authority may, but is not obliged to exclude a tenderer from further public contract procedure.

By giving the contracting authority the right to exclude from further public contract procedure the tenderer for whom it established that they have not regularly serviced contractual obligations to contracting authorities, for the first time in the national legislation regulating the public procurement procedure the legislator sanctions the tenderer who has not met prior contractual obligations to contracting authorities. This imposes additional obligation on tenderers to regularly meet their contractual obligations to contracting authorities in order to avoid being sanctioned by exclusion from further public contract procedure by the same contracting authority which right is set out in this Article of the Law.

Evidence on suitability

Article 51

Tenderers are obliged to prove their suitability for participation in public competitions.

The 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, produced not more than 6 months as of the day of issued invitation, shall be submitted in original, in copy duly certified or in electronic format.

Evidence of having met the requirements referred to in Article 45 above is:

- **excerpt from the court, professional or commercial register in the country of the seat or valid permit and/or license of the tenderer issued by a competent body for the professional conduct of business activity;**
- **proof that the legal person is not insolvent or in insolvency procedure - certificate of the court or competent body in the country of the seat;**
- **proof that the payments towards the tenderer are not suspended - corresponding bank statements, certificate or statement on financial suitability of the bank the legal person is the account holder with;**
- **proof that the legal person has not been lawfully convicted for a criminal offence from Article 46 above and that protection measure has not been pronounced banning certain commercial activity - excerpt from the penal record or corresponding certificate of a competent body;**
- **report on accounting and financial condition - balance sheet and income statement, or report of an authorized auditor for the last 3 years, in cases prescribed by the Law on Accounting and Auditing, or for the period from the registration provided the commercial company has been registered inside that period,**

- proof issued by the tax administration and the institution of pension and health insurance on the taxes and contributions being paid,
- 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 performed works and technical capacities.

Should the contracting authority request the 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. The contracting authority is obliged to accept the proof on fulfilling quality requirements and/or certificates and /or licenses in another form in case the tenderer offers the evidence on its lack of possibility or entitlement to requesting respective certificates.

In case the tenderer`s seat is located in another country, evidence showing documentation needs to be certified by a competent body of that country (administrative or judicial body, or chamber of commerce), or by that country`s embassy in the Republic.

In case the country of the tenderer`s seat does not issue proofs from paragraph 4 above, 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 5 days as of the day of change of any data from paragraph 4 above, to advise the 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.

A tenderer`s suitability (eligibility) is proved by supplying the relevant evidence. Of all the evidence material (public documents, witnesses, expert evaluation), the Law on Public Procurement mentions public documents as the fundamental evidence, yet not excluding other expert findings and opinions – expert evaluation - in the part relating to professional abilities. Witnesses are the only ones not mentioned as the proof of evidence, but their use is not appropriate since the entire procedure is carried out in writing (documented).

Public documents must be submitted in original or in copy duly certified.

Most of the documents proving the tenderer`s ability are of public nature (an excerpt from the court, professional or commercial register or other appropriate confirmations or public documents, an excerpt from the penal record or the

corresponding certificate of a competent judicial or administrative body, the tax administration confirmation).

Private documents are the evidence on suitability specified in the Law as being a banking statement, tender guarantee, performance guarantee, balance sheet and income statement.

The contracting authority may specify the type and worthiness of evidence on suitability and they must be equal for all tenderers. Tenderers prove their suitability in the same manner. The contracting authority must specify the type and worthiness of the suitability evidence in the invitation to tender. The suitability evidence is set out in the Law and the contracting authority may individually determine the type of evidence and, in some cases, their worthiness. The contracting authority is not obliged to specify any other suitability evidence.

The contracting authority sometimes opts for the tenderer's statement as an evidence. Here it should be said that such a proof may be used and should not be neglected. However, its objectivity and power of proof are certainly the weakest of all other possible suitability evidence. If no other proof is required to substantiate the statement, then it cannot be verified neither by the contracting authority nor any other subsequent controlling authority, thus likely indicating potential misuse. Therefore, of all pieces of evidence, this is the one that has the weakest power of proof.

Tenderers themselves are responsible for proving their suitability in the public contract procedure to the contracting authority. They are obliged and must submit all the evidence envisaged in the law or stated in the invitation to tender and tender documents by the contracting authority. The risk of providing the suitable proof lies with tenderers themselves.

In the complaints procedure before the Commission for the Control of Public Procurement Procedure, the duty of proving the existence of a fact/ability is of the person claiming its existence, that is, on the tenderer himself. He is authorized and obliged to prove all claims stated in such a complaint.

Proving the ability is partly a formal – mechanical process. This refers to all pieces of suitability evidence that are simultaneously the public documents. Owing to the legal status of public documents as being considered genuine regarding their content, the procedure of proving is very simple. With regard to private documents and proving their validity, then this is the same as always in case that something needs to be proved – *questio facti*.

The law specifically emphasizes the obligation of a tenderer to prove their suitability for participation in the public contract procedure by submitting the evidence on the fulfilment of contractual obligations and, if specified by the contracting authority in the invitation to tender and tender documents, by

submitting the evidence on the fulfilment of optional conditions for the participation in the tendering procedure. (Article 51 paragraph 1)

In addition, the Law strictly specifies that the contracting authority may not require from tenderers to submit any evidence on suitability other than those envisaged in this Law, nor may request any other evidence that would bring tenderers into unequal position (e.g. unreal requests regarding the tenderer's financial position, technical and staffing abilities that would favour one tenderer over another). With regard to this, it is not possible to envisage providing of either evidence in respect of misdemeanors, commercial offences and the like, or evidence for the responsible person in the legal entity, about which the Commission for Control of Public Procurement Procedure at the session held on 19 September 2008, determined its general position, which is posted on the web site of this Commission www.nabavka.vlada.cg.yu (Article 51 paragraph 2)

Evidence of suitability is submitted in original, in copy duly certified (by court or the competent body of local authority) or in electronic format. Evidence of suitability may not be older than six months as of the day of issued invitation, except evidence on the tenderer's registration, extension of registration or license and evidence on extended license in line with the separate regulations. (Article 51 paragraph 3)

Evidence on suitability specified under Article 45 of the Law is the following:

1. *a tenderer has not been convicted in a criminal proceeding nor subjected to the prohibition of further conduct of business that is the subject-matter of the public contract:*
 - proof that the tenderer has not been lawfully convicted for a criminal offence from Article 46 of the Law and that protection measure has not been pronounced banning a certain tenderer to perform commercial activity
 - excerpt from the penal records or corresponding certificate of a competent body, in line with the Law on Liability of Legal Person for Criminal Offences;
2. *a tenderer possess business and professional capacity:*
 - excerpt from the court, professional or commercial register in the country of the seat or a valid permit and/or license issued by a competent body to the tenderer for the professional conduct of business activity;
3. *a tenderer has properly fulfilled the due and payable obligations relating to taxes and contributions:*
 - proof issued by the tax administration and the institution of pension and health insurance on the taxes and contributions being paid.

Optional conditions for participation in tendering procedure are proved as follows:

1. for economic and financial standing:

- proof that the legal person is not insolvent or has entered insolvency procedure - certificate of the court or competent body in the country of the seat;
- proof that the payments towards the tenderer are not suspended - corresponding bank statements, certificate or statement on financial suitability issued by the bank of which the legal person is a client;
- report on accounting and financial condition - balance sheet and income statement, or report of an authorized auditor for the last 3 years, in cases prescribed by the Law on Accounting and Auditing, or for the period from the registration provided the commercial company has been registered inside that period;

2. for technical and/or professional and staffing ability:

- tenderer`s statement on their 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 performed works and technical capacities (Article 51 paragraph 4).

The contracting authority is obliged to accept the proof on fulfilling quality requirements and/or certificates and/or licenses issued by authorized bodies of European Union member states or other states as equally valid evidence on fulfilling requirements on business-professional ability, in accordance with the national legislation. The contracting authority is obliged to accept the proof on fulfilling quality requirements and/or certificates and /or licenses in another form in case the tenderer offers the evidence on its lack of possibility or entitlement to requesting respective certificates. (Article 51 paragraph 5)

The legislator has also envisaged that in case the tenderer`s seat is located in another country, evidence showing documentation needs to be certified by a competent body of that country (administrative or judicial body, or chamber of commerce), or by that country`s embassy in the Republic. (Article 51 paragraph 6)

In addition, the legislator has also envisaged that in case the country of the tenderer`s seat does not issue proofs from paragraph 4 of this Article, 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, but the contracting authority is obliged to determine whether the country of the tenderer`s seat issues such evidence and use it when evaluating tenders. (Article 51 paragraph 7)

With a view to ensuring legality of the public contract procedure and meeting the principle of greater efficiency and cost-effectiveness of the public contract procedure, the legislator has envisaged that the tenderer is obliged, without delay, and not later than within 5 days as of the day of change of any evidence from Article 51 paragraph 4, to inform the contracting authority in writing on the change as well as to properly document the same. (Article 51 paragraph 8)

The contracting authority is obliged to reject the tender as incomplete in case the tenderer fails to submit any of the suitability evidence envisaged in the invitation to tender and tender documents. (Article 51 paragraph 9)

8) TENDER

Tender

Article 52

When making the tender, a tenderer is obliged to adhere to the conditions given in the invitation to tender and tender documents.

During the time envisaged for submitting tenders, the tenderer may change and amend the tender or desist from the same in the form of a written statement. Amendments to or desistance from the tender shall be submitted by the tenderers in the same way as the tender. In case of the desistance from the tender, the contracting authority shall return unopened tender to the tenderer.

Private sector appears as tenderer in the system of public procurement and, therefore, one of the main questions that tenderers ask themselves is how to prepare a tender that would be assessed by the contracting authority as valid and the most advantageous. This because it often happens that a tender contains the best price, delivery date, quality and the like, but is rejected due to some formal-legal reasons. Tenderers do not have any influence on making their tenders accepted, but they are the only ones that can make sure that their tender is evaluated as valid.

When preparing their tenders, tenderers are obliged to adhere to requirements and conditions stated by the contracting authority in the invitation to tender and tender documents. Tenders that do not meet all the conditions stated in the invitation to tender may not be accepted as valid, otherwise that would be the violation of the principle of equality of tenderers and the legality of the implemented public procurement procedure.

During the time envisaged for submitting tenders, a tenderer may change and amend the tender or desist from the same in the form of a written statement. In case the tenderer desist from the tender, they lose the tender guarantee which

will be activated and collected by the contracting authority after the public opening of tenders in the amount originally stated in the invitation to tender and tender documents.

Timely tender

Article 53

Timely tender shall be considered the one reaching the contracting authority at the latest by the date and hour stated in the invitation to tender and tender documents for opening of tenders.

The tender shall be delivered in person, by mail or in electronic form. The tender in electronic form must be protected by electronic signature and the signature must be authenticated by a qualified acknowledgement.

Following the receipt of certain tender, the contracting authority shall indicate the date and hour of its receipt and, upon tenderer`s request, issue the certificate on receipt.

In case the tender is submitted untimely, the contracting authority shall return it to the tenderer as unopened following the completion of the procedure for opening tenders, with the indication of its being untimely submitted.

A timely tender, within the meaning of this Law, is considered the one that reaches the contracting authority at the latest by the date and hour stated in the invitation to tender and tender documents for opening of tenders. This implies that tenders received by mail or registered mail or delivered in person after the deadline specified in the invitation to tender shall be rejected as being untimely. (Article 53 paragraph 1)

The legislator has envisaged that a tenderer has the right to deliver the tender in person, by mail or in electronic form and, in case of the latter, such a tender must be protected by electronic signature verified by electronic attestation in accordance with the pertinent national legislation. (Article 53 paragraph 2)

With a view to determining timeliness of a tender, the contracting authority is obliged to indicate the date and hour of its receipt and issue the certificate of receipt to the tenderer at their request and attach the copy thereof to the tender. (Article 53 paragraph 3)

In case the tender is submitted untimely, the contracting authority will return such a tender to the tenderer after the completion of the procedure of opening of

tenders, indicating that the tender was untimely submitted. (Article 53 paragraph 4)

Submittal of joint tender

Article 54

Tender may be submitted by a group of tenderers whose liability is joint and several.

Relative to the case from paragraph 1 above, the contracting authority may not request formal legal form of association from joint tenderers in order for them to be able to submit joint tender.

Relative to the case from paragraph 1 above, tenderers shall submit a legal act by means of which they are obliged to jointly execute the procurement in case they obtain a contract, under the condition that such form of organization is necessary for successful execution of procurement.

The legal act referred to in paragraph 3 above shall define precisely the responsibility of each individual tenderer for the execution of the contract.

Tenderers shall state in their tenders names and appropriate professional qualifications of persons responsible for contract execution.

The issue raised with regard to public procurement procedures where the estimated value is very large is how to enable small and medium tenderers to participate. The legislator responded to this by allowing tenderers to submit joint tenders, thus encouraging the development of the national economy and small and medium-sized enterprises. The practice in such large value public procurement procedures is that both foreign and local tenderers join together and submit a joint tender.

When a tender is submitted by a group of tenderers, their liability is joint and several. This is the additional security to the contracting authority with regard to the fulfilment of all contractual obligations by the tenderer.

In case a group of tenderers submit a joint tender, the contracting authority has no right to require a formal legal form of association in order to be allowed to submit a tender. This is because the parties are free to regulate mutual rights and obligations, within the meaning of the Law on Obligations, when associating in order to submit a joint tender. In practice, the formal legal form of association of tenderers submitting a joint tender is an agreement on business and technical cooperation, a consortium agreement, joint venture agreement, and the like.

Participation of sub-providers of work and/or subcontractors

Article 53

In the text of the call for competition and in tender documents, the contracting authority may foresee possible participation of subcontractors and/or sub-providers of work.

Tenderer shall make sure that its subcontractors and/or sub-providers of work, also meet the requirements from Article 45 above, as well as the contract between tenderer and subcontractors and/or sub-providers of work for a part of the works or services that subcontractor and/or sub-provider of works will execute, in case the value of sub-contract surpasses 10% of the contract value.

Tenderer is fully liable to the contracting authority for the execution of the contractual procurement, regardless of the number of subcontractors and/or sub-providers of work.

In the text of the call for competition and tender documents, the contracting authority may provide for the option that a tenderer may subcontract a share of its contract provided that they indicate such an option in the tender. (Article 55 paragraph 1)

In order for their tender to be evaluated as valid, in case when the subcontracted value exceeds 10% of the contract value, the tenderer is obliged to submit the evidence on the fulfilment of requirements set out in Article 45 of this Law for the subcontractors and/or sub-providers of work for a part of the works or services that subcontractor and/or sub-provider of works will execute. (Article 55 paragraph 2)

Therefore, with a view to protecting the contracting authority, the legislator has envisaged that the tenderer shall be fully liable to the contracting authority for the execution of the public contract regardless of the number of subcontractors and/or sub-providers of work. (Article 55 paragraph 3)

Tender validity period

Article 56

Tender validity period shall be determined by the contracting authority in tender documents. Tender validity period may not be shorter than the one stated in tender documents, and in no way may it be shorter than 60 days as of the day of opening the tenders.

Throughout tender validity period, the contracting authority may request from tenderer in writing to extend the validity period up to the specified time. In case tenderer should reject the request for the extension of tender validity period, or does not extend tender validity period, or does not extend tender guarantee, it will be considered that tenderer has rejected the contracting authority's request and changed his/her mind about the tender.

The tenderer, who accepts the extension of tender validity period and informs in writing the contracting authority, may not alter the tender and shall extend the tender guarantee.

The contracting authority is obliged to indicate in tender documents the period of tender validity, provided that this period may not be shorter than 60 days as of the day of opening of tenders (Article 56 paragraph 1).

In case the public procurement procedure is prolonged, e.g. due to the initiated procedure for the protection of the tenderer`s rights and public interest, submitted objection to the contracting authority and complaint to the Commission for the Control of Public Procurement Procedure, the need to commission an expert to provide findings and opinions during the public procurement procedure, addressing authorized bodies in the country and abroad and the like, the contracting authority may, if assessing that the public procurement procedure will last longer than the specified tender validity period, request from the tenderer to extend the tender validity period up to the specified time. The legislator has envisaged that in case the tenderer rejects the request to extend the tender validity period, or does not extend the tender validity period, or does not extend the tender guarantee period (if any), then that will be considered that the tenderer has rejected the contracting authority`s request and desisted from their tender. In that case, the contracting authority will activate the tender guarantee if its submission has been specified in the invitation to tender and tender documents. (Article 56 paragraph 2)

In case the tenderer agrees to the contracting authority`s request to extend the tender validity period, than they must inform the contracting authority in writing and extend the tender guarantee (if any) for the requested period provided that the tenderer may not alter the tender or any of the parts thereof. (Article 56 paragraph 3)

Tender price

Article 57

Tenderer shall submit tender with price, without taxes, in euros. Tender price shall be written in figures and letters.

