

Government of Montenegro

Ministry of Finance

Questionnaire

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

– ADDITIONAL QUESTIONS –

05 Public Procurement

Minister:

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

5: Public Procurement

II. Award of public contracts

Legislation

1. (Ref to Q. 4): What are the legislative provisions for avoiding splitting of tenders in order to avoid more complicated procedures?

Pursuant to Article 27 of the Law on Public Procurement, 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 provisions of Article 32 of the Law related to determination of the value of a public contract, clearly define that the *contracting authority* is obliged to indicate the estimated value of a public contract in the call for competition *so as to observe the conditions and methods of procurement prescribed by the 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 the 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 Form – conditions and method of determining the public contract value. The Form is published in the Official Gazette of the Republic of Montenegro 71/06 and it has already been submitted in the previous Annex.

Pursuant to Article 33 of the Law, 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 of public procurement procedure, and in accordance with Article 34, every contracting authority that is, pursuant to the Law, obliged to adopt a public procurement plan, (the value of procurement is over EUR 100 000) shall publish a prior information notice on the website of the competent administrative authority of the Public Procurement Directorate indicating the main details and information from the public procurement plan, the type, subject-matter, planned value, quantity and conditions of the public contracts.

The prior information notice shall be published by not later than the end of the previous year for the following year.

The above mentioned method is to have preventive effects on the possibility to subdivide the subject of a public contract. However, such subdivision is still possible and, *for such behaviors, it is possible to apply sanctions as stipulated in Article 103 of the Law. In accordance with these provisions, 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) and/or 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).*

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 above mentioned infringements.

In addition to this, the authorized officers of the Public Procurement Directorate monitor procedures, indicate any deficiencies in relation thereto and state deadlines for their corrections in relation to publication of a contract notice or giving prior approval to contracting authorities for commencing certain procedures in the cases envisaged by the Law, as well as with publishing decisions on contract award, including the shopping method, and they have authority to inform the State Audit Institution and initiate a proceeding for determining criminal liability.

The standard form lays down detailed conditions and method of establishing the value of public procurement contracts which shall be applied by the contracting authorities in public procurement procedures. In accordance with this by-law:

1. Calculation of the estimated public contract value is based on total remuneration to be paid, with VAT, according to the estimation of the contracting authority;
2. The estimated value of goods, services or works corresponds to the total remuneration that is to be paid by the contracting authority for all goods, services, works, immovable assets and other items included in the procurement in question;
3. Where it is reasonably expected that the proposed contract is going to be extended, renewed or followed by a new goods, services or works contract, the basis for calculation of the estimated value of such proposed contract shall be the maximum total possible remuneration that shall be paid for the proposed contract, including the maximum total possible remuneration that shall be paid for the contingent contract extension, contract renewal or a new contract.

The estimated value of goods, services or works is their estimated value in time of publication of the tentative contents of the public procurement plan - prior information notice, that is, a prior call for competition.

The contracting authorities shall not divide the contract subject-matter with an intention of avoiding the application of the public procurement procedures prescribed by the Law.

Selection of methods for calculation of the estimated public contracts value shall not be performed with an intention of avoiding the application of the public procurement procedures prescribed by the Law.

Where, due to the proposed procurement of works, provision of services or goods, several public contracts are awarded simultaneously by the lots, a total estimated value of these lots shall be taken into account.

If the total value of all lots corresponds to or exceeds the value scales provided in the Law, then a procedure prescribed by the Law in relation to the given value scales shall be applied separately for each of the lots.

2. (Ref to Q. 5): With reference to existing procedures:

3. Please specify the qualification criteria type for restricted tenders published in the invitation and the tender documentation. Please confirm/correct the statement that pre-qualification depends upon "contracting authority's legal status, business capacity, financial capacity, technical qualifications and the qualifications of personnel".

Pursuant to Article 21 of the Public Procurement Law (Official Gazette of the Republic of Montenegro 46/06), 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 bidders 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 bidders on the basis of data evidencing their legal status, business capacity, financial capacity, technical qualifications and staffing qualifications,
 - select at least three qualified bidders;

Decision on qualification is published on the website of Directorate.

- 2) at the second stage, the invitation for bids will be sent to all qualified bidders.

Only the qualified bidders may submit a bid.

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

Pursuant to Article 22 of the Law, the contracting authority shall notify the bidders 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 bidder from the list of qualified bidders only for the reasons based on pre-determined conditions.

The provision that relates to the first stage of this public procurement procedure that reads: *"establish the qualification of bidders on the basis of data evidencing their legal status, business capacity, financial capacity, bidders qualifications and staffing qualifications"*, is an explicit legal norm. The process of improving the legislation currently ongoing and realised through IPA 2007 "Further development and strengthening of the public procurement system in Montenegro", will remove these shortcomings, since they have been already identified, in this part. Namely, every bidder must fulfil the conditions in the process of competition referred to in Article 45 of the Public Procurement Law:

- 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.

Criminal offences are specifically listed in Article 46 of the Law and they related to criminal offences of participation in criminal organization, corruption, fraud, money laundering or criminal offences related to the professional conduct of their business.

The contracting authorities may specify, in the call for competition and bidding documents that the bidders should meet 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 bidders shall be indicated in the call for competition and the bidding documents.

4. What else, along with the value and high importance, is required in order to launch a restricted procedure?

Pursuant to Article 22 of the Public Procurement Law, restricted procedure, as stated in the answer to the previous question, 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 bidders 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.

5. In negotiated procedure with prior publication of a contract notice, how is the list of companies invited for negotiations established in all relevant cases except when the negotiated procedures follows an unsuccessful open/restricted tender?

Pursuant to Article 24 of the Public Procurement Law, the contracting authorities may award their public contracts by negotiated procedure, after publication of a contract notice, in the following cases:

- 1) when the nature of the works, supplies, or services or the risks attaching thereto do not permit prior overall pricing;
- 2) in respect of 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) 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;
- 3) 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 above, and to seek out the best bid, contracting authorities shall negotiate with bidders who submitted their bids pursuant to previously published invitation to tender and fulfilled the required qualification conditions – the list of bidders who qualify to be invited to participate in negotiations, 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 bidders and shall not provide information that gives advantage to individual bidders.

Contracting authorities may provide for the negotiated procedure to take place in successive steps in order to reduce the number of bids to be negotiated by applying the award criteria stated in the contract notice or the tender documents. The contract notice or the bidding documents shall indicate in that case that recourse has been had to this option. The negotiators shall be informed about results in all phases in order to provide legal protection at that stage of proceedings.

6. (Ref to Q. 8): Please describe more precisely how "most economically advantageous tender" criteria are applied in restricted procedures and respectively how thresholds are established for compiling shortlists.

Regarding the restricted procedure, the only criterion for the selection of the best bid and award of a contract is the lowest offered price. We are aware that the Law, in this part, does not follow the provisions of EU Directive 2004/18, but this part will, in the future reform process, be fully harmonized with the regulations and standards of the European Union and allow the introduction of the criterion of the most economically advantageous bid with a possibility that relevant sub-criteria specific for a certain public procurement subject may be defined.

7. (Ref to Q. 9): Answer award criteria/link to subject matter: could Montenegro clarify its answer in more depth, in particular, in relation to the environmental and social criteria which could be used in the award procedures? The Commission would appreciate an indicative listing of examples, i.e. criteria which are deemed to be linked to the subject matter of the procurement and also an indicative listing of those criteria which following the Montenegrin legislation and practice would not be considered as criteria linked to the subject matter of the procurement.

The Public Procurement Law of Montenegro allows the specification of ecological criteria in the call for competition.

For the purpose of selection of the best tender in the procedures of public procurement of goods, works and services, the Law laid down the sub-criteria under the criterion of the "most economically advantageous tender", and from among listed sub-criteria, there was a sub-criterion "programme and degree of environment protection".

The above criterion enables the contracting authority, by means of invitation to tender and bidding documents and by determining conditions for the participation of bidders in the public procurement procedures and particular evaluation of the said sub-criterion, to award an appropriate number of points and the selection of the best bidder.

This sub-criterion was not only described in detail by the Law but in the Rulebook on the Methodology for expressing the criteria into an appropriate number of points and on the method and procedure and comparison of tenders, which has already been submitted in the previous Annex.

Therefore, there are no obstacles for ecological criteria within the criterion of the most economically advantageous tender to be included as a sub-criterion when selecting the best tender. Prior to that, ecological requirements have to be defined by the public procurement subject matter, technical specifications of the subject in question, that is by the invitation to tender and bidding documents. Should the contracting authority request standards for ecological management, it will refer to EMAS or relevant standards based on European or international standards. Other equivalent measures of ecological management shall be accepted by the bidder.

Criteria for awarding contract, which are applied when awarding a contract based on the "most economically advantageous bid", may include criteria in relation to satisfying the public needs in the area of environmental protection or society on condition that criteria are related to subject matter of public procurement, restrict the contracting authority when selecting the best bidder and openly stated in the bidding documents. On this occasion, different sub-criteria may be applied related to the subject of public procurement of the most economically advantageous bid, such as quality, price, technical characteristics, aesthetic and functional characteristics, *programme and degree of environment protection*, *social criterion - that the contract will be awarded, under equal terms, to the bidders where most of the employees are persons with special needs*, then running costs, cost-effectiveness, after-sales service and technical assistance. The term "environmental protection" may involve those characteristics of environmental protection that are not related to the

effect of the consumption phase (for example, the process of material production which has no such environmental impact). The task of contracting authority is that, when applying the criterion of the most advantageous bid for awarding a contract, it makes the overall comparative assessment of the advantages of individual bids and such assessment is to be made from the point of view of the administrative authority, factors that are not purely of economic nature can still be included in the criteria for selection if a contracting authority considered them valid for selection of the best bid and contract award. But, for example, criteria that would relate just to the amount of electricity produced from renewable resources that exceeds the expected demand of the contracting authority (that is a subject of a contract), was not related to the subject matter of the public procurement – contract. All related costs incurred during the lifetime cycles of the product are allowed (direct management costs, the costs of recycling) but not the external costs. It is also possible to evaluate the sub-criteria when the contract is of the social character, for example promotion of language or care for persons imprisoned or detained on ethnical basis. In relation to services, such as transportation, sub-criterion is allowed in relation to concentration of nitrogen oxide and noise emission of the vehicles of bidders, again in line with bidding documents, on the manner that exclude the possibility of unlimited freedom of selection and/or it is needed to provide matching with conditions and the subject matter of public procurement.

In Montenegro, according to our knowledge, there is no developed national, institutional plan or program for promotion of green public procurement, and a system of environmental protection is under the jurisdiction of government authorities, which monitor the realization of measures in this area.

The ecological and social sub-character for the selection of the best bid is applied in a small number of cases in the public procurement procedures, and on that basis, the relatively small number of points is awarded. The main obstacles in the process of implementation of ecological criteria for public procurement in Montenegro are insufficient awareness of the importance of environmentally clean products for life and human health and the need to create a broad platform for the establishment of sustainable national program to promote and educate the public on the extent and importance of the influence of green public procurement on the environment, and this especially for the better implementation of the sets of laws in the area of environmental protection. In this respect, we expect the future assistance and support from the European Union.

8. (Ref to Q. 14): With reference to corruption/conflict of interests: could Montenegro expand its submission by answering the following questions:

i. What are the concrete measures usually taken by contracting authorities to prevent corruptive practices, could Montenegro provide examples?

Pursuant to Article 13 of the Public Procurement Law, anti-corruption rules means that all contracting authorities, bidders 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.

In practice, 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 bidder 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 bidder and the administrative authority in charge of public procurement thereon in writing. The aforesaid means that so far there was no written notification addressed to the Directorate of violation of anti-corruption rules, although the Directorate issued the instruction on the manner of submitting of this type of information.

Additionally, in accordance with provisions of this Article of the Law, the contracting authorities shall provide access and adequate information on the organisation and decision-making process in public procurement procedures to all interested parties, so that, in case of violation of their rights, they can achieve adequate legal protection.

Pursuant to Article 14 of the Public procurement Law, *conflict of interest* means that all participants in the public procurement procedure shall take any necessary action to prevent existence of a conflict of interest. Participants are a public procurement officer, members of the Commission for opening and evaluation of bids, 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 - Public Procurement Directorate in a timely manner, of the actual or potential existence of a conflict of interest. The Directorate has not been notified of cases of conflict of interest in written form, except for requests for the provision of assistance through "help-desk", which are outlined in the answers.