Tender price shall be expressed for the whole subject matter of procurement or, when it is envisaged in tender documentation, for each individual lot.

Tender price shall include all expenses and discounts to the total tender price, without tax which is expressed separately after the price, unless otherwise stated in the tender documents.

A tenderer is obliged to submit a tender with the indicated price, in Euros, for the procurement of goods, services or work, to be written both in figures and letters. (Article 57 paragraph 1)

Tender price is expressed for the whole subject matter of the public procurement when goods, services or work are procured as such; in case the subject of public procurement is split in lots, the tenderer is obliged to indicate the price of each individual lot. (Article 57 paragraph 2)

The tenderer is obliged to submit the tender price in the manner indicated in tender documents, including all costs (contributions, customs duties, fees, and the like), excluding VAT that is expressed separately, next to the price. The provision set out in Article 4 paragraph 1 point 23 of the Law should be taken into account, prescribing that: “tender price discount is a method of pricing that the tenderer may offer only when the contract is awarded in lots, and the contracting authority cannot consider this method as an element for additional privilege”. Therefore, the tenderer may express the discounted price in their offer only when the subject matter of the public procurement is divided in lots. Any tender not indicating the price in the aforesaid manner shall be rejected as invalid. It was noticed that tenderers tend to overlook the obligation to express the price in absolute amount, and instead they submit a separate sheet supplementing their tender indicating that that is the price modification or offered discount. As the consequence, their tenders are rejected. This is the relapse from the earlier law, which means that the contracting authority is obliged to reject such a submitted tender due to being invalid. (Article 57 paragraph 3)

Price alteration

Article 58

Prices for public contracts with up to 12 months' contract execution period may not be increased, except in cases of market disturbances which could not have been foreseen, the consequence of which is price increase for at least 20%.

Price increase is possible for long-term public contracts with the execution period longer than 12 months.

Manner and conditions of price alteration must be determined in tender documents.

The legislator has envisaged that tender documents may indicate the conditions and manner for price alteration provided that the execution period of the public contract is longer than 12 months. To wit, if the contract execution period is up to 12 months, the price may not be increased, except in cases of market disturbances which could not have been foreseen and which have resulted in at least 20% increased prices of goods, services or works that are the subject matter of the public procurement contract. If the execution period is longer than

12 months, the contracting authority may increase the public contract price in exceptional cases and in accordance with the previously determined methodology and the manner for determining the conditions for price increase that are provided in tender documents. In that case, provisions set out in Article 23 paragraph 1 item 4 indent 1 of the Law shall be applied prescribing that tenderer is obliged to obtain approval of the Directorate of Procurement before concluding any annexes to the contract. (Article 58 paragraphs 1, 2 and 3)

Abnormally low price

Article 59

If the most favourable tender price is at least 30% lower than the average offered price of all acceptable tenders, the contracting authority may request thorough explanation of all its integral parts that are considered decisive, and especially assertions related to the economics of the construction method, the manufacturing process or chosen technical solutions, with regards to exceptionally favourable conditions available to the tenderer for the execution of the contract or relative to the originality of products or works proposed by tenderer.

In the case from paragraph 1 above, the contracting authority shall determine appropriate period for providing an answer, which period may not exceed 20 days as of the day of submitting the request.

Following the receipt of explanation, the contracting authority shall examine decisive integral elements of the tender from paragraph 1 above and reject the tender in case it evaluates such elements as unjustified.

Due to the existence of many such cases in practice, the legislator has also regulated the situation when a tenderer submits a tender containing abnormally low price. The legislator also provides the definition of the abnormally low price by defining it as the price that is 30% lower than the average offered price of all valid tenders. We think that it is wrong to indicate the actual percentage that will determine the abnormally low price. This is because that percentage depends on the subject matter and the value of public contract, as well as on market forces. It is not uncommon that tenderers intentionally offer abnormally low prices counting on the possibility to raise the price during the contract execution by concluding the contract annexes.

We also believe that, in case of abnormally low price offered, the legislator should have envisaged the obligation, instead of just the possibility, for the contracting authority and/or the Commission for the opening and evaluation of tenders to request a detailed explanation from the tenderer about all the integral parts of the tender that they consider decisive. It often happens in practice that abnormally low price expressed in tenders is due to the fact that those tenderers have not calculated in the price all taxes, customs duties, additional transportation or insurance charges, and the like.

In view of the EU, in the case *Impresa Lombardini SpA* (Joined Cases C-285/99 and C-286/99, *Impresa Lombardini SpA v ANAS* [2001] E.C.R. I-9233, para 55.), the European Court detailed the steps that the contracting authority should take for examining the tender that seems unusually low and it states that the contracting authority is obliged, firstly, to identify suspicious tenders, secondly to require in writing that tenderers provide details it considers necessary to enable the relevant tenderer to demonstrate its honesty, thirdly to assess validity of given explanations and fourthly to make a decision whether such tenders will be accepted or rejected.

Abnormally short period

Article 60

If the period for the execution of works or the provision of services from the best tender is considerably shorter than the period stated in the invitation to tender, or period stated in other tenders, the contracting authority may request thorough explanation of all its integral parts that it considers decisive.

In the case from paragraph 1 above, the contracting authority shall determine appropriate period for providing an answer, which period may not exceed 20 days as of the day of submitting the request.

Following the receipt of the explanation, the contracting authority shall examine decisive tender elements from paragraph 1 above and reject the tender in case it evaluates that they are not justified.

If during the public procurement procedure the Commission for the opening and evaluation of tenders determines that the period for the contract execution or the provision of services stated in the best tender is much shorter than that specified in the invitation to tender or those indicated in other tenders, the contracting authority is entitled to request from that tenderer to provide thorough explanations of all integral parts of the tender that it considers decisive. Here it should be taken into account that the contracting authority, in addition to adhering to the Law on Public Procurement, is obliged to apply the provisions of the Law on the Protection of Competition and/or other relevant regulations. This provision in the Law may be disputable with regard to its actual implementation in practice because contracting authorities tend to misuse it in determining and assessing the existence of abnormally short period; tenderers also misuse this provision by intentionally offering such periods for contract execution that they already know they cannot meet, yet do so in order to be awarded the contract. It is very important that the contracting authority specifies in the invitation to tender and tender documents that the contract execution period must be specified in calendar days or, in exceptional cases when that is justified due to the specific nature of the subject matter of the public procurement, in hours. Should such a

specified time period be omitted, we hereby advise all potential tenderers and parties having the legal interest in it, to initiate the proceedings for the protection of their rights during the call for competition by submitting the objection to the contracting authority or complaint to the Commission for Control of the Public Procurement Procedure in order to avoid any further misuse. To wit, it used to happen that the contracting authority rejected the tender due to abnormally short period although it was just one day shorter than time periods offered in other tenders, or awarded the contract to the tenderer offering the contract execution period expressed in hours (and which is not objectively unrealistic), while all other tenderers offered the period expressed in calendar days. Due to the aforesaid and in order to protect tenderers and public interest, the Public Procurement Directorate should, when verifying the content of invitations to tender, carefully consider the aforementioned circumstances, and tenderers should timely exercise their right to challenge such imprecisely defined conditions regarding the contract delivery deadline.

Tender withdrawal and alteration

Article 61

Following the expiry of time limit for the submission of tenders, tenderer may not withdraw nor alter his tender, and in case he still does that or if he does not sign the contract once his tender is selected, the contracting authority may activate the guarantee given with the tender.

After the expiry of the deadline for the submission of tenders specified in the invitation to tender and tender documents, a tenderer may not withdraw or alter their tender; in case they do so or refuse to sign the contract once their tender is selected, the contracting authority may activate the security instrument submitted with the tender (tender guarantee). (Article 61)

9) TIME LIMITS IN THE PROCEDURE OF AWARDING PUBLIC PROCUREMENT CONTRACTS

Time limit for the submission of tenders

Article 62

The contracting authority is obliged to determine, in the call for competition and tender documents, the time limit for the submission of tenders, the manner of submitting tenders, place and time of public opening of tenders.

The contracting authority must set the time limits which leave potential tenderers enough time for the preparation and submission of tenders.

Time limits for the submission of tenders shall be calculated as of the day of invitation to tender on the responsible administrative authority's official website, or as of the delivery of invitation to tender at the second stage of restricted procedure and in negotiated procedure without prior publication of contract notice.

Tenders arrived after the expiry of the time limit for the receipt of tenders, are to be rejected as untimely.

In case tender preparation requires the inspection of voluminous tender documents or detailed technical specifications, visit of location and so on, the contracting authority shall envisage the possibility of extension of time limits.

One of the most important moments in the public procurement procedure is the determining of the time limit for the submission of tenders. It is important that the contracting authority clearly specifies this deadline both in the invitation to tender and tender documents.

Determining the time limit for the submission of tenders implies specifying the date and hour until which tenders must be submitted. We recommend that this time limit should be determined immediately after the expiry of the deadline for the submission of tenders, that is, 30 to 60 minutes after the deadline. This is because that would prevent any potential misuse (unauthorized opening and disclosing of tenders` content before the public opening of tenders).

Cases in practice have shown that the lack of understanding of the public procurement procedure has led to untimely submission of tenders. To wit, it happens that tenderers submit their tenders by mail not knowing that the tender must reach the contracting authority by the specified date and hour, which is unlikely to happen if they post their tenders one day prior to the expiry of the specified deadline for the submission of tenders. This rule, according to which a tender not reaching the contracting authority by the specified date and hour shall be considered untimely, is certainly justified in the public procurement procedure. If it were allowed otherwise, then this would leave room for misuse because tenderers could learn about the content of other tenders that have already been opened and then post their tenders by antedating them and this would make the entire public procurement procedure senseless.

This Article also specifies as of which moment the time limit is calculated. Thus, the time limit for the submission of tenders is calculated as of the day of invitation to tender on the Public Procurement Directorate's official website, or as of the delivery of invitation to tender at the second stage of restricted procedure and in negotiated procedure without prior publication of the invitation to tender. Provisions of the Law on General Administrative Procedure are applied in the calculation of the aforesaid time limits. (Article 62 paragraph 3)

In order to set the right time limit for the submission of tenders and receive as many valid and competitive tenders as possible, the contracting authority must be very well informed about both local and international market trends. In addition, when determining the time limit, the contracting authority is obliged to take into account the time required for tenderers to collect the requested suitability evidence, do the market research, prepare tenders in the Montenegrin language (in case of foreign tenderers), to examine often complex tender documents, visit the location where the contract will be executed, contact potential subcontractors, and the like.

Time limit for the submission of tenders in open procedure

Article 63

Time limit for submitting tenders in open procedure may not be shorter than 26 days as of the day of the announcement on the responsible administrative authority's website.

Time limit for submitting tenders in open procedure may be shortened, for reasons of urgency, and it may not be shorter than 15 days as of the day of the public announcement on the responsible administrative authority's website.

The legislator prescribes that the time limit for the submission of tenders may not be shorter than 26 days as of the day of the announcement on the responsible administrative authority's website. (Article 63 paragraph 1)

However, the legislator has also envisaged the exception to the general time limit of 26 days which may be shortened for reasons of emergency, but may not be shorter than 15 days as of the day of the announcement on the responsible administrative authority's website. Here it should be taken into account that the contracting authority is the only one authorized to decide on the shortening of time limit for the submission of tenders, but such a decision could be the subject of the protection of rights of tenderers and public interest as tenderers would submit an objection to the contracting authority or a complaint to the Commission for Control of the Public Procurement Procedure, in which case the remedy would be to legally dispute this time limit and prove that its shortening represents the infringement of transparency of the public procurement procedure and unfair competition because tenderers were not able to prepare complete, valid and concrete offers in such a short time period. (Article 63 paragraph 2)

Time limits for submitting tenders in restricted procedure and negotiated procedure

Article 64

Time limit for submitting tenders for the participation in the first stage of restricted procedure and in negotiated procedure may not be shorter than 20 days as of the day of public announcement on the responsible administrative authority's website.

Time limit for submitting tenders referred to in paragraph 1 above may be shortened, for reasons of urgency, but it may not be shorter than 15 days as of the day of public announcement on the responsible administrative authority's website.

Time limit for submitting tenders for the participation in the second stage of restricted procedure may not be shorter than 26 days as of the day of sending invitation to tender to qualified tenderers.

The legislator prescribes that the time limit for submitting tenders for the participation in the first stage of restricted procedure and in negotiated procedure may not be shorter than 20 days as of the day of public announcement on the responsible administrative authority's website. (Article 64 paragraph 1)

However, the legislator has also envisaged the exception to this general time limit of 20 days which may be shortened for reasons of emergency, but may not be shorter than 15 days as of the day of public announcement on the website of the Public Procurement Directorate. Here it should be taken into account that the contracting authority is the only one authorized to decide on the shortening of time limit for the submission of tenders, but such a decision could be the subject of the protection of rights of tenderers and public interest as tenderers would submit an objection to the contracting authority or a complaint to the Commission for Control of the Public Procurement Procedure, in which case the remedy would be to legally dispute this time limit and prove that its shortening represents the infringement of transparency of the public procurement procedure and unfair competition because tenderers were not able to prepare the complete, valid and concrete offer in such a short time period. (Article 64 paragraph 2)

The legislator also strictly prescribes that the time limit for submitting tenders for the participation in the second stage of restricted procedure may not be shorter than 26 days as of the day of sending invitation to tender to qualified tenderers. (Article 64 paragraph 3)

10) CRITERIA FOR SELECTION

Setting criteria

Article 65

In the call for competition and tender documents, the contracting authority shall establish criteria, and sub-criteria if needed, for the selection of the best tender.

Criteria referred to in paragraph 1 above shall be clearly expressed in words and the maximum number of points that can be awarded on the basis of each individual criterion and sub-criterion.

Criteria and sub-criteria must not be discriminatory and they should be logically linked to the content of the public procurement.

When evaluating tenders, the contracting authority shall apply only those criteria contained within the call for competition and tender documents, in such a way as they are described and valued.

The contracting authority is obliged, considering the character and specific nature of public procurement in question, to establish the criteria and sub-criteria, if required, in the call for competition and tender documents, which will enable it to select the most suitable tender. Such a selected criteria and sub-criteria are clear indicators of the contracting authority's understanding of the market trends. Imprecisely determined criteria and their lack of objectivity often imply that the contracting authority will receive poor or invalid tenders or no tenders at all. Tenderers have the right, during the public procurement procedure, to dispute the selection of the criteria and sub-criteria by submitting objection to the contracting authority or complaint to the Commission for Control of the Public Procurement Procedure if they believe that the established sub-criteria are not related to the subject matter of the public procurement, that they were imprecisely described, that they are discriminatory, and so on. Nevertheless, the public procurement procedure is not intended to be the struggle between the contracting authority and tenderers over the proper specifying and implementation of the criteria, but for the selection of the best tender. Therefore, it is of utmost importance that the contracting authority gives serious consideration to the selection of the criteria and their objective purpose. Thus, the contracting authority may not impose any impossible requests on tenderers such as abnormally short periods for delivery, payment dates that would make tenderers incur losses, and the like. (Article 65 paragraph 1)

All criteria and sub-criteria must be described in a clear and comprehensible manner so that every tenderer could understand them in the same way, and they must also understand the modus operandi of the Commission for the opening and evaluation of tenders in comparing and evaluating the submitted tenders.

The criteria and sub-criteria must be clearly expressed in words and the maximum number of points that can be awarded on the basis of each individual criterion and sub-criterion, provided that the total sum of points for the individual criterion may not exceed 100. (Article 65 paragraph 2)

The contracting authority is obliged to ensure the consistent implementation of the principles of equality and competition of tenderers in the manner that the established criteria and sub-criteria must not be discriminatory and must be logically linked to the content of the public procurement. (Article 65 paragraph 3)

The legislator has envisaged that, when evaluating tenders, the contracting authority is obliged to apply only those criteria contained in the call for competition and tender documents, in such a way as they are described in those documents. However, it often happens in practice that the contracting authority realizes that a criterion is wrongly determined, that it has been assigned abnormally high or low number of points, thus preventing the evaluation of those tender elements for which it was initially intended for, and the like, but this happens not before the evaluation of tenders. At this stage of public procurement procedure it is not allowed to alter any criterion or sub-criterion or the methodology of work of the Commission for the opening and evaluation of tenders as that would represent the infringement of the principle of competition and equality of tenderers.

Types of criteria

Article 66

Criteria for evaluating tenders are:

- 1) most economically advantageous tender or**
- 2) the lowest price offered.**

Most economically advantageous tender is the tender based upon various sub-criteria, depending on the subject of public contract, especially the following:

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

In the invitation to tender and the tender documents, the 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.

The 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.

The selection of the best tender by applying the criterion of the lowest price is based upon the lowest price as the sole criterion, provided all the conditions stated in tender documents have been met.

The contracting authority is authorized to select the subject matter of the public procurement and the criteria. However, the contracting authority's selection of the criteria is limited, that is, it is not given the freedom of choice but must select only those criteria and sub-criteria specified in the Law.

The contracting authority is obliged to establish the criteria for the selection of the best tender indicating them in the call for competition and tender documents. The legislator has envisaged, in line with Directive 2004/48/EC, that the contracting authority may apply only two award criteria:

- the most economically advantageous tender or
- the lowest price.

The contracting authority is obliged to carefully select and describe the criterion for the selection of the best tender, but what is the most important and most demanding is their ranking by the degree of importance. The selection of the rank of importance represents the key stage in applying the principle of cost-effectiveness of the very public procurement procedure.

Depending on the specific nature of the subject matter of public procurement, the criterion "the most economically advantageous tender" is based on the following sub-criteria, in particular:

- 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.(Article 66 paragraph 2)

The application of the criterion "the most economically advantageous tender" must be explained with regard to the selection of this particular criterion and a logical link of this criterion to the subject matter of public procurement. Therefore, the criterion and sub-criteria for the selection of the best tender must be linked to the subject matter of public contract, and not to the tenderer. This is the main postulate of the most economically advantageous tender. If otherwise being the

case (that the selection of criteria is linked to the tenderer), then certain tenderers would always be preferred by the contracting authorities they had cooperated with in the past, which would bring other tenderers into an unequal and discriminatory position. The connection of the criteria and the subject of the public contract are considered from the aspect of a direct link to the subject matter and the importance of its realization.

In the invitation to tender and tender document, the contracting authority specifies the value of points for every individual sub-criterion to be used in the selection of the best tender, so that the sum of all points equals 100. The contracting authority performs the selection among the submitted tenders by applying the most economically advantageous tender award criterion and ranking those tenders in line with the established sub-criteria and points established for those sub-criteria.

The criteria and sub-criteria must be described in a clear and comprehensible manner so that every tenderer could understand them in the same way, and they must also understand the modus operandi of the Commission for the opening and evaluation of tenders.

When selecting the sub-criteria, the contracting authority is obliged to establish those sub-criteria that are relevant for the subject matter of the public procurement and objectively confidential.

The contracting authority must clearly specify and explain in details in its tender documents the link between the subject of the public procurement and the established sub-criteria for the selection of the best tender, as well as the elements taken into consideration when establishing those sub-criteria.

The contracting authority uses the following sub-criteria in the procurement of works, in particular:

- offered price;
- aesthetic and functional characteristics;
- date of completion of works;
- running costs;
- programme and degree of environment protection;
- cost-effectiveness;
- post-warranty maintenance;

The contracting authority uses the following sub-criteria in the procurement of goods, in particular:

- 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;
- obligations related to spare parts.

The contracting authority uses the following sub-criteria in the procurement of services, in particular:

- quality;
- aesthetic and functional characteristics;
- date of completion of services;
- cost-effectiveness;
- technical merits;
- offered price.

The contracting authority may, exceptionally, establish other sub-criteria under the most economically advantageous tender award criterion provided that it gives the explanation for the reasons for their introduction, other than those set out in Article 66 of this Law, and to underline the link between the additional sub-criterion and the subject matter of the public contract, as well as the purpose of its introduction that will be the subject of a separate decision.

The legislator's assessment, as highlighted in Directive 2004/18/EC, is that the stated number of sub-criteria under the award criterion "the most economically advantageous tender" is sufficient for an objective selection of the best tender. This means that an additional criterion may be introduced only in exceptional and justifiable cases when the contracting authority must justify the need for its introduction in a separate decision wherein it will express the benefit from this introduction. Otherwise, when the contracting authority has no economic benefit from such a sub-criterion, its introduction and applying would be senseless. This is because the range of sub-criteria for the procurement of goods, services and works is wide, and practice has shown that in most cases the additional sub-criterion is introduced with a view to favouring one tenderer and abuse the legality of the public procurement procedure.

It often happens that the contracting authority attempts to conclude the contract with the tenderer to whom it has awarded contracts in the past because the contracting authority knows that tenderer and is pleased with their previous cooperation, or because it considers that that tenderer is generally known as being competent. In such cases, the contracting authorities attempt to evaluate the tenderer's references whether by introducing them as the additional sub-criterion or by evaluating those references with regard to their quality - by evaluating the quality of the tenderer and not the quality of the product offered by that tenderer. Thus the contracting authorities are trying to evaluate the already established formal and informal relations, but this is not allowed. This is exactly the reason why the legislator does not allow the selection of references as one of the sub-criteria for the selection of the best tender, as it would restrict market

competition, and on the developing Montenegrin market, such a behaviour of the contracting authorities is rather detrimental because it could result in a reduced number of tenderers who want to participate in public competitions. The introduction of references for an additional sub-criterion would favour certain tenderers and formalize the privileged status that such tenderers enjoy with the contracting authorities.

The number of points for each sub-criterion is determined in accordance with their importance for the subject matter of the public contract.

The contracting authority is obliged to ensure the adequate proportion between the number of points assigned to individual sub-criteria by taking into consideration the importance and the link of the selected sub-criterion to the subject-matter of the public contract. (Articles 66 paragraphs 2 and 3)

Exceptionally, offered price, as the selected sub-criterion for the procurement of goods, is determined by the highest number of points, whereas the remaining number of points is divided among other sub-criteria in a descending order in accordance with their importance for the selection of the best tender.

When the award criterion is “the lowest price”, the contracting authority selects the best tender by examining, evaluating and comparing the submitted tenders. Offered price is regularly used in practice, whether as the only criterion or as a sub-criterion under the “most economically advantageous tender” award criterion.

When the evaluation basis for the selection of the best tender is offered price, depending on the subject of procurement, offered prices by tenderers submitting valid tenders are taken into consideration.

The maximum number of points for this criterion is assigned to the tenderer who has offered the lowest price, whereas points to other tenders are assigned proportionally, by applying the following linear equation:

$$\text{number of points} = \frac{\text{lowest price offered} \times \text{maximum points}}{\text{offered price}}$$

where the lowest price receives the maximum points

or $S = C_{\min} \times X/C$ where

S = number of points

C = offered price

C min = lowest price offered

X = maximum points (Article 66 paragraph 4).

11) PUBLIC OPENING OF TENDERS

Public opening of tenders

Article 67

Tenders shall be opened at the public opening of tenders, immediately after the expiry of the ultimate time limit for the submission of tenders, and at the latest 1 hour after the expiry of such time limit.

Tenders shall be opened at the open meeting of the Commission for the opening and evaluation of tenders, which is held at the place and time stated in the text of the invitation to tender and in tender documents.

The opening may be attended by all submitting entities.

The Commission for the opening and evaluation of tenders previously establishes the number of submitted tenders according to the order of reception, examines the authorities of tenderers' representatives, and determines amendments of tenders and their timeliness and completeness. The tenderer who withdraws his tender is not entitled to attend the procedure of public opening of tenders.

In the procedure of public opening of tenders for services, in case the tender documents requires tender in separate envelopes, the Commission for the opening and evaluation of tenders shall first of all open the envelope with evidence on suitability of tenderer, and then the technical and financial proposal.

The Commission for the opening and evaluation of tenders shall keep minutes of the tender opening procedure, indicating the following data:

- 1) number which tender has been recorded under;**
- 2) subject-matter of procurement;**
- 3) tenderer`s name and address;**
- 4) overview of submitted evidence related to the suitability of tenderers;**
- 5) offered price for the subject-matter of procurement, as well as for the individual lots;**
- 6) objections, proposals and suggestions of tenderers' authorised representatives.**

More detailed contents, form and format of the minutes referred to in paragraph 6 above shall be determined by the responsible administrative authority by issuing a special form.

The minutes must be signed by members of the Commission for the opening and evaluation of tenders and the present authorized representatives of tenderers.

If any of the tenderer`s authorized representatives refuse to sign the minutes, the Commission for the opening and evaluation of tenders shall jointly state the reasons of the refusal in the minutes.

The contracting authority shall ensure, during the procedure, the keeping of tenderer`s business secret.

The contracting authority shall send to tenderers the minutes of opening tenders within 3 days as of the day of termination of the procedure for opening tenders.

With a view to ensuring the principle of being public and transparent, the legislator has envisaged that tenders are opened at the public opening of tenders, immediately after the expiry of the deadline for the submission of tenders, and at the latest 1 hour after the expiry of such deadline. (Article 67 paragraph 1)

The opening of tenders is performed by the Commission for the opening and evaluation of tenders at the open meeting, at the place and time stated in the invitation to tender and tender documents. (Article 67 paragraph 2)

The opening may be attended by authorized representatives of tenderers who enclose the relevant letter of proxy. The Law does not envisage the general public presence at the opening of tenders in order to ensure more efficient protection and exercising of rights of the parties involved – both the contracting authority and tenderers. (Article 67 paragraph 3)

The Commission for the opening and evaluation of tenders is obliged to ensure the legality of the very procedure of tender opening and evaluation by keeping minutes of the tender opening procedure indicating the attendance of authorized representatives of tenderers as per submitted letters of proxy, then the number of the received tenders and their timeliness. The Commission is obliged to publicly open the tenders, as per the order of their arrival, and to read out loud all elements contained in the tenders, especially the part referring to the evidence on suitability and commercial conditions, and all that needs to be minuted. The Commission is also obliged to clearly mark every page of the arrived tenders by signatures of all members of the Commission, affixing a stamp, and the like. The Commission must also minute all remarks, suggestions, and comments made by the authorized representatives of tenderers (Article 67 paragraph 4).

In the procedure of public opening of tenders for service contract, in case the tender documents require tender in separate envelopes, the Commission first opens the envelope with evidence on suitability of the tenderer, and then the technical and financial proposal. (Article 67 paragraph 5)

With a view to ensuring accuracy and integrity of the Minutes on the public opening of tenders, as well as the rights of tenderers to determine whether the minutes contain all their remarks, it is envisaged that the Minutes are to be signed by all members of the Commission and the present authorized representatives of tenderers. (Article 67 paragraph 8)

If any of the tenderers` authorized representatives refuse to sign the minutes, the Commission for the opening and evaluation of tenders is obliged to state the reasons for the refusal in the minutes. (Article 67 paragraph 9)

During the procedure of public opening of tenders, the contracting authority is obliged to ensure the keeping of tenderer`s business secret by not reading out

loud the parts of the tender marked as confidential (business secret), thus adhering to the regulations governing the confidentiality and treatment of documents labelled as confidential. More detailed provisions on the protection of information and documents and the procedure records are set out in Article 10 of this Law. (Article 67 paragraph 10)

The contracting authority is obliged to send to tenderers the minutes of the opening of tenders within 3 days as of the day of termination of the procedure for opening tenders. As of that day, the time period starts for initiating the procedure for the protection of tenderers` rights and public interest during whereby tenderers may submit objection to the contracting authority and/or complaints to the Commission for Control of the Public Procurement Procedure. The contracting authority and/or the Commission for the opening and evaluation of tenders should wait until the expiry of the deadline for the submission of objections before they start examining, evaluating and comparing the tenders, in order to avoid the situation of evaluating and awarding contract before tenderers could have exercised their right to submit objections to the tender opening procedure. This is the leak in the Law, and it will be necessary to prescribe this obligation as an imperative in order to ensure the legality of the public procurement procedure. (Article 67 paragraph 11)

Valid tender

Article 68

Valid tender is the one which fulfils all conditions required by the text of the call for competition and tender documentation, as well as the one which contains slight deviation or shortcomings which are not of decisive influence on the tender.

Slight deviations and shortcomings, in the meaning of paragraph 1 above, are considered the following:

- **differences in the use of ciphers,**
- **differences in standards,**
- **failure to include minor items,**
- **established arithmetical errors,**
- **sub-contracts which are unclear or controversial,**
- **different construction methods,**
- **difference in the final date of delivery,**
- **difference in delivery dynamics,**
- **completion time, when it is not of crucial importance,**
- **discord with some local technical regulations that have not been envisaged as conditions in the invitation,**
- **any other condition of minor influence on tender.**

In case slight deviations are found out, tenderer will be requested to submit a written explanation. In case tenderer does not submit written explanation or does not accept the correction of the slight deviation, in

case of the existence of calculation errors up to the amount of 3% of the value of the tender, such a tender shall be rejected. The tenderer shall be informed in writing about the rejection of the tender without delay.

During the procedure of examination and evaluation of tenders, the Commission for the opening and evaluation of tenders determines the tenders` validity based on their content and the Minutes on the public opening of tenders. A tender that fulfils all conditions required by the text of the call for competition and tender documentation is considered valid. The Commission will also designate as valid a tender that contains slight deviation or shortcomings which are not of decisive influence on the tender. In the evaluation of validity of a tender, it is the sole authority of the Commission for the opening and evaluation of tenders, for which it is accountable to the contracting authority and the professional public, to estimate whether the tender meets all the requirements stated in the invitation to tender and tender documents or whether the shortcomings contained in the tender could be qualified as slight deviation or shortcomings which are not of decisive influence on the tender. Thus, the Commission for the opening and evaluation of tenders has the right to require the tenderer to retain an expert or professional services if it estimates that the expert evaluation and opinion should be acquired during the procedure of evaluating tender validity. However, the evaluation of tender validity in this case is also the sole authority of the Commission for the opening and evaluation of tenders. (Article 68 paragraph 1)

The legislator has envisaged that the deviation and shortcomings, within the meaning of this Article, are, in particular, the following:

- differences in the use of ciphers,
- differences in standards,
- failure to include minor items,
- established arithmetical errors,
- sub-contracts which are unclear or controversial,
- different construction methods,
- difference in the final date of delivery,
- difference in delivery dynamics,
- completion time, when it is not of crucial importance,
- discord with some local technical regulations that have not been envisaged as conditions in the invitation and
- any other condition of minor influence on tender. (Article 68 paragraph 2)

In case the Commission for the opening and evaluation of tenders identifies that a tender contains slight deviation and shortcomings which are not of decisive influence on the tender, it will request from the tenderer in writing to submit a written explanation for the identified slight deviation or shortcomings. (Article 68 paragraph 3)

The tenderer is obliged to submit the requested explanation within the designated time period. In case the tenderer does not submit the written

explanation or does not accept the correction of the slight deviation, in case of the existence of calculation errors up to the amount of 3% of the value of the tender, the contracting authority shall, as advised by the Commission for the opening and evaluation of tenders, reject such a tender by concluding that it is invalid. The conclusion on the tender rejection and the pertinent reasons for its rejection shall be submitted to the tenderer immediately. The tenderer has the right to initiate the procedure for the protection of their rights by submitting an objection to the contracting authority and/or a complaint to the Commission for Control of the Public Procurement Procedure. (Article 68 paragraph 4)

Invalid tender

Article 69

A tender is invalid:

- **when it is an untimely one;**
- **when it is not in harmony with the conditions required in the text of the invitation to competition and in tender documentation;**
- **when it is incomplete or contains deviations or inadmissible parts which are not in harmony with the text of the invitation to competition and with tender documentation;**
- **when it does not contain tender guarantee defined in the text of the public invitation;**
- **when it does not contain evidence on suitability or conditions for qualification envisaged by the law and the text of the invitation to tender;**
- **when a tenderer has not taken over properly or paid for tender documentation in accordance with the conditions from tender documentation;**
- **when tenderers have not submitted the evidence on joint participation and appointed joint tender bearer;**
- **when tenderer is not invited to submit a tender at a competition by invitation;**
- **when it does not clearly state total price in its absolute amount;**
- **when tenderer refuses to give requested explanation;**
- **when it contains arithmetical error with the value greater than 3%;**
- **when a tenderer does not accept the correction of the arithmetical error in the tender in the manner established in the Law;**
- **when a tenderer has submitted two or more tenders in which he/she is tenderer or participant in a joint tender;**
- **when a tenderer has not given a satisfactory answer to the request of the contracting authority with regards to the low tender price or abnormally short period.**

Tenders which contain the shortcomings referred to in paragraph 1 above shall be rejected by stating reasons for their rejection.