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

This is where rules on elimination of conflict of interest are applied which were passed to deal with different administrative areas, primarily in the state administration and/or local self-government. The recommendation is always given to implement regulations on civil service, civil servants and state employees and local self-government including special codes of ethics for particular administrative or other areas.

The conflict of interest especially exists (meaning that it may exist in other cases as well) if a person (this relates to any person participating in the public procurement procedure or perform any action in the procedure) is the bidder itself or the bidder'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 (either to bidder or the bidder's legal representative or attorney), is a guardian, adopter or adoptee of the bidder, his legal representative or attorney; is a shareholder or member of management bodies of the bidder; that has direct or indirect interest in the public procurement procedure, which enables personal acquisition of property, by exerting influence on the decision-making process; as well as if there are other circumstances causing a doubt about such person's impartiality or being related to these persons anyhow.

A person who prepares bidding documents and has any impact on the implementation of the public procurement procedure *may not act as a bidder or sub-contractor and may not cooperate with the bidder in preparing the tender.*

Persons, who, on behalf of the contracting authority, perform some of the activities of public procurement, shall submit a written statement on existence or non-existence of the cases of conflict of interest. The signed statement shall make an integral part of the documentation of the respective public contract.

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

In this part, as it was indicated, the provisions of general and specific codes of ethics for public administration and local self-government and other codes of contracting authorities are applied.

It should be mentioned that the form of declaration of independence for bidders is defined by the Rulebook and the Standard Form that is published as a by-law.

The examples related to this sub-question, because of coherence, are given in the answers on the following sub-questions ii, iii and iv.

ii. Does the Public Procurement Directorate or other central state authority conduct trainings or uses any other means to disseminate good practice related to fight against corruption and handling of conflict of interest among the potential stakeholders of a public procurement procedure?

The Public Procurement Directorate in continuity, independently, as well as in cooperation with the Human Resources Management Authority and the Directorate for Anti-Corruption Initiative participate and cooperate in organization of personnel training to perform public procurement tasks. *Within these trainings, on a regular basis, training on compliance with ethical behavior with emphasis on anti-corruption rules and conflict of interest has been conducted as part of special training.* This means that this training relates to the application of specific ethical rules contained in the very regulations on public procurement and ethical rules that are contained in the general regulations of the state administration and local government, including special codes of ethics for certain administrative areas.

Directorate has developed a Personnel Training Program in the area of public procurement.

Trainers in train-the-trainer scheme have been identified.

Topics for the future trainings and organizational aspect of the training seminars were prepared. The significant assistance was planned in the area of public procurement within the IPA Program of pre-accession assistance and the training started in cooperation with the consultant - company in charge of implementation of this project.

It is of specific importance to emphasize that the OSCE mission in Montenegro in cooperation with the Public Procurement Directorate and the Directorate for Anti-Corruption Initiative conducted a project of training the employees on public procurement tasks at the level of local self-government and governmental institutions under title "Realization of the principle of transparency in public procurement procedures in Montenegro". The project emphasize was on ethical rules – anti-corruption behavior and prevention of conflict of interest.

As a result of this joint cooperation, the Handbook was prepared on "Public Procurement in Montenegro (realization of basic principles)".

Training activities on public procurement procedures, for this project, were carried out through several workshops for staff employed in local self-government and institutions at the central level. For the region of municipalities in the south of Montenegro, the training was realized on 23-24 April 2009, for about 30 participants, for municipalities in the central part on 7 and 8 May 2009 for about 25 participants and for the municipalities in the northern region on 14 and 15 May 2009 for About 45 participants.

Final training for institutions at the central-state level was conducted in Podgorica on 11 and 12 June 2009 for about 30 participants. The representatives of the mentioned institutions contributed to increasing knowledge on public procurement procedures system in Montenegro and promoting the information on the importance on transparent and competitive public procurement procedures through methods of interactive learning and intensive group work. The special emphasize was given to anti-corruption rules and prevention of conflict of interest. The ethical rules on the prevention of corruption contained in the Public Procurement Law, the Law on Civil Servants and Employees, the Code of Civil Servants and Employees and other regulations were presented

separately. The training was conducted by the local certified trainers for public procurement, some of which are also experts in the codes of ethics, with the support of international experts

Elaboration of held trainings, including ethics in public procurement is given below in the answer to the question "Institutional set-up (administrative capacities)-1. (Ref. Questions 15-18) "Could Montenegro expand its answer and inform about the activities which the relevant authorities conducted in the area of guidance and training?"

iii. In how many cases did contracting authorities reject a tender/cancel the procedure/withdraw from the conclusion of the contract/etc. for the reasons of corruptive practices? Are there any statistical data or examples available? What are the most frequent reasons for the said actions?

Yes, there are certain data on the violation of ethical rights. Some of the examples and statistical data are given in the answer to the following sub-question.

According to existing regulations as to forms for preparation of statistical reports on public procurement, there are no specific columns in which it would be possible to keep statistics on cases and number of cases of cancellation of public procurement procedures, which are maintained by contracting authorities because of existence of conflict of interest or corruption. We do not know that there are established so highly sophisticated systems even in highly developed countries, or it is possible that we do not know about such systems. The entire procedure by the contracting authority is his responsibility, in the procedure, the declaration of independence is signed, and failures thereto is a reason for canceling the public procurement procedure as much as other shortcomings defined by the law being the reason for canceling the procedure or a part of it. We keep specific statistics based only on the cases reported to the Directorate (in writing, by telephone and in public or anonymous).

Possible examples of conflict of interest or unethical behavior that are almost reaching the level of corruption are close acquaintance with some of the potential participants in the public procurement procedure, negligence in the performance of tasks and communication of information, kindred, friendly relations or other, traditional attitudes, lack of motivation of employees in respect of their earnings or occupational status, the promise of prizes or gifts or other doubts as to the respect of ethics and rules and insufficient knowledge of the contents and significance of codes of ethics which the heads of bodies in most cases did not introduce officials with nor when entering into employment contract or the arrangement into the new work posts handed a copy of the Code of Ethics, signed by the employee that they are familiarized with and understand the essence of the rules of ethics.

iv. In how many cases did public officials dealing with procurement signal the existence of a conflict of interest? Are there any statistical data or examples available?