This Article clearly specifies which tender the Commission for the opening and evaluation of tenders shall designate as invalid during the procedure of examination and evaluation of tenders. A tender is invalid:

- when it is an untimely one;
- when it is not in harmony with the conditions required in the text of the invitation to competition and in tender documentation;
- when it is incomplete or contains deviations or inadmissible parts which are not in harmony with the text of the invitation to competition and with tender documentation;
- when it does not contain tender guarantee defined in the text of the public invitation;
- when it does not contain evidence on suitability or conditions for qualification envisaged by the law and the text of the invitation to tender;
- when a tenderer has not taken over properly or paid for tender documentation in accordance with the conditions from tender documentation;
- when tenderers have not submitted the evidence on joint participation and appointed joint tender bearer;
- when tenderer is not invited to submit a tender at a competition by invitation;
- when it does not clearly state total price in its absolute amount;
- when tenderer refuses to give requested explanation;
- when it contains arithmetical error with the value greater than 3%;
- when a tenderer does not accept the correction of the arithmetical error in the tender in the manner established in the Law;
- when a tenderer has submitted two or more tenders in which he/she is tenderer or participant in a joint tender;
- when a tenderer has not given a satisfactory answer to the request of the contracting authority with regards to the low tender price or abnormally short period. (Article 69 paragraph 1)

The contracting authority shall, as advised by the Commission for the opening and evaluation of tenders, reject such a tender by concluding that it is invalid. The conclusion on the tender rejection and the pertinent reasons for its rejection shall be submitted to the tenderer immediately. The tenderer has the right to initiate the procedure for the protection of their rights by submitting an objection to the contracting authority and/or a complaint to the Commission for Control of the Public Procurement Procedure (Article 69 paragraph 2).

12) TENDER EVALUATION

Inspection, evaluation and comparison of tenders

Article 70

Inspection, evaluation and comparison of tenders shall be carried out by the Commission for the opening and evaluation of tenders at a closed session.

The methodology for expressing criteria through appropriate number of points, as well as the manner and procedure of evaluating and comparing tenders shall be prescribed by the Ministry of Finance.

Tender evaluation is carried out in such a way that the content of the tender is examined, in accordance with the documentation and conditions for competition.

The Commission for the opening and evaluation of tenders can be assisted in the stated procedure by special professional services and/or experts for certain areas that are the subject matter of public procurement and who are commissioned by the contracting authority, upon the suggestion of the Commission for the opening and evaluation of tenders.

The procedure of inspection, evaluation and comparison of tenders, until the notice of selection of the most favourable tender is confidential.

Tenders, minutes and data relative to the inspection, explanation, evaluation, comparison and selection must be made available to tenderers from the moment of notice on the selection of the most favourable tender to the expiry of period for making a complaint.

The Commission for the opening and evaluation of tenders is obliged to keep the minutes on the inspection, evaluation and comparison of tenders which contains:

- competition number,
- procurement subject matter,
- name and address of tenderers who submitted their tenders according to the order from the minute on public opening of tenders,
- analytical survey of requested and submitted evidence relative to tenderers' ability and evaluation of ability and admissibility of tender,
- tender price for subject matter of the contract, i.e. for lots,
- criteria and number of points awarded to each tenderer for each established criterion and sub-criterion with the explanation for awarded number of points,
- comparative survey of the evaluation and analysis of tenders
- opinion of a professional service or expert, in case the Commission for the opening and evaluation of tenders used their services,
- explanation on the selection of the most favourable tender,
- explanation if all tenders are rejected,
- explanation of the decision on annulment of public competition,
- list of supplements to the minutes and stated supplements,
- date of the minutes and signatures of all Commission members.

On the basis of these minutes evidencing the inspection, evaluation and comparison of tenders, the Commission for the opening and evaluation of tenders shall compile a special report on public procurement procedure which shall be submitted to a responsible person for making a decision on the selection of the most favourable tender.

More detailed contents, form and format of the minutes referred to in paragraph 7 above and the report referred to in paragraph 8 above shall be determined by the responsible administrative authority by issuing a special form.

Inspection (examination), evaluation and comparison of tenders are carried out by the Commission for the opening and evaluation of tenders. With a view to ensuring the confidentiality of tenders and the procedure of inspection, evaluation and comparison of tenders, the inspection, evaluation and comparison of tenders are carried out at a closed session. (Article 70 paragraph 1).

The legislator has prescribed the methodology for expressing the criteria through appropriate number of points, as well as the manner and procedure of evaluating and comparing tenders that is to be prescribed by the Ministry of Finance. The criteria for the selection of the best tender, as well as their objectivity and the obligation of the existence of a link to the subject matter of the public procurement have been explained in previous comments. Here it should be underlined that the evaluation procedure is often the subject of objections made to the contracting authority and complaints submitted to the Commission for Control of the Public Procurement Procedure. The Commission for the opening and evaluation of tenders is obliged to carefully examine, evaluate and compare tenders, whereby consistently adhering to the prescribed provisions regarding the content of the Minutes on inspection, evaluation and comparison of tenders and to separately indicate individual grades (marks) given by members of the Commission responsible for this procedure. It would be preferable if in complex public procurement procedures of large value the Commission for the opening and evaluation of tenders would also prepare minutes on the discussions and voting that would clearly indicate the marks given by every individual member of the Commission and refrained opinions, if any.

The Commission for the opening and evaluation of tenders starts with the evaluation of tenders by verifying the content of tenders, in accordance with the requirements and conditions stated in the invitation to tender and tender documents. (Article 70 paragraph 3)

Depending on the specific nature of the subject matter of public procurement, the Commission for the opening and evaluation of tenders has the right, when it considers that it has no professional knowledge in certain administration areas related to the public procurement procedure, to retain special professional services or experts for certain areas which are the subjects of public procurement. In addition, in some complex public procurement procedures, the contracting authority already knows that it will commission professional services or experts whether when preparing tender documents or in the assessment of validity and evaluation of tenders. Therefore, it is desirable if the contracting authority indicates this in the invitation to tender and tender documents so that all potential tenderers will know that their tenders will be analysed by independent

experts and accredited institutions specialised in the subject of public procurement in question. (Article 70 paragraph 4)

In order to ensure the principle of cost-effectiveness and efficiency, as well as confidentiality of the public procurement procedure, the Law envisages that the procedure of inspection, evaluation and comparison of tenders shall be confidential until the notice of selection of the most favourable tender. This means that tenderers and other interested parties have no right at this stage of the public procurement procedure to have an insight into the documents related to the concrete public contract until the passing of a decision on the selection of the best tender or a decision on the annulment of the public procurement procedure.

The legislator restricts the right of free access to information and data related to the public procurement procedure by stipulating that tenders, minutes and data relative to the inspection, explanation, evaluation, comparison and selection are made available to tenderers only as of the moment of notice on the selection of the most favourable tender until the expiry of the period for submitting a complaint.

The Commission for the opening and evaluation of tenders is authorized and obliged to perform its activities within the time limits set out in the act of establishment and to make proposals by simple majority vote.

The Commission for the opening and evaluation of tenders first examines all received tenders in order to determine:

- a) whether they meet all the requirements related to suitability which have been stated in the invitation to tender and tender documents,
- b) whether they are duly signed,
- c) whether they are supplied with the proper guarantee, if so requested in the invitation to tender and tender guarantee, and
- d) if the tender is invalid or whether the tender designated as being valid contains shortcomings set out in Article 68 paragraph 2 and Article 69 of the Law on Public Procurement.

After the public opening of tenders, the contracting authority may not require or allow:

- a) price alteration;
- b) alteration of tender contents or
- c) any other amendments that could result in invalid tender becoming valid.

Valid tenders are reviewed by the contracting authority for identifying the existence of arithmetical errors.

The identified arithmetical errors shall be corrected by the contracting authority in the following manner:

- a) when there is discrepancy between the amount stated in figures and letters, the amount expressed in letters shall be decisive;
- b) when a tenderer omits certain minor items in the tender, the omissions are quantitatively determined in monetary terms by comparing them with other tenders and average values of the missing item. The value of the missing item is determined and designated as the base used solely for the purpose of comparison. Quantitatively determined value of the missing item is added to the offered price;
- c) when there is discrepancy between the unit price and total amount obtained by multiplying the unit price by the quantity, the stated unit price shall be decisive, unless, if so deemed by the contracting authority, there is a decimal separator error in the unit price, in which case the total amount stated shall be decisive, and the unit price shall be corrected.

The amount stated in the tender shall be corrected by the contracting authority in accordance with the aforesaid procedure for the correction of errors and fulfilment of tenderer`s requests, and it shall be binding for the tenderer. If the tenderer does not accept the corrected amount, the tender shall be rejected.

Valid tenders shall be evaluated and compared, in accordance with the established criteria and sub-criteria indicated in the invitation to tender and tender documents.

Every member of the Commission for the opening and evaluation of tenders shall, in particular:

- a) perform individual inspection, evaluation and comparison of tenders based on the information provided in tenders and the contracting authority's requests stated in the invitation to tender and tender documents,
- b) give written explanation for the performed inspection, evaluation and comparison and the awarded points for each criterion and/or sub-criterion indicated in the invitation to tender and tender documents,
- c) submit to the chairman of the Commission for the opening and evaluation of tenders a filled in form on the minutes on the tender evaluation and filled in forms 1 and 2.

After the performed individual evaluation, the chairman of the Commission for the opening and evaluation of tenders shall, in the presence of the Commission members:

- a) determine the average, based on the obtained average results from every member,
- b) determine the ranking of valid tenders at a descending order, and
- c) make minutes by filling in the public procurement form on the inspection, evaluation and comparison of tenders and separately indicate the reasons for the Commission's decision and stance taken by every individual member of the Commission for the opening and evaluation of tenders, with the separate opinions. (Article 70 paragraphs 5 and 6)

On the basis of minutes on the inspection, evaluation and comparison of tenders, the Commission for the opening and evaluation of tenders compiles a special report on the public procurement procedure which it submits to a responsible person for making a decision on the selection of the most favourable tender or a decision on the cancellation of the public procurement procedure. (Article 69 paragraph 8)

Tender explanation

Article 71

The Commission for the opening and evaluation of tenders may request during the procedure of inspection, evaluation and comparison of tenders, and tenderers are obliged to give, necessary interpretations for the purpose of explaining tenders or eliminating doubts related to the validity of the same.

During the procedure of inspection, evaluation and comparison of tenders, the Commission for the opening and evaluation of tenders may request from tenderers to provide additional explanations in writing necessary to clarify the tender and remove any doubts in tender validity. Tenderers must provide such explanations and interpretations after the received request from the Commission for the opening and evaluation of tenders. In case a tenderer does not supply the requested explanation within the time period determined by the contracting authority or if the Commission for the opening and evaluation of tenders estimates that the provided explanations are insufficient, such tender shall be rejected as being invalid. (Article 71)

Public competition annulment cases

Article 72

The contracting authority annuls a public procurement procedure in case:

- 1) when no acceptable tender has been submitted,**
- 2) when, before the expiry of the time limit for submitting tenders, it is deemed necessary to change substantially competition documentation,**
- 3) when the need ceases for public procurement subject matter and when public procurement is not going to be repeated during the budget year,**
- 4) when the amount of all offered prices exceeds the one of planned and allocated resources for subject public procurement.**

The contracting authority is obliged, in cases of annulment referred to in items 2 and 3 of paragraph 1 above, to reimburse expenses tenderers incurred by tender submittal.

The contracting authority is obliged to give a written rationale behind its decision to annul public competition, by especially stating the reasons for cancellation, and to submit it to tenderers.

The Law strictly stipulates the cases of annulment of the public procurement procedure. Thus, it is clearly specified that the contracting authority may annul the public procurement procedure only in case:

- when no acceptable tender has been submitted,
- when, before the expiry of the time limit for submitting tenders, it is deemed necessary to change substantially competition documentation,
- when the need ceases for public procurement subject matter and when public procurement is not going to be repeated during the budget year,
- when the amount of all offered prices exceeds the one of planned and allocated resources for public procurement in question (Article 72 paragraph 1).

The contracting authority was not given the power to cancel the public procurement procedure by itself in any case other than those listed above. Therefore, it has been assessed that this provision in the law should be mandatory (the same as in Croatia, it should be specified that the contracting authority in the aforesaid cases must, but cannot, cancel the public procurement procedure).

The issue of validity of tenders which amount exceeds the estimated procurement value set out in the Decision on the initiation and enforcement of the public procurement procedure, invitation to tender and tender documents is often disputed. The Commission for Control of the Public Procurement Procedure has taken the principle stance that it is the sole authority of the contracting authority during the procedure of examination, evaluation and comparison of tenders to estimate the validity of a tender which amount exceeds the amount of allocated funds for the procurement in question, in accordance with its needs. Therefore, the aforesaid clearly indicates that the contracting authority is not obliged to reject a tender which amount exceeds the amount of planned and allocated funds for the public procurement or to cancel the public procurement procedure, but is to be treated as the sole authority of the contracting authority, depending on its needs and assessments, to decide whether it will accept such a tender as valid. To wit, the contracting authority can verify the proposal of the Commission for the opening and evaluation of tenders on the determining of a tender which amount exceeds the amount of planned and allocated funds for the public procurement in question by passing a decision on the selection of the best tender and a decision on the contract award, thus accepting the Commission's selection and committing itself to providing the lacking amount of financial resources in order to provide for the implementation of the public contract and fulfilment of contractual obligations.

If the contracting authority cancels the public procurement procedure due to the aforesaid reasons, it is obliged to reimburse expenses that tenderers incurred by tender submittal (refund for the purchase of tender documents, expenses for location visits, arrival to the pre-tendering session, if envisaged in the invitation to tender and if held, and other similar costs and expenses). (Article 72 paragraph 2)

The contracting authority is obliged to give a written rationale behind its decision to annul public competition, by especially stating the reasons for cancellation. In addition, the contracting authority is obliged to post the decision on the website of the Public Procurement Directorate and to submit it to tenderers so that they could, if they consider that the aforesaid decision represents the infringement of their rights and the pertinent interests, initiate the procedure for the protection of their rights by submitting an objection to the contracting authority and/or a complaint to the Commission for Control of the Public Procurement Procedure. (Article 71 paragraph 3)

13) DECISION MAKING IN PUBLIC PROCUREMENT PROCEDURE

Decision on the selection of the best tender

Article 73

Public procurement procedure ends in passing the decision on the selection of the best tender, provided the contracting authority does not previously annul the public procurement procedure, in cases envisaged by this law.

The decision referred to in paragraph 1 above is passed by the head of the body, or a competent body of the contracting authority.

The decision on the selection of the best tender is passed within the time limit determined in the invitation for tender submittal, on the basis of the report referred to in Article 70 above.

The decision on the selection of the most favourable tender must have a rationale and in particular contain data referred to in Article 70 above.

The contracting authority is obliged to submit the decision from paragraph 1 above to all tenderers within 5 days as of the day of making the decision.

In case the decision from paragraph 1 above is not passed within the stated time limit, the contracting authority is responsible for damages incurred by the tenderers.

If the contracting authority does not cancel the public procurement procedure due to the existence of cases set out in Article 72 of the Law, the public procurement procedure will end with the passing of a decision on the selection of the best tender after the implemented procedure of inspection, evaluation and comparison

of tenders and the submission of the Report on the public procurement procedure. (Article 73 paragraph 1)

The decision on the selection of the best tender is passed by the head of the body, or a competent body of the contracting authority upon the proposal of the Commission for the opening and evaluation of tenders stated in the Report on the public procurement procedure. (Article 73 paragraph 2)

In order to be able to exercise their rights, it is very important that tenderers carefully monitor the deadline for the passing of a decision on the selection of the best tender stated in the invitation to tender. To wit, sometimes the contracting authority misuses the public procurement procedure in the manner that they sometimes even do not pass a decision on the selection of the best tender. Tenderers then have the right to initiate the procedure for the protection of their rights by applying the silence of administration institute. Namely, in case the contracting authority does not pass a decision on the selection of the best tender within the period it designated in the invitation to tender, tenderers have the right to initiate the procedure for the protection for their rights eight days following the expiry of the designated date by submitting objections to the contracting authority and/or complaints to the Commission for Control of the Public. In addition, it happens that the contracting authority, due to objective reasons, is not able to pass a decision on the selection of the best tender within the period it designated in the invitation to tender. Considering that this is instructive period determined by the contracting authority itself, and not the mandatory period set out in the Law, the contracting authority has the right to pass a decision on the extension of the time period for the selection of the best tender and inform thereof all tenderers who submitted tenders in the public procurement procedure. (Article 73 paragraphs 3 and 4)

A decision on the selection of the best tender is posted on the website of the Public Procurement Directorate and submitted to all tenderers within five days as of the day of making the decision so that tenderers could, if they consider that the decision has infringed their rights and the pertinent interests, initiate the procedure for the protection of their rights by submitting an objection to the contracting authority and/or a complaint to the Commission for Control of the Public Procurement Procedure. (Article 73 paragraph 5)

The Law also envisages that if the contracting authority does not pass the decision on the selection of the best tender (Decision on Contract Award) within the stated time limit, it shall be responsible for damages incurred by the tenderers. (Article 73 paragraph 6)

Public contract

Article 74

The contracting authority concludes a public contract with the tenderer whose tender has been selected as the best one.

Public procurement contract must be in accordance with the accepted tender and it must contain a guarantee for the regular payment for the execution of all due obligations.

The contract referred to in paragraph 1 above shall not be concluded before the expiry of the time limit for receiving objections.

In case draft contract does not make part of competition documentation, the contracting authority shall send draft contract to the tenderer within 8 days as of the day of final decision on the selection of the most successful tenderer.

Tenderer is obliged to sign the draft contract within 8 days as of the day of receipt of the contract, and to return it to the contracting authority, together with the required performance guarantee.

In case tenderer does not sign draft contract after the repeated request by the contracting authority or does not submit the performance guarantee as it has been requested in the tender documentation, the contracting authority may conclude contract with the next most successful tenderer provided the price difference is not bigger than 10% in relation to the originally selected tender, or annul the competition and repeat procurement procedure.

Tenderer who has been awarded a contract shall not conclude a sub-contract on any essential part of the contract without prior written approval of the contracting authority. Contract elements that are sub-contracted and the identity of sub-contractors must be promptly communicated to the contracting authority prior to the conclusion of a sub-contract. The contracting authority shall advise tenderer on its decision within 15 days following the received notification, stating the reasons in case of refusal. Tenderer who is awarded a contract bears full responsibility for contract realization.

After the ending of the public procurement procedure and the finality of the decision on contract award, the contracting authority concludes a public contract with the tenderer whose tender has been selected as the best one. (Article 74 paragraph 1)

A draft public contract is an integral part of tender documents, so the public contract must be in accordance with the first-ranked tender of the tenderer who was awarded the contract. The contract also contains a guarantee for the regular payment of all due obligations, which is also a part of the tender documents. (Article 74 paragraph 2)

A public contract may not be concluded before a decision on the selection of the best tender and/or a decision on contract award have been made final since the Law prescribes that the submission of objections and complaints has a suspensive effect on the public procurement procedure, which means that the

contracting authority is obliged to suspend all actions in the public procurement procedure until the passing of the final decision by the Commission for Control of the Public Procurement Procedure. (Article 74 paragraph 3)

If the contracting authority has not envisaged a draft contract in the tender documents, it is obliged to send the draft contract to the tenderer within eight days as of the day of passing of the final decision on the selection of the best tender. (Article 74 paragraph 4)

The tenderer is obliged to sign the draft contract within eight days as of the day of receipt of the contract, and to return it to the contracting authority, together with the required performance guarantee, if any required by the invitation to tender and tender documents. (Article 74 paragraph 5)

In case the tenderer does not sign the draft contract even after the repeated request by the contracting authority or does not submit the performance guarantee in the manner and to the amount as requested in the invitation to tender and tender documents, the contracting authority may conclude contract with the second-ranked tenderer provided the price difference is not bigger than 10% in relation to the first-ranked tender, or it may annul the competition and repeat the public procurement procedure. This right to annul the procurement procedure has been prescribed due to potential misuse of the public procurement procedure by tenderers, as the first-ranked tenderer could back out from concluding the contract after making agreement with the second-ranked tenderer to cede him the contract if the latter offers some financial compensation or any other kind of benefit or satisfaction to the first-ranked tenderer, for which tenderers are criminally liable. (Article 74 paragraph 6)

A tenderer who is awarded a contract may not conclude a sub-contract on any essential part of the contract without prior written approval of the contracting authority. Contract elements that are sub-contracted and the identity of sub-contractors must be timely communicated to the contracting authority before the conclusion of the sub-contract. The contracting authority shall inform the tenderer on its decision within 15 days following the received notification, stating the reasons in case of refusal. The tenderer who is awarded a contract bears full responsibility for contract implementation. (Article 7 paragraph 7)

IV. SPECIAL CASES OF AWARDING CONTRACTS

Award of public service contracts by means of design contest

Article 75

Public procurement subject matter, according to this law, comprises competitions for projects, plans or designs which are integral part of the procedure for awarding contracts on public procurement of services, as

well as individual competitions for projects, plans or designs, with the awarding of prize and payment to the participants in cases stated in Annex I, except for the services of voice telephony, radio-telephony, paging and satellite services referred to in item 5 of Annex I.

The contracting authority shall award the contract on public procurement of services by means of competition in the areas of urban, construction and architectural planning, design and information technology.

Project, plan or design is selected by an independent jury.

Members of the jury referred to in paragraph 2 above may be only natural persons who are not connected to the participants of the competition.

If the contracting authority requires special professional qualifications or experience from the participants of the competition, at least one third of the members of the jury must have at least equal qualifications, or experience.

The jury is independent in deciding.

Plans and designs submitted by the candidates are examined anonymously and exclusively on the basis of criteria from the public invitation.

The award of public service contract by means of contest is specificity in the public procurement of services. The contracting authority may apply a contest only in specific cases that are clearly set out in this Article. In a contest, as a rule, the contracting authority may not precisely define the subject of procurement but only the main concept which is to be supplemented and upgraded later on.

A contest does not represent a special public procurement procedure, as it is just a form of the procedure which is applied only in certain cases. Design contest may be awarded in both open and restricted public procurement procedures, as well as in the procedure with or without previous call for competition, in accordance with the contracting authority's decision on the fulfilment of the conditions for the application of these procedures and obtained approval from the Directorate of Procurement.

What is specific here is that the Law prescribes that an independent jury is to be formed which will select the proposed design. In addition, the Law prescribes the composition and professional qualifications of the jury members. An additional request allowed by the Law is that the participation in the contest can be anonymous. The anonymity is an exception to the usual rule for the submission of tenders in the public contract award.

The jury is independent in decision-making, but its decision must be based solely on the criteria and sub-criteria set out in Article 66 of the Law.

The Law, however, does not go into fundamental rules of the contest with regard to architecture, since it is the matter of applying other laws. To wit, for the contest in architecture design, the contracting authority will carry out the procedure in accordance with this Law and material provisions set out in other regulations.

Consulting services

Article 76

The contracting authority may, according to previously obtained approval from the responsible administrative authority, submit the invitation for the submittal of consulting services tenders directly to tenderers, if:

- 1) the consulting service, which is the subject matter of the public procurement, can be obtained only from a limited number of tenderers, in which case the invitation for the submittal of tenders is submitted to such tenderers only;**
- 2) time and expenses necessary for evaluation of a great number of proposals would not be proportionate to the value of services which are the subject matter of the public procurement, under the condition that the invitation for the submittal of tenders has been submitted to a sufficient number of tenderers in order to ensure effective competition.**

Invitation for submitting consulting services tenders, apart from the elements referred to in Article 33 above, contains criteria and points for each criterion, which will be applied during the evaluation of tenders with the total number of points per criteria of 100.

The contracting authority is obliged to base the criteria referred to in paragraph 2 above on:

- 1) qualifications, experience, reputation, reliability and professional and managerial abilities of tenderers and personnel that will be included in rendering services;**
- 2) degree to which the tender satisfies the needs of the contracting authority;**
- 3) tender price, including possible secondary and related expenses;**
- 4) effects of the transfer of technology, knowledge and development of managerial and professional skills;**
- 5) other circumstances, depending from the nature of consulting services.**

This Article of the Law regulates the awarding of consulting service contract in negotiated procedure. Since there is no explicit mentioning of the negotiated procedure, in addition to the non-existence of a prior invitation to tender, there

have been some dilemmas regarding such specific provisions set out in this Article.

To wit, this Article allows two options for negotiated procedure without prior announcement of the call for competition, i.e. to submit the invitation for the submittal of consulting service tenders directly to tenderers. Both options require the fulfilment of one mandatory prerequisite – the acquired prior approval from the Public Procurement Directorate. In the first case (paragraph 1 point 1), the required condition is that the sought consulting service can be obtained only from a limited number of tenderers. This means that sometimes it is not advisable to apply the restricted procedure for the procurement of consulting services. Instead, the contracting authority, after the obtained approval from the Public Procurement Directorate, submits the invitation to tender directly to tenderers. This is usually when there are no more than 2 to 3 tenderers who could submit tenders regarding the area of interest for the contracting authority.

The second case (paragraph 1 point 2) could be classified as falling under the principle of cost-effectiveness, i.e. the saving of money and time of the contracting authority. To wit, it is indisputable that the procedure of procuring consulting services could last somewhat longer than it is required to evaluate those tenders. However, when the estimated value of the public procurement is not large, and the expenses for the evaluation of those tenders are disproportionately large, it is justifiable to submit the invitation to tender directly to tenderers. This, of course, provided that the principle of effective competition is applied by submitting the invitation to a sufficient (larger) number of tenderers.

Paragraph 2 of this Article specifies that the invitation for submitting tenders, in addition to the mandatory requirements, must contain the criteria for the selection of the best tender. This ensures equality and security of tenderers in the procedure and they are made clear about the criteria important for the contracting authority in the selection of the best tender.

The next paragraph specifies in five points on what the contracting authority must base the previously stated criteria. Each of the specified elements is assigned a certain number of points, but the total sum of points per criterion may not exceed 100.

V. PUBLIC CONTRACTS OF SMALL VALUE

Direct solicitation of tenders (shopping method)

Article 77

Public procurement procedure by direct solicitation of tenders (shopping method) shall be carried out by soliciting at least three tenders.

Within 3 days after the expiry of the time limit for the submission of tenders, the public procurement officer shall review the received tenders and draw up minutes of the opening and selection of the most successful tenderer.

The decision on the selection of the most successful tenderer using the shopping method shall be published on the website of the responsible administrative authority.

Tenderers may submit only one tender each and it may not be changed.

A public contract under the shopping method shall be awarded to the tenderer who offers the lowest price under equal conditions.

The contracting authority is obliged to observe the conditions and manner of procurement determined in this law according to the established values and it may not divide the subject matter of the procurement during the budgetary or financial year with the intention to avoid the application of this law and prescribed procurement procedure.

Public procurement officer is responsible for the legality of public contract procedure carried out under the shopping method; he is obliged to keep record of public contracts awarded under the shopping method and to submit the decision on the selection of the best tender to the responsible administrative authority, for the purpose of its publication on the website.

Bargaining between the contracting authority and tenderers with regards to the elements of the tender is not allowed. Procedure related to public contracts awarded under the shopping method may be carried out twice a year at the most, individually for each subject matter of the public supply, service or works contracts.

The Law on Public Procurement regulates special cases of awarding public contracts of small value (public procurement by direct solicitation of tenders and public procurement by direct agreement).

A decision on the awarding of public contract of small value (shopping method) is regulated in Article 77 of the Law on Public Procurement with the following specified:

- public procurement procedure is carried out by direct solicitation of tenders (shopping method) by soliciting at least three tenders – mandatory public opening of tenders;
- within 3 days after the expiry of the time limit for the submission of tenders, the public procurement officer reviews the received tenders and draws up minutes of the opening and selection of the most successful tenderer;
- a decision on the is be published on the website of the responsible administrative authority;
- tenderers may submit only one tender each and it may not be changed;

- a public contract under the shopping method is awarded to the tenderer who offers the lowest price under equal conditions.
- the contracting authority is obliged to observe the conditions and manner of procurement determined in this law according to the established values and it may not divide the subject matter of the procurement during the budgetary or financial year with the intention to avoid the application of this law and prescribed procurement procedure;
- the public procurement officer is responsible for the legality of public contract procedure carried out under the shopping method; s/he is obliged to keep record of public contracts awarded under the shopping method and to submit the decision on the selection of the best tender to the responsible administrative authority, for the purpose of its publication on the website. (Article 77 paragraphs 1-7)

The Law also specifies that bargaining between the contracting authority and tenderers with regards to the elements of the tender is not allowed and that the procedure related to public contracts awarded under the shopping method may be carried out twice a year at the most, individually for each subject matter of the public supply, service or works contracts. (Article 77 paragraph 8)

III. In accordance with the aforesaid provisions of the Law, the public procurement under the shopping method may be carried out not more than twice a year for each of the individual subject matters of public procurement - supply, service or works (not more than twice a year for each of the individual subject matters of public procurement of supplies, works or services). The value of every individual supply and service contracts must range between EUR 2,000 and 10,000 and that of the works contract between EUR 2,000 and 30,000, as specified under Article 19 paragraph 1 indent 2 of the Law on Public Procurement. At the same time, the subject matter of procurement may not be divided with the intention to avoid public competition by the contracting authority - e.g. the contracting authority announces the public supply of office material under the shopping method and later on repeats the procurement of the same material by applying the same method. This is because that would mean the division of the subject matter of public procurement and the violation of the principles of competition, transparency of the procedure and equality of tenderers.

Here it should be pointed to Article 84 paragraph 4 of the Law stating that the Public Procurement Directorate may request a report from any contracting authority on each individual contract awarded in public procurement procedure, with additional information, provided that it is necessary for keeping a record of data from the area of public procurement or the protection of public interest.

It should also be stressed that the penalty provisions of the Law on Public procurement, Article 103 paragraph 1 point 3 prescribe that a pecuniary fine ranging from 30-fold to 200-fold amount of the minimum wages in Montenegro shall be imposed on the contracting authority for an infringement where the

subject of a public contract that represents a single whole is subdivided, with the intention to avoid the application of this Law and the prescribed procurement procedure (Article 32 paragraph 2). Paragraph 2 of the same Article prescribes that a pecuniary fine ranging from 5-fold to 20-fold amount of minimum wage in Montenegro shall be imposed on contracting authority's responsible person for the specified infringements.

Direct agreement

Article 78

Public contracts the value of which is up to €2,000 may be carried out by direct agreement.

The contracting authority is obliged to ensure that the total annual value of such contracts does not exceed 10% of its total annual procurement budget.

Public procurement officer is obliged to keep record of public contracts that are carried out by means of direct agreement and to state the number, value and name of suppliers in the annual report submitted to the responsible administrative authority.

Public supply contracts the value of which is up to EUR 2,000 are carried out by direct agreement. (Article 78 paragraph 1)

The total annual value of public contracts by direct agreement may not exceed 10% of total annual procurement budget of the contracting authority. This provision has been envisaged with a view to preventing any misuse of the Law by contracting authorities that would try to avoid the shopping method or public competition by applying the procedure of direct agreement (Article 78 paragraph 2).

Public procurement officer is obliged to keep a record of public contracts carried out by means of direct agreement by stating the number, value and name of suppliers in the annual report and submit the annual report on the public contracts in the previous year to the Public Procurement Directorate by 28 February of the current year at the latest. (Article 78 paragraph 3)

VI. PUBLIC PROCUREMENT IN ELECTRONIC FORM

Article 79

Public procurement in electronic form may be carried out through open and restricted procedure, in accordance with this Law, the Law on Electronic Signature and the Law on Electronic Trade.

The Law envisages the possibility of public procurement being carried out through open and restricted procedure and in electronic form. Public procurement in electronic form is carried out in line with the regulations governing public procurement, electronic signature and electronic trade.

Article 80

To carry out the electronic system of public procurement, the following must be provided:

- 1) communication, exchange and storage of information, in such a manner as to ensure data integrity and tender confidentiality;**
- 2) that the contracting authorities review the contents of tenders only upon expiration of the time limit for their submission;**
- 3) that information related to specific requirement regarding the electronic submission of tenders is made available to all tenderers and candidates.**

More detailed content and manner of carrying out public contract procedure in electronic form shall be prescribed by a relevant administrative authority in charge of information system development.

With a view to providing efficient electronic public procurement system, the Law prescribes that the following must be provided:

- communication, exchange and storage of information, in such a manner so as to ensure information integrity and confidentiality of tenders;
- that the contracting authorities may review the contents of tenders only upon expiration of the time limit for their submission;
- that information related to specific requirement regarding the electronic submission of tenders must be made available to all tenderers and candidates.

Subsidiary legislation regulating in more details the content and manner of the implementation of the public contract procedure in electronic form shall be prescribed by a relevant state administrative authority in charge of information system development.

Article 81

Electronic devices used for communication through the electronic system of public procurement, and their technical characteristics, must be non-discriminatory, equally accessible to tenderers and based on information and communication technologies that are in general use and do not restrict accessibility of public contract procedures to tenderers and candidates.

With a view to ensuring equality of tenderers, the Law prescribes that electronic devices used for communication through the electronic system of public

procurement, and their technical characteristics, must be non-discriminatory, equally accessible to tenderers and based on information and communication technologies that are in general use. In addition, the information and communication technologies should be such that they do not restrict accessibility of public contract procedures by tenderers and candidates in the electronic public procurement procedures.

Article 82

The contracting authority shall indicate in its decision on conducting the procedure and in the text of the invitation to tender that the procedure will be carried out in electronic form.

When a public contract procedure is carried out in electronic form, the review of tender documents, modifications of and additions to tender documents, suitability evidence, tenderers' clarification, and other communication and information shared between the contracting authority and tenderers, or candidates, shall be performed through the electronic system of public procurement.