Yes, there are several recent examples. In one, an officer involved in the process of public procurement of a certain state administration body informed the Public Procurement Directorate by telephone, calling the "help-desk", on how to act in a situation discovered in the process of public procurement in that body. On that occasion, he wanted to protect his integrity, specifically requesting that his address remain anonymous. The Directorate had to comply with his request, not insisting on his instating on his identity or the identity of the body in accordance with positive legal regulations and the right of the officer. He was given the complete information. It was about a situation that one of the employees of the authority had an access to bidding documents and was not included in the public procurement process itself, using a personal acquaintance with one of the potential bidders, he gave the bidder the bidding documents, before publishing an invitation, thereby breaking the rules related to conscientious performance of under the Law on Civil Servants

and State Employees (Official Gazette of the Republic of Montenegro 50/08 and 86/09) so as the Code of Ethics for civil servants and state employees. At the same time, the basic principles of public procurement were violated including anti-corruption rules and conflict of interest. The fact that a person is not directly involved in the specific public procurement procedure does not relieve the contracting authority of complying with all legally defined rules on public procurement processes. Therefore, it is advised to the applicant who asked for assistance to publicly identify such bidder and the person who abused the office and gave documentation which was even incomplete and invalid (from some of the draft stages), to initiate disciplinary proceedings and other proceedings in accordance with the law, and to exclude the bidder who has submitted an offer although he did not purchase the valid bidding documents, exclude from the public procurement procedure and take measures accordingly. The designated officer called the Directorate, upon completion of the assessment and evaluation, to thank for help.

In the second case, the public procurement officer reported the negligence of all officials of the Commission which led the public procurement procedures. He asked for advice for the head of body due to the negligence of staff in the very procedure and their public communication with bidders outside the regular procedure whereat it was possible to recognize clearly a doubt of existence of conflict of interest in the public procurement procedure because of their personal relations, the nature of which could not be clearly defined. The advice was that based on all the facts collected strengthen the base for existence of such doubt, the commission should disqualify, initiate a proceeding for determining liability, appoint a new commission and return the process to the stage before the violation occurred, or depending on the size of violation, it is possible to cancel the whole public procurement procedure. We expect feedback on what has been done in this case.

In the following example, one member of the Commission for opening and evaluation of tenders at a public institution was in a conflict of interest because of close family relations with the bidder in the public procurement procedure. Member of the Commission knew that the bidder, whom he is in a close family relation, purchased bidding documents, and later submitted an offer without exempting himself from the public procurement procedure. During the procedure, this situation is discovered; the officer is disqualified and replaced as a member of the commission, and against the same person, the procedure of disciplinary responsibilities was initiated. According to the Code of Ethics, a fine was envisaged for such disciplinary offense.

Two complaints were lodged with the Commission for Control of Public Procurement Procedure, one of them by "Cijevna komerc" DOO Podgorica, and the second one by "Yu Briv" DOO, Kotor, both filed against a decision of the Public Procurement Directorate, in relation to invitation No. 04-21/08, about open procedure for the selection of the best tender for the execution of works on solidification of muddy material and earthworks on masses hauling, with solidified muddy material and dry material from the dump site of Mojkovac Lead and Zink Mine, within project "Remediation and re-cultivation of Lead and Zink Mine dump site in Mojkovac".

The above complaints were related to the possible existence of conflict of interest in public procurement procedures, and wherein the validity of tender submitted by the bidder "Vodni zdroje" a.s. Prague was adjudicated, with emphasize that the said did not contain a valid argument that the said bidder was not found to be in conflict of interest.

Namely, the Commission, at its meeting on 04.07.2008, found that indications of complainant are groundless in terms of the submitted complaints, whereby they were dismissed as groundless.

At the seminars, it has been emphasized, that the contracting authorities and bidders may freely turn to the Directorate for reporting irregularities in the proceedings, particularly in unethical behavior and corrupt acts, and for that purpose, the instruction on how to report such cases was publicly posted on the website. In 2009, there were about 40 complaints in relation to about 300 subjects on irregularities in the public procurement procedures mainly by shopping method (small value of EUR 2 000 to EUR 10 000) where such violation, among other things, indicated the conflict of interest. The reports filed, in over 95% cases, were submitted by a single non-governmental organization registered in Montenegro. However, the Directorate, upon detailed reviewing of those procedures, did not find the existence of conflict of interest. It was about other

irregularities of procedure (about 30 minor irregularities) i.e. infringements; it filed appropriate reports and informed the State Audit Institution thereof. If the rules of the European Union are to be strictly applied regarding the value classes in these cases as well, there would not almost been irregularities in any case, since the Montenegrin law is, in this part, even more restrictive than the rules applied in the countries of the European Union.

In addition, by telephone, people addressed to the Directorate to file reports on conflict of interest in different administrative areas, so the said reports were directed to the institutions responsible for providing advice and conduct of actions.

In the future period, the specific attention will be paid to special trainings on the manner of elimination of conflict of interest and possible anti-corruption acting. *The special brochure will be prepared that will be used as a guide for familiarization with ethical rules – code of ethics in general and within that context the ethics rules in the public procurement.*

Institutional set-up (Administrative capacity)

9. (Ref to Q. 15-19): With reference to administrative capacity:

i. Could Montenegro expand its answer and inform about the activities which the relevant authorities conducted in the area of guidance and training?

The Public Procurement Directorate, from the beginning of its establishment in mid-2007, has been conducting activities to provide advisory and consulting services through written opinions, discussions at meetings in the premises of the Directorate or contracting authorities as well as by providing fast information on the implementation of regulations on public procurement – help desk. In particular, as one of the main activities, trainings in the area of public procurement have been carried out continuously of both contracting authorities and bidders.

Advisory and consultancy services

One of the activities and tasks of the Directorate is to provide advisory and consulting services. Every day, by written request, including requests for direct reception with authorized officers, a large number of covered parties addressed to the Directorate – contracting authorities to give opinion on the implementation of regulations on public procurement in accordance with the authority to provide advisory and consulting services. Although the Directorate determined that these services are to be provided twice a week, keeping in mind the urgency of taking certain actions in public procurement procedures, almost on the everyday basis through immediate reception in its premises and interpretation and giving instructions on the implementation of certain provisions, advised the contracting authorities how to act in individual situations according to the regulations on public procurement. The most common services were provided in relation to the covered parties under the law, the selection of procedure, criteria for evaluation in the public procurement procedure, procurement planning, assessment and comparison of offers, deadlines for filing complaints and answer to the complaint, proof of eligibility, preparation of bidding documents and their changes and others. More than 100 opinions were given in the provision of advisory and consulting services. This included a large number of telephone advice - help desk, that is, with a relatively limited number of staff who, beside their regular jobs, were to give prompt and timely response, which was significantly slowing down the conduct of regular activities and their intensification in the non-working weekly days (Saturday and Sunday).