If the documents and other writings referred to in paragraph 2 above do not exist or may not be provided in electronic form, tenderers and candidates may submit them in written form, within the time frame prescribed in this Law.

In order to carry out electronic public procurement, the contracting authority is obliged to indicate in its decision on conducting the procedure and in the text of the invitation to tender that the procedure will be carried out in electronic form.

When a public contract procedure is carried out in electronic form, the contracting authority is obliged to ensure that the entire procedure is carried out in such form, which implies the reviewing of tender documents, modifications of and additions to tender documents, suitability evidence, tenderers' clarifications, and other communication and information shared between the contracting authority and tenderers, or candidates, is performed through the electronic system of public procurement.

If the documents and other writings related to tender documents, suitability evidence or any other information do not exist or may not be provided in electronic form, tenderers and candidates may submit them in written form, within the time frame prescribed in this Law.

Article 83

The contracting authority shall notify the responsible administrative authority of every public contract procedure in electronic form within 15 days before the submission of the invitation to tender for publication.

Before the submission of invitation to tender, the contracting authority is obliged to inform the Public Procurement Directorate that the public contract procedure shall be carried out in electronic form. This notice is submitted to the responsible administrative authority within fifteen days before the submission of the invitation to tender for it to be announced on the responsible administrative authority's website.

VII. PUBLIC PROCUREMENT RECORDS

Record keeping

Article 84

Contracting authorities are obliged to collect and record certain data on awarded public procurement contracts in accordance with this law, at which they are obliged to record data separately for the awarding of public supply contracts, then on public service contracts, and finally on public works contracts, as well as on public contracts in water, energy, transport and postal services sectors.

The responsible administrative authority prescribes forms for recording public procurement data.

The contracting authority is obliged to submit the report on public contracts concluded in the previous year by 28 February of the current year at the latest.

The responsible administrative authority may request a report from any contacting authority on each individual contract awarded in public procurement procedure, with additional information, provided it is necessary for keeping record of data from the area of public procurement, or because of the protection of public interest.

The responsible administrative authority is obliged to prepare a summary report and to submit it to the Government by 31 May of the current year at the latest.

Article 78 of the Law on Public Procurement prescribes that public supply contracts the value of which is up to EUR 2,000 are carried out by direct agreement and that the contracting authority is obliged to ensure that the total annual value of public contracts by direct agreement does not exceed 10% of total annual procurement budget of the contracting authority.

Public procurement officer is obliged to keep a record of public contracts carried out by means of direct agreement by stating the number, value and name of suppliers in the annual report submitted to the responsible administrative authority (*Public Procurement Directorate*).

Further on this Article specifies that contracting authorities are obliged to collect and record certain data on awarded public procurement contracts in the

manner prescribed by this law, whereby they are obliged to separately record data for the awarding of public supply contracts, public service contracts, and public works contracts. (Article 84 paragraph 1)

The Public Procurement Directorate prescribes forms for recording public procurement data. (Article 84 paragraph 2)

Contracting authorities are also obliged to submit to the Public Procurement Directorate the report on public contracts concluded in the previous year by 28 February of the current year at the latest. (Article 84 paragraph 3)

The Public Procurement Directorate may request a report from any contacting authority on each individual contract awarded in public procurement procedure, with additional information, if necessary for keeping a record of data from the area of public procurement or the protection of public interest. (Article 84 paragraph 4)

The Public Procurement Directorate is obliged to prepare a summary report and to submit it to the Government of Montenegro for consideration and adoption by 31 May of the current year at the latest. (Article 84 paragraph 5)

Taking into account the aforesaid, all Law obligors who awarded public contracts in the previous year are obliged to submit to the Public Procurement Directorate, as soon as possible and not later than by 28 February of the current year, reports on carried out public procurements for the purpose of compiling the Annual Report on public procurement. These reports must be prepared in accordance with the standard forms for the application of Article 84 of the Law on Public Procurement published in the Official Gazette of Montenegro and on the website – the Manner of recording information on public procurement. The following forms must be filled in:

1. *Form A* – data on awarded public contracts in the previous year by:
 - open public procurement procedure,
 - restricted public procurement procedure,
 - negotiated public procurement procedure without prior announcement of call for competition,
 - negotiated public procurement procedure with prior announcement of call for competition,
 - framework agreement, and
 - design contest;

2. *Form B* – data on:
 - awarded public contracts of small value (shopping method) in the previous year and the report containing:

3. *Information on the number, value of public contracts and name of the supplier (tenderer) of public contract carried out by means of direct agreement.*

Standard forms, instructions for their completion and submission are published, as previously said, in the Official Gazette of Montenegro and on the website of the Public Procurement Directorate. The forms must be signed by the authorized person and submitted to the responsible administrative authority in writing and electronically.

It should be emphasized that the penalty provisions of the Law on Public Procurement, Article 103, prescribe that a pecuniary fine ranging from 30-fold to 200-fold amount of the minimum wages in Montenegro shall be imposed on the legal person-contracting authority for an infringement:

- where public procurement of small value (shopping method) has been enforced contrary to the provisions of Article 77;
- where records have not been maintained or public procurement documentation has not been kept (Article 84, paragraph 1, and Article 85);
- where information on enforced public procurement procedures has not been provided to the Public Procurement Directorate within the foreseen time. (Article 84, paragraph 3)

A pecuniary fine ranging from 5-fold to 20-fold amount of minimum wage in Montenegro shall be imposed on the contracting authority's responsible person for the specified infringements.

Storing of documentation

Article 85

The contracting authority is obliged to store the documentation on procurement procedure in the manner and according to the procedures prescribed by special regulations.

The Law prescribes that the contracting authority is obliged to store documentation on the procurement procedures in the manner and according to the procedures prescribed by regulations governing office operations and archiving. (Article 85)

VIII. CONTROL OVER LAW APPLICATION AND PROTECTION OF TENDERERS' RIGHTS AND PUBLIC INTEREST

Provision of legal protection

Article 86

Protection of tenderers' rights and public interest at all stages of a public procurement procedure shall be provided in the manner and under the conditions laid down in this Law.

Parties to litigation and competent authorities shall rapidly and efficiently resolve disputes arising from public procurement procedures.

When considering and deciding on requests for the protection of rights, the competent authorities shall apply provisions of the Law on General Administrative Procedure, unless otherwise prescribed by this Law with respect to individual issues.

The legislator has envisaged that the protection of tenderers' rights and public interest may be provided at all stages of a public procurement procedure. This is a novelty in comparison with the previous law, but also in comparison with the applicable regulations in the Western Balkan region. These provisions provide full protection of tenderers' rights and public interest at all stages of the public procurement procedure, which is of utmost importance considering that the initiation of procedure for the protection of rights in the initial stages of procurement procedure (e.g. with regard to the contents of the invitation to tender and tender documents) allows for timely correction of identified shortcomings which could not be removed any time later, except by annulling the entire public procurement procedure. Therefore, it is undisputable that this provides for a consistent adherence to the principle of efficiency and urgency of public procurement procedures. (Article 86 paragraph 1)

The legislator specifically underlines the urgent nature of public procurement and the principles of cost-effectiveness and efficiency of the procedure by prescribing that parties to litigation and competent authorities must rapidly and efficiently resolve disputes arising from public procurement procedures. (Article 86 paragraph 2)

When considering and deciding on requests for the protection of rights, the contracting authorities and the Commission for Control of the Public Procurement Procedure shall apply the provisions of the Law on General Administrative Procedure, except in the part of the procedure prescribed by this Law with respect to individual issues (e.g. manner and procedure of submitting objections, time limits for submitting objections, deciding on objections, submission of complaint, deciding on complaints, and the like). (Article 86 paragraph 3)

Objection to the contracting authority

Article 87

Any tenderer and any person the rights and legal interests of which the public procurement procedure refers to (interested person) shall have the right to objection in case of irregularities during the whole public procurement procedure.

The objection referred to in paragraph 1 above, when relating to the protection of public interest, may also be submitted by a competent state prosecutor, relevant administrative authority, the Supreme Auditing Institution and other competent bodies.

Objection shall be submitted to the contracting authority, in writing, in three copies, directly or by registered mail with return receipt.

Objection shall indicate irregularities in a public procurement procedure, facts and evidence for committed infringements and a proposal for removal of the infringements.

Active authority to submit objections have a number of persons, these being:

- any tenderer and any person the rights and legal interests of which the public procurement procedure refers to (interested person) ,
- the authorized state prosecutor,
- the Public Procurement Directorate,
- the State Audit Institution and
- other competent bodies.

The novelty in comparison with the previous law is that objections may be submitted during the entire public procurement procedure, so that objections can be made to the content of the invitation to tender, tender documents, the procedure of public opening of tenders, the conclusion on the rejection of tender, the decision on the tender rejection, the decision on the selection of the best tender and/or the decision on contract award and the decision on the annulment of the public procurement procedure. (Article 87 paragraphs 1 and 2)

It is important to point to the obligation of tenderers, if they consider that their rights and the pertinent interest have been infringed during the public procurement procedure, to dispute the contracting authority's actions during the stage of the procurement procedure when those actions have been undertaken, and later on in some other public procurement stage. This means that if a tenderer, for example, considers that some of his rights have been violated in the invitation to tender and tender documents, he must initiate the procedure for the protection of his rights during the period of validity of the invitation to tender by submitting an objection to the contracting authority and a complaint to the Commission for Control of the Public Procurement Procedure, indicating his allegations thereof. If the tenderer fails to initiate the procedure for the protection of his rights at the aforesaid stage, but states the allegations referring to the invitation to tender and tender documents during some other public procurement stage (e.g. after the passing of the decision on contract award or a decision on the annulment of the public procurement procedure), such a complaint shall be rejected as being untimely as the tenderer did not exercise his right on time.

The legislator clearly prescribes the formal condition to submit an objection, according to which the objection is submitted in writing, in three copies, directly or by registered mail with return receipt. (Article 87 paragraph 3)

The legislator also prescribes the content of the objection by specifying that a tenderer's objection shall indicate irregularities in the public procurement procedure, facts and evidence for committed infringements and a proposal for removal of the infringements. In the event that the objection does not contain all the aforesaid elements, the Law on General Administrative Procedure is applied, prescribing that if the petition request contains some formal deficiency that impedes the acting upon the petition request, or if it is unintelligible or incomplete, the authority having received such a petition request shall, not later than eight days from the day of receipt thereof, call upon the submitter to eliminate the deficiencies and determine a deadline for the submitter to do so (Article 87 paragraph 4).

If the submitter eliminates the deficiencies in the specified period, it shall be considered that the petition request has been submitted on the day it was complemented. If the submitter should not eliminate the deficiencies in the specified period, thus it can not be acted upon the petition request due to that, the authority shall reject such a petition request by a conclusion. The submitter shall specifically be admonished of this consequence in the invitation for correction of the petition request. Special appeal against such a conclusion shall be permitted.

When the petition request has been sent by telegraph, fax or in electronic form, and there is a doubt whether the petition request had been submitted by the person whose name is indicated on the telegraphed petition request, respectively fax or electronic petition request, the authority shall start the procedure for the establishment of these facts, and if they are not established, respectively if the deficiencies are not eliminated, it shall proceed in the manner that the authority shall reject such a petition request by a conclusion. An official note shall be made on this. Special appeal against the conclusion of the authority, by which the petition request was rejected, shall be permitted. Therefore, the general rules of the administration procedure are applied here.

Time limits for objection submission

Article 88

Objection shall be submitted within 8 days from the day of adoption of the decision or committed action infringing rights or undertaking of other measures or actions infringing rights under the procedure.

The contracting authority shall inform all the participants in a public procurement procedure on submitted objection within 3 days upon the receipt of the objection.

An objection may be submitted within eight days from the day of adoption of the decision or committed action infringing rights or undertaking of other measures or

actions infringing rights under the procedure. Therefore, this is a preclusive deadline for the submission of objection, which means that if the submitted fails to submit the objection within the specified time limit, the contracting authority shall reject the objection by a conclusion that it is untimely. (Article 88 paragraph 1)

With a view to ensuring transparency and equality of tenderers, the Law prescribes the obligation of the contracting authority to inform all the participants in a public procurement procedure on the submitted objection within three days upon the receipt of the objection. (Article 88 paragraph 2)

Objection legal consequences

Article 89

Objection, submitted within the specified time limits, shall deter any further activities of the contracting authority in the public contract award procedure until the objection has been resolved.

The Law prescribes that the submitted objection shall have a suspensive effect on the public procurement procedure, which implies that the contracting authority is obliged to deter any further activities in the public contract award procedure until the objection has been resolved. It should be taken into account here that Article 98 of the Law prescribes the suspensive effect of complaint, so the contracting authority must deter all activities in the public procurement procedure and as per the submitted complaint.

Decision of the contracting authority in respect of objection

Article 90

The contracting authority shall by means of a conclusion reject an objection that is unlawful, untimely and presented by an unauthorised person.

The contracting authority shall consider objection submitted in good time and adopt a decision thereon, within 8 days from the day of receipt of the objection.

By means of the decision referred to in paragraph 1 above:

- 1) the objection may be adopted in whole or in part and the decision on selection of the best tender may be altered,**
- 2) the objection may be adopted as grounded and the public contract award procedure may be annulled, in whole or in part, or**
- 3) the objection may be rejected as groundless.**

Reasoned decision referred to in paragraph 2 above shall be submitted to 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 time limit referred to in paragraph 4 above, the submitter may continue the procedure for protection of its right as if its objection was rejected.

The contracting authority can make a decision on the submitted objection in the form of conclusion or decision.

By means of conclusion, the contracting authority rejects an objection that is unlawful, untimely and presented by an unauthorised person.

The objection is considered unlawful if:

- the objected procedure is not a public procurement in the sense of the Article 2 of this Law, or
- the process assumption for its submission has not been fulfilled.

The objection is considered untimely:

- when the contracting authority submits the objection after the expiration of the time limit for submission from Article 88 paragraph 1 of the Law, i.e. after eight days from the day of submitting the decision, i.e. committing of the act that has violated rights, or other measures or activities undertaken that are violating rights in the procedure.

The objection lodged by an unauthorised person is an objection for which the contracting authority indisputably determines that the person that has submitted the objection has not been actively authorised in the sense of Article 87 paragraph 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 party), responsible state prosecutor, the Public Procurement Directorate, the State Audit Institution and other responsible authorities). (Article 90 paragraph 1)

The Law has established the imperative time limit of eight days from the day of submitting of the objection, within which the contracting party is obliged to make a decision. Such short time limit for making the decision on the submitted objection is established due to the character of public procurement, which is urgent by nature, and due to the need to ensure consistent efficiency and economic efficiency of public procurement procedure. (Article 90 paragraph 2)

By means of a decision, the contracting party shall:

- adopt the objection 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. (Article 90 paragraph 3)

Decision on the objection must be reasoned, i.e. it should contain precisely defined reasons for its adoption or rejection, in whole or in part. Contracting party

shall evaluate each of the statement in the objection, which are challenging the procedure and activities in the public procurement procedure.

Reasoned decision on the objection shall be submitted to submitter of the objection no later than 3 days from the day of adoption of the decision, in order to enable him to potentially continue with the procedure of protecting his rights by submitting a complaint to the Commission for the Control of Public Procurement Procedure. (Article 90 paragraph 4)

The Law envisages the application of the silence of administration institute in the situation when the contracting authority does not make a decision on the submitted objection within the legally prescribed time limit or does not submit the decision to the submitter of objection within three days from the day of adoption of the decision. Time limits envisaged for the silence of administration institute are significantly shortened by this Law, compared to the Law on General Administrative Procedure, due to the need to make a decision in these procedures within shorter time limits. If objection submitter is not provided with the decision within 3 days from the day of adoption of the decision, the Law envisages that the submitter may continue the procedure for the protection of his rights as if his objection were rejected. (Article 90 paragraph 5)

Complaint to the Commission for Control of Public Procurement Procedure

Article 91

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 above, to the Commission for Control of Public Procurement Procedure (hereinafter referred to as: the State Commission) within 8 days from the day of receipt of the decision made in respect of submitted objection.

The Law is centralizing the procedure of protection of rights of the contracting authority and public interest in the second instance, which is realized before the Commission for Control of Public Procurement Procedure (hereinafter: the State Commission). Namely, in the procedure of protection of rights, a complaint may be submitted against the decision of the contracting authority or in the case of silence of administration, when the contracting authority fails to make a decision on the submitted objection or does not submit the decision to the submitter of objection within three days as of the day of its adoption. The complaint shall be submitted within eight days. (Article 91)

Article 92

**The State Commission shall be autonomous and independent.
The State Commission shall have a president and two members.**

President and members of the State Commission shall be appointed by the Government as follows: president at the proposal of the Ministry of Justice, one member at the proposal of the Ministry of Finance and one member at the proposal of the Community of Municipalities.