Training of staff, in particular, within the contracting authorities - covered parties under the regulations on public procurement and bidders, including public procurement officers and

employees in the Directorate, is one of the basic, continuous and future priority actions of the Directorate.

Further strengthening of the human resources and assistance to the Directorate shall be conditioned by activities and requirements of the European Union in the future period.

The Commission for Control of Public Procurement Procedure, to facilitate and simplify the application of the Law, published the following:

- Publication "Protection of bidder's rights", which was published thanks to the assistance of the Delegation of the European Commission, through CARDS 2006 project "Strengthening capacities of the Commission for Control of Public Procurement Procedure". The said publication provides for comparative analysis of procedures and manner of realization of bidder's rights and public interest in public procurement;
- The Public Procurement Law and Commentary, which contributes significantly to the more efficient application of public procurement in Montenegro, considering the fact that it incorporates the most important legal positions presented in the decisions of the Commission for Control of the Public Procurement procedure, tentative position adopted by this Commission, as well as the past practice of this Commission, the Constitutional Court and European Court in the public procurement procedures. The Commentary of the Public Procurement Law is a result of a joint work of the Commission for Control of Public Procurement Procedure, Public Procurement Directorate and SIGMA/OECD;
- The Collection of Decisions adopted during 2008, which was submitted to all contracting authorities in Montenegro. Development of the legal practice of the Commission for Control of Public Procurement Procedure presented in the Collection of Decisions enables greater legal safety, whereby the legal protection becomes predictable, and thereby well known to all participants in the public procurement procedures. The predictability of legal protection of the Commission for Control of Public Procurement Procedure guarantees the qualitative control mechanism in every public procurement procedure;
- The publication "Bidder's rights protection in the public procurement procedure in Montenegro", which was published in cooperation with the World Bank. The attitudes and procedures related to system of legal protection in Montenegro were explained in the publication in a simple and easy to understand manner, all for the purpose to make the system clear to those persons who have never had experience in public procurement and who are not lawyers. The said publication was translated into the English language.

Organizing the trainings on public procurement

Trainings in 2007, including seminars and conferences

The Human Resources Management Authority, in cooperation with the Ministry of Justice and Organization for Security and Cooperation in Europe – OSCE, organized between 11-13 September 2007 seminar under the title "Corruption in public administration" – (repressive and preventive character) for the purpose of conducting recommendation of GRECO initiative, dedicated to combat against corruption and adapted to the needs of different categories of civil servants, as well as the implementation of the Action Plan for conducting the program of combat against corruption and organized crime.

The Directorate for Anti-Corruption Initiative, in cooperation with the office of the United Nations Development Program (UNDP) in Montenegro and the Organization for Security and Cooperation in Europe (OSCE), Mission in MNE, organized the "Conference on harmonization of the Public Procurement Law with the United Nations Convention on Anti-Corruption" in the Hotel Crna Gora in Podgorica on 12 October 2007. At the conference, the findings of experts were presented and guidelines and recommendations were given for a full implementation of the UN Convention into the national legislation.

In the organization of the European Institute of Public Administration (EIPA), of the Maastricht Regional School for Public Administration (RESPA), the seminar "Negotiating techniques in the context of joining the European Union – means and methods" was held in Pristina on 24-25

October 2007. State employees who cooperate with international partners in the process of accession to the EU took part in the training, and they are expected to be engaged as trainers for EU issues and negotiation.

Training program, organized by the Directorate, OECD, for public procurement officers and employees of Directorate, was held in the premises of the Human Resources Management Authority on 7 November 2007. The number of 50 employees for public procurement participated at this training, at the part of discussions. The continuation of activities for public procurement officers, members of the Committee for Opening and Evaluation of Bids, bidders, contracting authorities and media for 2008 was agreed.

Regional School for Public Administration (RESPA), in cooperation with the International Training Centre in Torino, organized regional school – workshop in the area of public procurement in Torino on 18 – 25 November 2007. That training, beside the Directorate's employees, was attended by the employees of other bodies of public administration of Montenegro, as well as the representatives of the countries in the region. The legislative framework of the public procurement system of EU was presented, basic principles of the system, harmonization of the national legislation system of the Western Balkan countries and current directions of the public procurement system development in EU. New public procurement techniques were presented, the centralized system of public procurement in the EU countries, the system for complaining in the member countries, savings in public procurements, electronic procurements, and development of professional skills, monitoring and control.

Within the professional training program for civil servants and state employees for the year 2007, in the organization of Human Resources Management Authority, employees of the Directorate attended the training of budget planning, communications skills with customers, preparations for EU accession and free access to information.

Trainings in 2008, seminars and conferences

The Public Procurement Directorate participates and cooperates, in continuity, in organizing the personnel training to perform their public procurement tasks.

In cooperation with representatives of SIGMA/OECD, in January 2008, the seminar was organized for covered parties, under the title "Practical Implementation of the Public procurement System in the countries of the European Union". The training was organized for 30 participants who monitor the public procurement procedures.

In cooperation with the HRMA, two training seminars were organized in the area of public procurement for about 50 participants in the first quarter of 2008.

New procedures and new rights of participants in the public procurement procedure means new obligations for contracting authorities, and bearing in mind that these issues are being conformed with and conducted in line with the European Union law, it is justified that there are the unknowns in the application of the Law and regulations on public procurement. Therefore, in cooperation with the Human Resources Management Authority, the Directorate developed the Plan for Training Needs in the area of public procurement in November 2008, and started to conduct unique training in this area.

At the premises of the Human Resources Management Authority, the seminar was organized under the title "Public Procurement Procedure – best practice" on 22 and 23 December 2008 and there were 60 participants present. The lecturers at the seminar trained and certified for trainers for the area of public procurement, were representatives of the Directorate and state bodies. The subjects at the seminar were the following:

- public procurement system, regulations and literature, familiarization with competencies of the Directorate for Public Procurement, website of the Directorate and other issues of general character,
- conditions for giving a prior approval from the Directorate for Public Procurement for carrying out the negotiated procedure without prior publication of a call for competition,

- procedure of procurement of goods – a practical example of public procurement of goods (a vehicle for state authority),
- procedure of procurement of a service – a practical example of public procurement of a service of development of technical documentation (main project) for building an object,
- procedure of procurement of a service – a practical example of public procurement of a service (property, persons and motor vehicles insurance service)
- carrying out the negotiating procedure without prior publication of a call for competition for public procurement of a service – risk analysis (maintaining the information system service),
- procedure of public procurement of specific goods – practical example of a public procurement of goods needed for real estate cadastre.

Directorate was involved in final activities of the project “Capacity Building for the Public. Procurement Commission” realized by the European Agency for Reconstruction, which deadline for realization was extended until 9 June 2008. Given the fact that the Directorate is a new body in the system of public administration, the project was to have the aim of providing adequate preconditions for uninterrupted work and functioning with adequate human resources. Within this project was held three-weeks training of employees of the Public Procurement Sector of the Directorate in March and April 2008, on the subject “Legal Aspect of public procurement policy and best practice for improvement management of public procurement and bidding process”. The continuation of this project provided for innovation of the Internet page of Directorate.

As organized by the Human Resources Management Authority, the employees of the Directorate attended the series of other trainings related to budgetary planning, communication skills with customers, preparation for joining the European Union, negotiating techniques and free access to information.

The British Council organized, under the project with a title “Skills for the European Union”, appropriate training of Directorate’s employees, and it was related to acquiring skills to develop techniques of efficient communication and functioning in the international context for the needs of the Union.

Trainings in 2009

The Public Procurement Directorate continuously participates and cooperates in organizing training for employees who perform the public procurement tasks. Immediate actions for spreading information on public procurement procedures and application of ethical rules in the area of public procurement has been going on within these trainings, also by advisory and consultancy services at the premises of the Public Procurement Directorate and by direct telephone contacts (help desk), through notices posted on the Internet page and opinions prepared in cooperation with the Commission for Control of Public Procurement Procedures.

The Directorate developed a Personnel Training Program in the area of public procurement for the future period.

The trainers, who are trained in trainers’ skills, have been identified.

The subjects for future trainings have been prepared and the organizational aspect of the training seminar. In cooperation with the Human Resources Management Authority, in the first quarter of 2009, two training seminars were organized in the area of public procurement for 70 participants.

New procedures and new rights of participants in the public procurement procedure means new obligations for contracting authorities, and bearing in mind that these issues are being conformed with and conducted in line with the European Union law, it is justified that there are the unknowns in the application of the Law and regulations on public procurement. The lecturers at the seminars, trained and certified trainers, were representatives of the Directorate and state bodies.

In cooperation with SIGMA there was initiated a project - elaboration of generic modules of training on public procurement for the countries within the IPA project – Training in public procurement in the western Balkan (2010 - 2012). The European Commission is the organizer of this project. The role of SIGMA is to, in cooperation with representatives of national institutions, prepare a set of

handbooks for public procurement at the regional level in the follow-up and localized (adapted and translated in line with a national legal systems), and then they will be used for training on public procurement at the national level of the IPA project countries. The Commission will contract the remaining part (localization of modules, providing training for about 200 persons and assistance to the governments in 8 countries, including Montenegro as well, during the initial phase implementation) as a regional project of technical assistance – bidding procedure will be initiated at the beginning of 2010. The establishment of the Audit Commission is ongoing (3-4 experts from the EU member countries and representatives of all countries users, including Montenegro).

The representatives of the Public Procurement Directorate in cooperation with TAZ of Belgrade conducted training on the subject “Public Procurement – Legal Regulations and practice”, in Podgorica on 23 March and 7 December 2009 with about 100 participants.

The OSCE mission in Montenegro in cooperation with Public Procurement Directorate and the Directorate for Anti-Corruption Initiative conducted a project of training the employees on public procurement tasks at the level of local self-government and governmental institutions under title “Realization of the transparency principle in the public procurement procedures in Montenegro” in the first quarter of 2009. *The project emphases were the ethical rules – anti-corruption behavior and prevention of conflict of interest.*

As a result of this cooperation, there was prepared a Handbook “Public Procurement in Montenegro (realization of basic principles)”.

Training activities on public procurement, according to this project, were conducted through several workshops for the officers employed with the local self-government. For the region of municipalities in the south of Montenegro, the training was realized on 23-24 April 2009 for about 30 participants, for municipalities in the central part on 7 and 8 May 2009 for about 25 participants and for municipalities in the northern region on 14-15 May 2009 for about 45 participants.

The final training for institutions on the central – governmental level was held in Podgorica on 11 and 12 June 2009 for about 30 participants. At the two-day seminars/workshops, the representatives of the mentioned institutions, through methods of interactive learning and intensified group work, contributed to improving knowledge on public procurement procedure system in Montenegro and development of informing about the importance of transparent and competitive public procurement proceedings. The special emphasize was given on anti-corruption rules and prevention of conflict of interest. The ethical behavior in prevention the corruption as specified in the Law on Public Procurement, the Law on Civil Servants and State Employees, the Code of Ethics of civil servants and state employees and it was explained separately. The local certified trainers for public procurement, and some of them being also experts for the ethics code, with the support of international experts, conducted the training.

The authorized representatives of the Commission for Control of Public Procurement Procedure participated in the training organized by the Human Resources Management Authority, as lecturers, on the subject of public procurement (5 seminars, with participation of 46 officials) and on the combat against corruption in public procurement (5 seminars, with participation of 53 civil servants and state employees). In addition, authorized representatives of the Commission for Control of Public Procurement Procedure, as lecturers, participated in the trainings of the Conflict of Interest Commission, where they spoke about the existence of the conflict of interest in the public procurement procedures and related legal protection for such cases.

One of the basic priorities of the Directorate in the future period is the organization of trainings in the area of public procurement. The intensified trainings shall be provided through realization of the IPA project 2007, for the period 2010-2012, and it will include the creation of a special segment of the training strategy, the overall plan and training program, the creation of public campaign and practical training for contracting authority – covered parties that are subject to the application of regulations on public procurement, bidders, all parties involved in the proceedings and control, supervision and audit as well as media representatives..

ii. (Ref to Q. 16) Please comment on the clear separation of the functions of PPD and PPC. Is there involvement of PPC in controlling the public procurement procedures before a complaint is filed with PPC? Please provide an overview of the legislative and practical aspects of such involvement? Is there a need for modification/adjustment in this respect?