For the president of the State Commission appointment eligible may be a law school graduate with bar examination passed and with no less than 15 years of relevant work experience.

For a member of the State Commission appointment eligible may be a person with tertiary education and no less than 10 years of relevant work experience.

President of the State Commission shall represent the State Commission and shall manage its work.

President and members of the State Commission shall be appointed for the period of 4 years.

President and members of the State Commission may not be the following: parliament members; councillors; heads of state authorities, and organizations and institutions which are beneficiaries of the Budget of the Republic; heads of organizations for obligatory social security; chief administrators or heads of local government authorities; directors of public companies or other legal persons covered under this Law.

The State Commission shall have a secretary, appointed by the Government at the proposal of the president of the State Commission.

For the secretary of the State Commission appointment eligible may be a law school graduate with no less than 5 years of work experience in public procurement area.

The Commission for the Control of Public Procurement Procedures – the State Commission, whose task is to ensure legal protection of tenderers and public interest in all stages of the public procurement procedure, is a separate, autonomous and independent state body. Among the reasons for a more detailed regulation by the Law on Public Procurement of the status, authority and activities of the State Commission, was the request for harmonization with the legal protection directives which, besides general guidelines, do not include more detailed provisions on the authorities responsible for decision making in the public procurement procedure.

Basic principles of public procurement apply on the manner of work and organization of the State Commission, namely: principle of legality, publicity, transparency and efficiency. In line with aforementioned principles, the State Commission was established by the Law on Public Procurement, as an autonomous and independent state body. Independency of the State Commission is reflected in its manner of work and decision-making, which are more closely regulated by the Rules of Procedure of the State Commission. Considering appointing, the Law stipulates that the president and members of the State Commission are appointed by the Government, as follows: the president is appointed at the proposal of the Ministry of Justice, one member is appointed at

the proposal of the Ministry of Finance and one member at the proposal of the Community of Municipalities. It should be emphasized that the legislator has prescribed the requirements for the appointment that are similar to the requirements for the appointment of judges, prescribing that the president of the State Commission may be a law school graduate with bar examination passed and with no less than 15 years of relevant working experience, while the member of the State Commission may be a person with tertiary education and no less than 10 years of the relevant working experience.

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

- 1) term of office of the president and a member of the State Commission may be terminated, i.e. they may be released from duty only in cases prescribed by the Law (if convicted of a criminal act to effective prison term for the period of no less than 6 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 3 months),
- 2) the State Commission is an independent budget user.

In addition to its members, the State Commission has the administrative and professional service, managed by the secretary. Regulations for state employees and civil servants apply to the employees of the administrative and professional service. We consider that amendments to the Law on Public Procurement should envisage the application of general regulations of the Labour Law on employees in the administrative and professional service of the State Commission (as it was done in Croatia), instead of the Law on State Employees and Civil Servants. This would enable greater flexibility of employment, attract the most qualified persons to apply for the job announcements for the State Commission, ensure the establishment of efficient incentive mechanisms through giving awards and scholarships to the best employees, etc.

The manner of work of the State Commission shall be regulated in more details in the rules of procedure, which stipulate that the State Commission shall work and make decisions at sessions.

At the sessions, the State Commission shall:

- 1) review complaints of tenderers against public procurement procedures, and make decisions in respect of them;
- 2) examine the regularity of application of the Law on Public Procurement and propose and undertake remedy measures for identified irregularities, providing for competitive behaviour of tenderers and transparency of the public procurement procedure;

- 3) determine general positions for the purpose of uniform application of the law;
- 4) examine implementation of laws and other regulations within State Commission jurisdiction;
- 5) enact the Rules of Procedure;
- 6) enact activity reports, based on the proposal of the State Commission president;
- 4) perform other operations in accordance with this Law and the Rules of Procedure.

The State Commission is enacting its decision at the sessions with the majority vote of present members. The State Commission sessions at which discussions on complaints take place, as well as decision-making, are not public. Special minutes signed by the president, members and secretary of the State Commission are prepared on discussions and voting. The State Commission must adopt a decision in respect of the submitted complaint within 15 days. This time limit may be extended for no more than 10 days in specifically justified cases; therefore the maximum time limit for adopting a decision is only 25 days. Such short time limits for adopting decisions imply great promptness of the State Commission. Adopting decisions in such short time limits enables continuation of the public procurement process. The suspension of the public procurement process would increase the costs of the contracting authority and indirectly create a burden for the state and public interest, particularly in public procurement cases that are of particular interest for the State and where a strong public interest exists. This does not answer the question why a specialized body such as the State Commission, instead of going to the regular court, is making decisions on the public procurement disputes. Such a solution is accepted in the European Union countries, as well as in the neighbouring countries (Slovenia, Croatia, Bosnia and Herzegovina, Serbia, Macedonia, and Albania).

Requirements of the European Union right regarding the status of the State Commission

During the establishment of the State Commission, EU Directives and specific decision of the European Court of Justice were used as a basis for establishing a new type of the state body, positioned between the administrative and judicial authorities.

EU Directive 89/665 prescribes that the bodies which are conducting the complaint procedure have to be based on the following rules:

- decision adopted by such body in the public procurement control process shall be in the written form with the rationale for adoption of such decision;
- parties in the preceding have to be provided with the court protection against the decisions of such bodies;
- the body shall be independent;

- members of the body shall be appointed and released from duty under the same terms as the representatives of judiciary authorities (requirements for the appointment of judges),
- members of the body shall be appointed for a specific term of office;
- president of the body shall have the same legal and professional qualifications as the members of the judicial authorities;
- the body shall conduct the proceeding on the debate principle by hearing of the parties;
- decisions of such body shall be legally binding.

Considering the judgments of the European Court of Justice, the most important is the case C-54/96 Dorsch Consult Ingenieurgessellschaft mbH against Bundesbaugessellschaft Berlin mbH, from 1997, in which the Court, in addition to the judgment on the presented appeal, determined the requirements that the state body has to meet in the public procurement control process, if the control is not performed by the judicial authorities, in order to acquire the right to pose the previous issue before the European Court of Justice. This judgment is of a great importance for the legal system in Montenegro, considering that the control of the public procurement process is performed by the State, and not by the court.

Requirements stated in the aforementioned judgment have to be met cumulatively and are relating to the following:

- the body shall be established by the law, not a bylaw;
- the body shall be established as a permanent body, instead of the ad hoc body;
- it shall have a binding authority;
- it shall conduct an inter partes proceeding;
- it shall apply legal regulations;
- it shall be independent.

In the stated directives, as well as in judgments of the European Court of Justice it was specified several times that the decision of the body responsible for decision-making on the legal means of the tenderer against the decision of the contracting authority is left to the member states. In numerous cases special *prima facie* non-judicial bodies, instead of courts, are deciding upon the request for the legal protection (with the exception being the remuneration request, which as a rule is under the courts jurisdiction). Reasons for such organization lay in the need to ensure urgent procedure and suspension effect of the submitted legal means – urgency for the authorized body to decide upon the submitted legal means as soon as possible. Nature of the public procurement and authorization of the responsible bodies in the legal protection proceedings (possibility to annul the decisions on the selection of the most favourable tender, i.e. complete the public procurement procedure) do not allow for complaints related to the public procurement procedure to be in the same waiting line before the court as the other requests, because this manner of legal protection is inefficient. In cases where the authorized bodies that are deciding upon legal

protection are not courts, the directives are requiring that each decision should be documented in the written form. In such case, the state has to ensure that the allegedly illegal decision of the body authorized for the legal protection or any omissions in the implementation of its authorization can be subject to the court protection or control of the other body which is the court or tribunal, pursuant to Article 234 of the Amsterdam Agreement, and which is independent from the contracting authority or body for the control of regularity of the public procurement procedure.

European Commission, as well as new the Directives 2004/17/EC (Article 72) and 2004/18/EC (Article 81) are promoting the organization of legal protection where special bodies are deciding upon the requests.

Responsibilities and authorizations of the State Commission

Article 93

The State Commission shall:

- 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.**

Authorities of the State Commission are to:

1. review complaints and decide upon complaints in the public procurement procedure;
2. in the procedure of reviewing complaints and establishing uniform positions, the State Commission is examining the regularity of application of this Law and proposing and undertaking remedy measures for identified irregularities, providing for competitive behaviour of tenderers and transparency of public procurement procedure, in order to realize its responsibilities and authorizations;
3. determine general positions based on the requests of interested parties (contracting authority, tenderers and other institutions and persons, which prove to have a legal interest for the adoption of the general position of the State Commission), for the purpose of uniform application of the law; and
4. perform other operations in accordance with this Law. (Article 93)

Manner of work of the State Commission

Article 94

Manner of work of the State Commission shall be in more details regulated in rules of procedure.

Members of the State Commission must keep information related to state, military, official or business secret and undertake actions with documents they have access to in their work, in accordance with the level of their confidentiality.

The State Commission shall enact the rules of procedure, which shall regulate the manner of work and other issues important for the implementation of the State Commission's function in more details. (Article 94 paragraph 1)

In addition to the principle of legality, one of the basic principles which are ensuring the implementation of the State Commission's function is the principle of data and documentation protection. Therefore, in accordance with the Law, members of the State Commission must keep information related to state, military, official or business secret and treat the documents they have access to in their work, in accordance with the level of their confidentiality. (Article 94 paragraph 2)

Article 95

Funds for the State Commission operations shall be provided in the Budget of the Republic.

President and members of the State Commission shall receive remuneration for their work.

Considering that the State Commission is autonomous and independent in its work, in order to ensure this autonomy and independency, which is the explicit requirement of the European Commission and the European Court of Justice, which ensures independent decision making of this body, this Article explicitly stipulates that the funds for the State Commission operations shall be provided in the Budget of Montenegro, i.e. that the State Commission is a special and independent budget user. (Article 95 paragraph 1)

In that sense, president and members of the State Commission shall receive remuneration for their work. (Article 95 paragraph 2)

Term of office termination and release from duty

Article 96

Term of office of the president and members of the State Commission may be terminated, i.e. they may be released from duty only:

- 1) if convicted of a criminal act to effective prison term for the period of no less than 6 months or if convicted of a criminal act making them unworthy for performance of the function;
- 2) in case of death or permanent loss of health capability for performance of the duty;
- 3) if they get appointed for and if they commence performing a function incompatible with the duty in the State Commission;
- 4) if they resign or demand to be released from duty;
- 5) if without justifiable reason they do not perform their duties in the State Commission for the period longer than 3 months.

President and member of the State Commission shall be given an opportunity to explain the reasons for the release.

Considering that the president and members of the State Commission are appointed for the period of four years, term of office permanence is provided. The legislator has envisaged clearly specified reasons for which the president and members of the State Commission may be released from duty:

1. if convicted of a criminal act to effective prison term for the period of no less than 6 months ;
2. if convicted of a criminal act making them unworthy for performance of the function;
3. in case of death;
4. in case of permanent loss of health capability for performance of the duty;
5. if they get appointed for and if they commence performing a function incompatible with the duty in the State Commission, which is evaluated for each individual case;
6. if they resign or demand to be released from duty; or
7. if without justifiable reason they do not perform their duties in the State Commission for the period longer than 3 months. (Article 96 paragraph 1)

In the procedure of determining the termination of office and release from duty, the president and the member of the State Commission shall be given an opportunity to give statements on the reasons for the release. (Article 96 paragraph 2).

Complaint contents

Article 97

Complaint is required to contain the following:

- 1) **decision of the contracting authority challenged by the complaint;**
- 2) **description of irregularities made by the contracting authority in public procurement procedure;**

- 3) reasons for challenging the decision, and
- 4) basic data on the complaint submitter.

The State Commission may, when assesses that the submitter of a complaint has not provided these elements in the complaint, demand the supplement to the complaint in the meaning of paragraph 1 above.

Time limit for the provision of the supplement of the complaint may not exceed 3 days.

If the submitter of the complaint does not provide the supplement to the complaint within the specified period, the State Commission shall continue the procedure and make a decision in accordance with available data and circumstances.

Complaint presented to the State Commission is required to contain the following:

1. decision of the contracting authority challenged by the complaint;
2. description of irregularities made by the contracting authority in public procurement procedure;
3. clear and precisely explained reasons for challenging the decision; and
4. basic data on the complaint submitted. (Article 97 paragraph 1)

The State Commission may, when assesses that the compliant does not include these elements, i.e. other data required for acting upon complaints, demand from the complaint submitter the supplement to the complaint. (Article 97 paragraph 2)

Time limit for the provision of the supplement of the complaint is preclusive and may not exceed 3 days from the day of submitting the request for the supplement of the complaint .(Article 97 paragraph 3)

If the submitter of the complaint does not provide the supplement to the complaint within the specified period, the State Commission shall continue the procedure and make a decision in accordance with available data and circumstances. (Article 97 paragraph 4)

Suspensive effect of complaint

Article 98

Timely and properly presented complaint shall postpone the conclusion of the public contract.

The Law provides that the submitted complaint shall have a suspensive effect on the course of the public procurement procedure, which implies that the contracting authority shall suspend all operations in the public procurement procedure until the passing of the final decision of the State Commission. If the complaint was submitted during the course of the public procurement procedure, until the passing of the decision on the selection of the most favourable tender,

i.e. decision on the award of the contract. If the complaint was submitted on the decision on the selection of the most favourable tender, i.e. decision on the award of the contract, the contracting authority shall postpone the conclusion of the contract until the passing of the final decision of the State Commission. (Article 98)

The State Commission Conduct of Actions

Article 99

The State Commission shall make a decision within the limits of the request submitted in the complaint.

The State Commission shall also make decisions with regard to infringements of public procurement procedure prescribed by law, which could significantly influence public contract award.

At request of the State Commission, the contracting authority shall be obliged, within 3 days from the receipt of the request, to provide any files and documentation required for resolution of the complaint.

In compliance with the disposition principle, the State Commission decides upon submitted complaints within the limits of the statements given in the complaint, while in the case of infringement of basic principles of public procurement, it can present the evidence which can contribute to the passing of a legal and rightful decision. Considering the limits of the statements in the complaint, the State Commission shall make decisions with regard to infringements of the public procurement procedure prescribed by the law which could significantly influence public contract awarding.

Consequently, the State Commission is obliged to examine the legality of the entire public procurement procedure, in compliance with the law, upon the expressed complaint, as its official duty. Therefore, in addition to the administrative act which is the subject of the procedure, actions/decisions that were performed in the stage prior to the announcement of the invitation to tender can be examined during the procedure (Decision on initiation and enforcement of the public procurement procedure, existence of officially provided funds for the enforcement of the public procurement procedure, publishing of the of the public procurement plan, etc.)

The Law strictly prescribes the time limit for submitting the list of items and documentation required for deciding upon the complaints, i.e. which files and documentation the contracting authority is obliged to submit to the State Commission within three days from the day of receiving the request. It is also important to emphasize that in Article 103 paragraph 1, point 13 of the Law, the legislator has envisaged that the failure to submit the list of items to the State Commission is subject to the misdemeanour liability, for which the relevant pecuniary fine has been established. (Article 99 paragraph 3)

Time limits for decision making

Article 100

For the purpose of protecting rights of the contracting authority and tenderer, the proceeding before the State Commission must be efficient and completed within the shortest time possible.

The State Commission must adopt a decision in respect of submitted complaint within 15 days from the day of receipt of the files and complete documentation.

The time limit referred to in paragraph 2 above, in specifically justified cases may be extended for no more than 10 days, and the submitter of the complaint and the contracting authority shall be informed thereof.

The State Commission shall provide the decision, referred to in paragraph 2 above, to the submitter of the complaint and the contracting authority.

Proceedings before the State Commission must be completed within the shortest time possible. The emphasis is on the protection of rights of tenderers and contracting authorities in the proceedings before the State Commission, in the sense of ensuring the efficiency. (Article 100 paragraph 1)

In order to ensure the efficiency principle, the Law prescribes the strict time limit for adopting a decision in respect of the submitted complaint within 15 days from the day of receipt of files and complete documentation. (Article 100 paragraph 2)

Exceptionally, the legislator allows the possibility to extend the 15-day time limit for deciding on the complaint in specifically justified cases for no more than 10 days, whereby the State Commission is obliged to inform the contracting authority and the submitter of the complaint thereof. (Article 100 paragraph 3)

The State Commission is obliged to submit the decision on the complaint (decision or conclusion) to the submitter of the complaint and the contracting authority. With that respect, the State Commission has increased the degree of transparency of its work by publishing all passed decisions on its website on the day of their passing. (Article 100 paragraph 4)

State Commission decision-making

Article 101

The State Commission may, by means of a conclusion:

- 1) reject a complaint, if the complaint is unlawful, untimely and presented by unauthorized person;**

- 2) **deter further procedure, by receiving a written notice from submitter of the complaint on abandonment of the submitted complaint.**

The State Commission 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 State Commission shall explain its decision.