In the previous answers was given the full answer on the questions about competencies of the Public Procurement Directorate and the Commission for Control of Public Procurement Procedure.

We shall repeat a part from those answers and make additions to the answers, in terms of asked question.

An administrative body in charge of public procurement activities - Public Procurement Directorate shall provide conditions for cost-effective, efficient and transparent use of public funds and create competitive and equal conditions for all bidders (affairs of the Directorate pursuant to Article 16 of the Public Procurement Law).

To that end, the competent 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 competent administrative authority's website in the cases foreseen by this Law;
- 8) to enhance the system of keeping contracting authorities and bidders informed about public procurement regulations and publish and distribute appropriate technical literature;
- 9) to prepare sample bidding 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 bidders, 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 competent administrative authority – the Directorate, each contracting authority and bidder shall make the documentation accompanying the course of the public procurement available for review by an authorized employee of such authority (affairs of the Directorate pursuant to Article 17 of the Public Procurement Law).

The Commission for Control of Public Procurement Procedure, under Article 93 of the Law, shall:

- 1) review complaints of bidders 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 bidders 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.

The Commission has a president and two members. The Law laid down that president and members of the 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 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 Commission shall represent the Commission and shall manage its work. President and members of the 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 Commission shall have a secretary, appointed by the Government at the proposal of the president of the Commission. For the secretary of the Commission appointment eligible may be a law school graduate with no less than 5 years of work experience in public procurement area. The Commission has a professional service which is managed by the secretary. The regulations on civil servants and state employees shall be applied to all employees of the professional service.

Pursuant to the Public Procurement Law, protection of bidders' rights and public interest at the second stage is centralised and it is realised before the Commission for Control of Public Procurement Procedure. A complaint may be lodged, in the rights protection procedure, against the decision of the contracting authority or in the case of silent administration when the contracting authority fails to make a decision in respect of a submitted objection or if the objection submitter is not provided with the decision within 3 days upon the receipt of the objection. The complaint may be lodged within 8 days.

The Commission makes decisions by majority of votes of present members. Meetings of the Commission, when deciding upon complaints, as well as the procedure itself, are not open to the public. A special minutes regarding discussion and voting during the meeting is taken and signed by the President, members and Secretary of the Commission. The Commission shall make decisions within 15 days, which period may be extended in specifically justified cases for another 10 days, so that the longest period for making a decision is 25 days only. Such a short deadlines for decision-making highlight the exceptional efficiency in the work of the Commission.

The Commission, in the rights protection procedure, makes decision 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 unauthorised 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.

In accordance with the dispositive principle, the Commission in decision making process upon presented complaint examine the regularity of the whole public procurement procedure. Thus, during the procedure, in addition to the administrative act, which is the subject of procedure, those actions and/decisions that are performed in the stage prior to announcement of the invitation to tender may be examined. The contracting authority is obliged to act in accordance with Commission's directions contained in the decision upon complaint presented by the unsatisfied bidder. If the Commission determines that contracting authority has not implemented its decision, it shall inform the Government of Montenegro and/or local self-government unit thereof, and propose initiation of a proceeding for determining liability. Such a decision enables the Government to take measures against the contracting authority acting contrary to the Law. In any case, the contract concluded contrary to the decision made by the Commission is null and void.

Decisions of the Commission for Control of Public Procurement Procedure are of the obligatory character and they have a status of final and executive acts. Court control over decisions in the public procurement that is the legality of decisions made by the Commission (decision or conclusion) is provided, in line with the requirements of the European Union Directives and European Court of Justice, in the court proceedings before the Administrative Court of Montenegro. It is not allowed to appeal against decisions of the Commission them, but within 30 days as of the delivery of the decision to the parties, an administrative dispute might be initiated before the Administrative Court of Montenegro. Also, unsatisfied bidder may demand compensation before the competent court.

The Commission for Control of Public Procurement Procedure participates in the control of public procurement procedures before the complaint was submitted, in the cases when it determines the principal positions for the unified application of the Law or when it examines the regularity of the implementation of the Public Procurement Law and proposes and takes measures to correct the irregularities identified, to ensure competitive behaviour of bidders and transparency of public procurement.

Namely, a large number of contracting authorities addressed to the Commission for Control of Public Procurement Procedure with a request to take a right standpoint, out of which the greatest number was related to the proper application of Article 3 of the Public Procurement Law as to the exception of application of the Public Procurement Law.

The Commission for Control of Public Procurement Procedure adopted a number of principal positions regarding:

1. proper application of Article 88 of the Public Procurement Law,
2. proper application of Article 77 of the Public Procurement Law,
3. proper application of Article 3 (1) (3) (g) of the Public Procurement Law,
4. the position whether the covered parties under the Public Procurement Law and other legal entity wherein Montenegro or local self-government unit or other covered party that are subject to the application of this Law possess less than 50% of securities or share in the company or which have less than half members in the managing body, and perform the activity of public interest and do not have industrial or commercial character,
5. the assessment of validity of bids when the value of the contract exceeds the estimated value determined by a decision on initiating and carrying out the procurement procedure, call for competition and bidding documents,
6. proper application of Articles 45 and 46 of the Public Procurement Law in relation to the type of evidence on non-conviction in criminal and other proceedings,
7. proper application of Article 25 of the Public Procurement Law,
8. proper application of Articles 45 and 47 of the Public Procurement Law, with regard to the possessing of business and professional capacity, i.e. licence for the professional conduct of business activity,

9. the validity evidence on proper fulfilment of due and payable obligations i.e. taxes and contributions.
10. validity and authenticity of evidence on economic and financial standing – balance sheet and income statement.

Within activities on the full harmonisation of legislation of public procurement in Montenegro initiated in the IPA 2007 project “Further Development and Strengthening the Public Procurement System in Montenegro”, organization and systematisation of job posts within the Public Procurement Directorate and the Commission for the Control of Public Procurement Procedures will be reviewed again. Also, the Commission for the Control of Public Procurement Procedures should be given new authorities in line with a new Directive on protection of rights in the public procurement procedures 2007/66/EC, in the part related to the complaint procedure.

iii. (Ref to Q. 16) Are there regulations (bylaws, decisions) establishing the timelines and the cycle for publication of tender notices after their submission by the CA to the PPD?

The Law on Public Procurement does not treat this issue separately. In practice, invitations to public tendering are published on the same day when delivered to the Public Procurement Directorate. They are published on the website of the Directorate and, at least, in one daily newspaper distributed on the whole territory of Montenegro. If the contracting authority does not submit the invitation by the end of working hours (about 5 p.m. when working day ends), the invitation will be published on the first following working day. If the following working day is Saturday, the officers in charge for publishing the invitation shall stay later at work than regular working hours and publish the invitation. At the time prior to the publishing of invitation, they are in constant communication with officers of covered parties who are to submit the invitation for publication to the Directorate.

iv. (Ref to Q. 19) With reference to review and remedies:

v. Please confirm that if an objection is submitted to the Contracting authority, the Contracting authority is obliged to suspend any action under the procurement procedure. If yes, when this suspension is waived? What happens in cases when the PPC is not addressed at all? Please comment on the principle of efficiency in this case.

Pursuant to the Article 86 of the Public Procurement Law it is envisaged that the protection of bidders' rights and public interest shall be provided at all stages of a public procurement procedure. Such determination provides for the full protection of bidders' rights and public interest at all stages of a public procurement, what is of great importance, if starting from the fact that upon initiating the procedure of rights' protection in the initial stages of procedure (for example, regarding the content of invitation to tender and bidding documents), at the very beginning it is possible to correct some deficiencies made in the public procurement procedure, and later it would not be possible to undertake remedy measures but to cancel the overall public procurement procedure. So, it is undisputable that, in this manner, it has been provided the consistent compliance with the principle of efficiency and urgency in the public procurement procedures. The contracting authority especially emphasized the character of public procurement, which is, by its nature urgent and the principle of economy and efficiency in the public procurement procedure request that party in the procedure and competent bodies have, in a fast and efficient manner, to resolve disputes resulting from public procurement procedure.

In the Article 89 of the Public Procurement Law, it is envisaged that submitted objection has suspensive effect on the course of the public procurement procedure, which means that the contracting authority is obliged, *upon submitted objection, to deter all further activities in the public procurement procedure until the objection has been resolved*. Here, it should be born in mind that the Article 98 of the Law envisage the suspensive effect of complaint, so the contracting authority is also obliged to deter all activities in the public procurement procedure upon submitted complaint as well.

The complaint may be submitted to the Commission for Control of Public Procurement Procedure only after the contracting authority rejected, disapproved or did not decide on the objection.

vi. Please provide more information on the audit functions of the PPC and the Administrative Court. Please comment on the involvement of the Internal audit units in auditing public procurement procedures?

Pursuant to the Public Procurement Law, protection of bidders' rights and public interest at the second stage is centralised and it is realised before the Commission for Control of Public Procurement Procedure. In accordance with provisions of Article 91 of the Law, a **complaint** may be lodged against the decision that the contracting authority made in respect of a submitted objection, or in case that the contracting authority fails to make a decision within the specified period, in the meaning of Article 90, paragraph 4 above, **to the Commission for Control of Public Procurement Procedure** within 8 days from the day of receipt of the decision made in respect of submitted objection.

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

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

The Commission makes decisions by majority vote of present members. Meetings of the Commission, when deciding upon complaints, as well as the procedure itself, are not open to the public. A special minutes regarding discussion and voting during the meeting is taken and signed by the President, members and Secretary of the Commission. The Commission shall make decisions within 15 days, which period may be extended in specifically justified cases for another 10 days, so that the longest period for making a decision is 25 days only. Such a short deadlines for decision-making highlight the exceptional efficiency in the work of the Commission.

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

Decisions of the Commission for Control of Public Procurement Procedure are of the obligatory character and they have a status of final and executive acts. It is not allowed to appeal against them, but within 30 days as of the delivery of the decision to the parties, an **administrative**

dispute might be initiated before the Administrative Court of Montenegro. Also, unsatisfied bidder may demand compensation before the competent court.

In the administrative dispute, the court shall decide upon the legality of administrative act and legality of other individual act, if not specified in the Law. The administrative act, in terms of this Law, is an act by which a state authority or a local self-government authority, institution or other legal person, in exercising public authority, decides in administrative matters on rights, obligations or legal interests of a natural or legal person.

The right to institute an administrative dispute shall have any natural or legal person, who believes that some of his/her rights or legally based interests have been violated by an administrative or other act. Furthermore, a state authority, organization, a settlement, group of persons or other, who do not have the attribute of a legal person, may institute an administrative dispute, if they may be holders of rights and obligations decided on in an administrative or other procedure. The Law on Administrative Dispute (Official Gazette of the Republic of Montenegro 60/03) has, also, stipulated that if by an administrative or other act the Law has been violated to the advantage of a natural person, legal person or other party, an administrative dispute may be instituted by the state prosecutor or other competent authority. Also, an administrative dispute may be instituted by the state prosecutor or other competent authority when by an administrative or other act the Law has been violated to the prejudice of the state, a local self-government unit, institution or other legal person.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Internal audit

The Law on internal financial controls in public sector (Official Gazette of the Republic of Montenegro 73/08) defines the role and tasks of the internal audit. Within the audit of conformity, internal audit units assess the internal control system within the subjects which are related to all kind of processes, systems or other area covered by audit, in order to obtain confirmation that the functioning of the certain area is in compliance with the laws, other regulations, guidelines for the work, internal documents and contracts. Pursuant to the above mentioned, the internal audit units carries out the both, the audit of application of prescribed rules and public procurement procedures.

vii. Montenegro seems to admit in its answers certain challenges linked to the budget and sufficient staffing of the relevant authorities. Could Montenegro inform the Commission if Montenegro adopted any strategy (which would go beyond budgeting for the next year) how to tackle these challenges?

The European Union and relevant international organizations and institutions identified challenges related to strengthening of administrative and institutional capacities for public procurement – Directorate for Public Procurement and the Commission for Control of Public Procurement Procedure including the need to provide an adequate technical equipment and larger budgetary assets. In light of that is the concept of IPA project 2007 “Strengthening and Further Development of the Public Procurement System in Montenegro”, whereby the base for further strengthening of the system was identified to be giving sufficient administrative capacity to these institutions. One of the components of the process is the Strategy for development of public procurement system that will include, as a separate segment, recommendation for strengthening of these capacities, activities to achieve that objective, the action plan and needed budgetary assets. The Strategy should be finalized by the end of 2010.