The contracting authority shall act in accordance with the State Commission directions contained in the decision, within the time limits determined by the State Commission.

The State Commission may request from the contracting authority to submit a report to the State Commission on the implementation of orders contained in the decisions referred to in paragraphs 1 and 2 above.

If the State Commission determines that the contracting authority has not implemented its decision issued in respect of the complaint and the reported case of irregularity, it shall inform the Government of Montenegro or local self-government unit thereof, and propose initiation of a proceeding for determining liability.

As previously mentioned, the State Commission, in the procedure of protection of rights, decides by means of a conclusion or a decision.

The State Commission may, by means of a conclusion:

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

The objection is considered unlawful if:

- **the objected procedure is not a public procurement in the sense of the Article 2 of this Law, or**
- **the process assumption for its submission has not been fulfilled (objection was not previously submitted to the contracting authority).**

The objection is considered untimely:

- **-when the contracting authority submits the objection after the expiration of the deadline for submission under Article 91 of the Law.**

The objection lodged by an unauthorised person is an objection for which the contracting authority indisputably determines that the person that has submitted the objection has not been actively authorised in the sense of Article 87 paragraph 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), responsible state prosecutor, the Public Procurement Directorate, the State Audit Institution and other responsible bodies). (Article 101 paragraph 1)

The contracting authority is obliged to act according to the State Commission statements included in the decision on the lodged complaint of unsatisfied tenderer. In case that the contracting authority does not act according to its decision, the State Commission is authorized to inform the Government of Montenegro thereof, i.e. the responsible body of the local-self government unit and propose the initiation of the accountability procedure. This solution enables the Government and the responsible bodies to undertake measures against the contracting authority that is acting contrary to the law. In any case, the contract concluded contrary to the State Commission's decision is considered invalid.

Article 102

The decision of the State Commission shall be final in an administrative procedure, but for the purpose of establishing its legality, an administrative dispute procedure may be undertaken, by means of an action, against it before the Administrative Court of the Republic of Montenegro.

Decisions of the State Commission are binding and have the status of a final and executive act. The judicial control over the public procurement decisions (decisions and conclusions) of the State Commission is provided in accordance with the requirements of EU Directives and the European Court of Justice, in the court proceedings before the Administrative Court. Namely, the right to appeal against the decision of the State Commission is not allowed; however, within 30 days of the day of submitting the decision to the parties, administrative dispute can be initiated before the Administrative Court of Montenegro. Also, an unsatisfied tenderer can request a compensation of damages before the responsible court.

IX. PENALTY PROVISIONS

Infringements

Article 103

A pecuniary fine ranging from 30-fold to 200-fold amount of the minimum wages in Montenegro shall be imposed on the contracting authority for an infringement:

- 1) where information from the tender has not been protected, in accordance with corresponding level of confidentiality (Article 10);**
- 2) where public contract has been awarded without previous enforcement of the procedure laid down in this Law (Article 18);**

- 3) where the subject of a public contract that represents a single whole is subdivided, with the intention to avoid the application of this Law and the prescribed procurement procedure (Article 32, paragraph 2);
- 4) where prior information notice, invitation to tender and contract award decision have not been advertised in the manner laid down in this Law (Articles 33, 34, 35 and 36);
- 5) where tender documentation has not been provided to all those who requested it, in accordance with invitation to tender (Article 41);
- 6) where the envisaged conditions for participation and criteria have not been in accordance with this Law or where conditions and criteria have been altered after the publication and announcement of the invitation to tender, without informing the tenderers (Articles 66 and 45-51);
- 7) where invitation to tender does not specify the time limit, manner of submitting tenders, and place and time of public opening of tenders (Article 62);
- 8) where public procurement of small value (shopping method) has been enforced contrary to the provisions of Article 77 above;
- 9) where records have not been maintained or public procurement documentation has not been kept (Article 84, paragraph 1, and Article 85);
- 10) where information on enforced public procurement procedures has not been provided to the responsible administrative authority within the foreseen time (Article 84, paragraph 3);
- 11) where public contract has been concluded prior to expiry of the time limit for submission of requests for protection of rights referred to in Article 88 above;
- 12) where it has acted contrary to the provision of Article 89 above regarding the deterring of the procedure in case of a submitted request for protection of rights;
- 13) where documentation referred to in Article 99 above has not been provided;
- 14) where the decision of the State Commission from Article 101 above has not been enforced within the envisaged time limits.

Pecuniary fine ranging from 5-fold to 20-fold amount of minimum wage in Montenegro shall be imposed on the contracting authority's responsible person for the infringement referred to in paragraph 1 above.

In accordance with positive legal regulations governing the area of misdemeanour liability in Montenegro, this Article of the Law prescribes fines for actions that are contrary to the specific rules stipulated by the Law. Therefore, it is stipulated that a pecuniary fine ranging from 30-fold to 200-fold amount of the minimum wage in Montenegro shall be imposed on the legal entity - contracting authority (the Law obligor), where:

- information from the tender has not been protected, in accordance with corresponding level of confidentiality (Article 10);

- public contract has been awarded without previous enforcement of the procedure laid down in this Law (Article 18);
- the subject of a public contract that represents a single whole is subdivided, with the intention to avoid the application of this Law and the prescribed procurement procedure (Article 32, paragraph 2);
- prior information notice, invitation to tender and contract award decision have not been advertised in the manner laid down in this Law (Articles 33, 34, 35 and 36);
- tender documentation has not been provided to all those who requested it, in accordance with invitation to tender (Article 41);
- the envisaged conditions for participation and criteria have not been in accordance with this Law or where conditions and criteria have been altered after the publication and announcement of the invitation to tender, without informing the tenderers (Articles 66 and 45-51);
- invitation to tender does not specify the time limit, manner of submitting tenders, and place and time of public opening of tenders (Article 62);
- public procurement of small value (shopping method) has been enforced contrary to the provisions of Article 77 of this Law;
- records have not been maintained or public procurement documentation has not been kept (Article 84, paragraph 1, and Article 85);
- information on enforced public procurement procedures has not been provided to the responsible administrative authority within the foreseen time (Article 84, paragraph 3);
- public contract has been concluded prior to expiry of the time limit for submission of requests for protection of rights referred to in Article 88 of this Law;
- it has acted contrary to the provision of Article 89 of this Law regarding the deterring of the procedure in case of a submitted request for protection of rights;
- documentation referred to in Article 99 of this Law has not been provided;
- the decision of the commission for the control of the public procurement procedure in Montenegro has not been enforced within the envisaged time limits (Article 101). (Article 103 paragraph 1)

For the aforementioned infringements (from Article 103 paragraph 1), the legislator has stipulated that the pecuniary fine ranging from 5-fold to 20-fold amount of the minimum wage in Montenegro shall also be imposed on the responsible person of the contracting authority. These fines have also been established in accordance with the ranges determined by the general regulations on misdemeanour liability. (Article 103 paragraph 2)

Article 104

A pecuniary fine ranging from 30-fold to 200-fold amount of the minimum wages in Montenegro shall be imposed on the tenderer for an infringement:

- 1) where it provides incorrect information in respect of professional technical and personnel capabilities (Article 49);
- 2) where it fails to inform the contracting authority about alteration of information (Article 51).

Pecuniary fine ranging from 5-fold to 20-fold amount of minimum wage in Montenegro shall be imposed on tenderer`s responsible person for the infringement referred to in paragraph 1 above.

Pecuniary fine ranging from 5-fold to 20-fold amount of minimum wage in Montenegro shall be imposed on a natural person as a tenderer for the infringement referred to in paragraph 1 above.

By ranking the degree of risk from the infringement of specific provisions of the Law, this Article establishes infringements that are of the lesser degree of social risk when compared to the infringements from Article 103 of the Law. Therefore, a pecuniary fine ranging from 30-fold to 200-fold amount of the minimum wage in Montenegro shall be imposed on the legal entity - tenderer for an infringement:

- where it provides incorrect information in respect of professional technical and personnel capabilities (Article 49);
- where it fails to inform the contracting authority about alteration of information (Article 51) - (Article 104 paragraph 1)

For the aforementioned infringements a pecuniary fine ranging from 5-fold to 20-fold amount of the minimum wage in Montenegro shall be imposed on the tenderer`s responsible person. (Article 104 paragraph 2)

Additionally, for infringements referred to in Article 104 paragraph 1 of this Law, a pecuniary fine ranging from 5-fold to 20-fold amount of the minimum wage in Montenegro shall be imposed on a natural person as a tenderer (Article 104 paragraph 3).

X. TRANSITIONAL AND FINAL PROVISIONS

Article 105

Public procurement for which invitation to tender was published before this Law enters into force, shall be enforced in accordance with the regulations based on which it has been initiated.

In order to ensure the protection of interests of parties in the public procurement procedures and the public interest, this provision is ensuring that the public procurement for which invitation to tender was published before the entering into force of this Law, shall be enforced in accordance with the regulations that were in force prior to the implementation of this Law. (Article 105)

Article 106

The provisions of Article 46 above referring to criminal liability of legal persons shall apply after the Law on Criminal Liability of Legal Persons becomes effective.

This provision of the Law, with the objective of its efficient implementation, decidedly stipulates that the provisions of Article 46 above referring to criminal liability of legal persons shall apply after the Law on Criminal Liability of Legal Persons comes into force. (Article 106)

Article 107

Public Procurement Commission, appointed based on the provisions of the effective law, shall continue its work, with rights, obligations and term of office determined in this Law.

This transitional provision envisages that the Public Procurement Commission, appointed based on the provisions of the effective law, shall continue its work, with newly established rights, obligations and powers. (Article 107)

Article 108

The responsible administrative authority shall be established within 90 days from the day when this Law enters into force.

Until the day of establishment of the responsible administrative authority, Directorate for Procurement of the Republic shall perform its operations.

The Public Procurement Directorate whose operations are regulated in Article 17 and other provisions of this Law, in accordance with this provision, shall be established within 90 days from the day when this Law enters into force. (Article 108 paragraph 1)

Until the day of establishment of the Public Procurement Directorate, the Directorate for Procurement of the Republic, which continues its operation under the title Administration for Common Services of State Authorities, shall perform its operations. (Article 108 paragraph 2)

It should be emphasized that in accordance with regulations on the public administration, operations of the public administration are performed by the ministries and administrative authorities. Administrative authorities are performing operations related to law implementation; therefore, the public administration character has been recognized for the Public Procurement Directorate, which is established in accordance with the provisions of this Law.

Article 109

The responsible administrative authority shall take over the officials from the Directorate for Procurement of the Republic that perform public procurement operations, within the time referred to in Article 107, paragraph 1 above.

Assignment of duties to the officials referred to in paragraph 1 above shall be performed in accordance with the act on organization and systematization of the responsible administrative authority.

Officials of the Directorate for Procurement of the Republic, who are not assigned duties in accordance with paragraph 2 above shall exercise the rights in respect of employment in accordance with the law governing the rights of civil servants and state employees.

Provisions of this Article stipulate that the Public Procurement Directorate shall take over state employees from the Directorate for Procurement of the Republic that perform public procurement operations, within 90 days from the day of this Law entering into force. (Article 109 paragraph 1)

Assignment of duties to state employees and civil servants shall be performed in accordance with the act on organization and systematization of the Public Procurement Directorate. (Article 109 paragraph 2)

In order to ensure the protection of rights in respect of employment, the Law stipulates that the state employees and civil servants of the Directorate for Procurement of the Republic, who are not assigned duties in accordance with this Article of the Law, shall exercise their rights in respect of employment in accordance with the law and other regulations governing the rights of civil servants and state employees. (Article 109 paragraph 3)

Article 110

As of the day of establishment of the responsible administrative authority, Directorate for Procurement of the Republic shall continue its work under the former title - Administration for Common Services of State Authorities, until the Government issues an act that will govern its responsibilities, rights and obligations.

The responsible administrative authority shall take over business premises, means of work, things, equipment, archive and other resources used on the day when this Law enters into force by employees of the Directorate for Procurement of the Republic performing public procurement operations, within the time referred to in Article 107, paragraph 1 above.

This provision of the Law stipulates that as of the day of establishment of the responsible administrative authority, whose rights and obligations are specified under Article 17 and other provisions of the Law, Directorate for Procurement of the Republic, established by the previously effective Law on Public Procurement, shall continue its work under the title - Administration for Common Services of State Authorities, until the Government issues an act that will govern its

responsibilities, rights and obligations, i.e. the scope of activities. (Article 110 paragraph 1)

Within 90 days from this Law entering into force, the Public Procurement Directorate shall take over business premises, means of work, objects, equipment, archive and other resources used by employees of the Directorate for Procurement of the Republic performing public procurement operations on the day when this Law enters into force. (Article 110 paragraph 2)

Article 111

The subsidiary legislation that needs to be adopted according to this Law shall be adopted within 90 days after this Law enters into force.

This Article establishes the time limit for the adoption of subsidiary legislation for the implementation of this Law, which is 90 days as of the day this Law enters into force. (Article 111)

Article 112

Public Procurement Law («Official Gazette of the Republic of Montenegro», no.40/01) shall be repealed on the day when this Law enters into force.

The subsidiary legislation adopted on the basis of the Law on Public Procurement («Official Gazette of the Republic of Montenegro», no.40/01) shall apply until the subsidiary legislation envisaged by this Law has been adopted.

This Article stipulates that as of the day of this Law entering into force, the previous Public Procurement Law shall cease to be valid, while the subsidiary legislation adopted on the basis of the Law on Public Procurement shall apply until the subsidiary legislation envisaged by this Law has been adopted. (Article 112)

Article 113

This Law shall enter into force on the eighth day after its publication in the “Official Gazette of the Republic of Montenegro”.

In accordance with the general rule of coming into force of laws and other regulations and the obligation of publishing the laws in the Official Gazette of Montenegro, this Article envisages that this Law shall enter into force on the eighth day following its publication in the “Official Gazette of Montenegro”. (Article 113)

ANNEX I:

Services

- **Maintenance and repair services;**
- **Land transport services (except for rail transport services), including armoured car services, and courier services (except transport of mail);**
- **Air transport services of passengers and freight, except transport of mail;**
- **Transport of mail by land and by air (except for rail transport services);**
- **Telecommunications services (except for voice telephony, radio telephony, paging and satellite services);**
- **Financial services:**
 - **insurance services**
 - **banking and investment services (except financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments, and central bank services);**
- **Computer and related services;**
- **Accounting, auditing and bookkeeping services;**
- **Market research and public opinion polling services;**
- **Management consulting services (except arbitration and conciliation);**
- **Architectural services:**
 - **engineering services;**
 - **urban planning and landscape engineering services;**
 - **related scientific and technical consulting services;**
 - **technical testing and analysis services;**
- **Advertising services;**
- **Building-cleaning services and property management services;**
- **Publishing and printing services on a fee or contract basis;**
- **Sewage and refuse disposal services; sanitation and similar services.**
- **Hotel and restaurant services;**
- **Rail transport services;**
- **River transport services;**
- **Supporting and auxiliary transport services;**
- **Legal services;**
- **Personnel placement and supply services;**
- **Investigation and security services (except armoured car services);**
- **Education and vocational education services;**
- **Health and social services;**
- **Recreational, cultural and sporting services;**
- **Other services.**

The Annex to services, with the specific exemptions from the application of the Law, has been established by Annex I that is an integral part of the Law.

This Annex specifies the list of services to which the Law on Public Procurement applies, these being the following:

- Maintenance and repair services;
- Land transport services, including armoured car services, and courier services;
- Air transport services of passengers and freight;
- Transport of mail by land and by air;
- Telecommunications services;
- Financial services:
- Insurance services
- banking and investment services;
- Computer and related services;
- Accounting, auditing and bookkeeping services;
- Market research and public opinion polling services;
- Management consulting services;
- Architectural services:
- Engineering services;
- Urban planning and landscape design services;
- Related scientific and technical consulting services;
- Technical testing and analysis services;
- Advertising services;
- Building-cleaning services and property management services;
- Publishing and printing services on a fee or contract basis;
- Sewage and refuse disposal services; sanitation and similar services.
- Hotel and restaurant services;
- Rail transport services;
- River transport services;
- Supporting and auxiliary transport services;
- Legal services;
- Personnel placement services;
- Investigation and security services;
- Education and vocational education services;
- Health and social services;
- Recreational, cultural and sporting services;
- Other services.

Additionally, this Annex prescribes the services to which the Law does not apply, namely:

- rail transport services;
- mail transport services;
- voice telephony, radio telephony, pager and satellite services;
- financial services related to issuing, sale, purchase or transfer of securities or financial instruments and services of the Central Bank,

- arbitrage and reconciliation services; and
- security services, including armoured vehicle transport.