



SIGMA

Support for Improvement in Governance and Management

A joint initiative of the OECD and the European Union, principally financed by the EU

MONTENEGRO
PUBLIC PROCUREMENT SYSTEM
ASSESSMENT MAY 2009

1. Summary

1.1 Main Developments since last year

There have been no changes in the Republic of Montenegro's 2006 Public Procurement Law (PPL) since the last Sigma assessment in May 2008. Hence the basic legislative framework remains unchanged, although a number of pieces of secondary legislation were adopted and came into force during 2008.

The 2006 legislative reform was a step in the right direction in improving the public procurement system. Nevertheless, a review of the PPL reveals several areas of non-compliance with the relevant EC Directives and/or international good practice, which will need to be addressed in future work.

However, there is now considerable practice and experience with the 2006 PPL, and stakeholders in the public and private sectors of the country generally consider it to be a major improvement.

A new Law on Concessions was adopted in January 2009. However, Sigma concludes that the law is not compliant with either the EC Directives or good practice. Furthermore, this law requires for its correct implementation the formation of a concessions committee and a full set of supporting secondary legislation.

There have been changes in Montenegro's central procurement organisation and capacity. Most importantly, several competences of the State Commission for the Control of Procurement Procedures (hereafter referred to as the "State Commission") have been transferred to the newly established Public Procurement Directorate (PPD), in operation since 2007.

1.2 Main Characteristics (strengths and weaknesses)

The economy of Montenegro is comparatively small, which affects the market functionality of public procurement in terms of the availability of domestic economic operators and the extent of contracting authorities as well as the way in which the regulatory, controlling and advisory functions within the government administration are, and should be, organised and managed. Sigma concludes that the public procurement system largely includes the key components of a sound procurement system in terms of an EC-compatible legal framework for public procurement and a fairly solid institutional structure for regulation and support, complaints review and control. The ambition to develop the system is also highly noticeable and a number of improvements have been registered in recent years.

However, Sigma has also identified a number of significant shortcomings and deficiencies in the legal framework that need to be addressed. Some of these problems relate to non-compliance with the EC Directives, but there are also many rules that simply do not follow good procurement practice. The PPL is still considered to be too complex, inflexible and bureaucratic, which in turn affects the operational efficiency within contracting authorities. There is also a strong need to strengthen the institutional capacity generally, but in particular of the PPD, to enable it to carry out its important regulatory and advisory functions efficiently.

1.3 Recommendations for Reform

As mentioned above, Montenegro's public procurement system has moved in the right direction with the adoption of new legislation based on the EC Directives and a comprehensive set of secondary legislation. However, a number of significant shortcomings have been identified in the legal system for both public procurement and concessions, which should be addressed by the government in the near future in order to meet EU requirements in terms of harmonisation and good practice. Considerable weaknesses remain in the implementation of the legal framework and the operational capacity to manage procurement work efficiently. The Montenegrin authorities are looking to the technical assistance project, due to start in summer 2009, to help them tackle these problems.

Priority should be given to the following actions:

A. *To be applied (or started) in the short term:*

- Initiate a comprehensive and simultaneous revision of both the Public Procurement Law and the Concessions Law. The revisions should ensure that these two acts comply with EU requirements and should remedy a number of deficiencies in areas that are not covered by the detailed provisions of the EC Directives. The aim should be to promote sound procurement practices and reduce the current overly bureaucratic, legalistic approach;
- Strengthen the capacity of both central public procurement institutions (the PPD and the State Commission);
- Further strengthen and professionalise procurement practice by institutionalising training and education in public procurement.

B. *To be applied (or started) in the medium term:*

- Provide more assistance to procurement officers through the publication of guidelines and manuals and the interpretation of public procurement legislation;
- Introduce new ways of organising and managing procurement processes within contracting entities;
- Provide support for the practical implementation of the new instruments in the EC Directives (*e.g.* framework agreements and e-procurement).

2. Legislative Framework

2.1 Public Procurement

Since no major changes have been observed in the regulatory framework for public procurement, the main findings in last year's Sigma assessment report remain relevant. In the present report, the Sigma assessment team identifies some further debatable features, and expands the discussion on various aspects of the regulatory framework.

The Public Procurement Law (PPL) was adopted and published in the *Official Gazette of Montenegro* in July 2006 and came into force three months later. The 2006 PPL aims to implement the provisions of the following EC Directives: Directive 2004/18/EC (public sector), Directive 2004/17/EC (utilities), Directive 89/665/EEC and Directive 92/13/EEC (remedies).

The PPL applies to any contract awarded on behalf of state or local authorities. Companies that are covered in the EU by Directive 2004/17/EC when they operate networks in the areas of drinking water, energy, transport and postal services are not expressly covered by the PPL. However, they are likely to be included in the wider definition of contracting entities (in the case of public undertakings). Unlike Directive 2004/17/EC, the PPL does not include private companies operating in the utilities sector on the basis of special or exclusive rights.

Six different procedures can be used under the PPL: open procedure, restricted procedure, negotiated procedure (with or without prior publication of a contract notice), framework agreement, direct solicitation of tenders (shopping method, only for supplies or services contracts below 10,000 EUR and works contracts below 30,000 EUR); and direct agreement (only for contracts below 2,000 EUR). The contract award criteria are "lowest price" and "economically most advantageous tender". There are rules about qualification and compliance, as well as a review system. For more detailed comments see below.

The PPL stipulates that a list must be published of parties subject to the PPL. This list has now been published on the PPD's website.

Generally, the PPL maintains a good standard and is basically in line with the main principles of the EU public procurement system. However, a detailed review of the PPL reveals several areas that do not comply with EU public procurement legislation and good practice, as indicated below.

Need for a separate procurement regime for utilities

The EU public procurement system, in Directive 2004/17/EC, provides for a separate and more flexible regime for publicly and privately owned utilities. The 2006 PPL does not provide for such a separate regime — either as a separate law or as a section of the PPL. While this situation is not prohibited by EU legislation, the lack of a more flexible utilities regime is in contrast to common practice in the EU and is symptomatic of the PPL's generally more inflexible and formal approach. The need for a utilities procurement regime also has to be seen against the backdrop of Montenegro's current restructuring of the utilities sectors, particularly the move towards privatisation. It appears that utilities in Montenegro do not consider the current PPL to be a fully adequate instrument for procurement in this context.

Purchase of electricity

The inclusion of the purchase of electricity in the PPL places a particular burden on the national electricity utility. It should be noted that the EC Directives have exemptions concerning supplies quoted and purchased on a commodity market and the purchase by utilities of energy to produce energy. This inclusion should be amended in future revisions of the PPL, and the utility should instead have the right to use sound commercial practices. The specific guideline for purchasing electricity could be defined in more detail, in co-operation with the PPD.

Prior approval for using some procedures

Under the PPL, contracting entities must request prior approval from the PPD when they intend to use the negotiated procedure (with or without prior publication of a contract notice) or to award a framework agreement. This requirement should be reconsidered in future — it creates a conflict of interest and goes against the principle of a decentralised procurement system in which contracting entities are delegated the authority to make decisions for which they are accountable.

Restricted procedure

The use of the restricted procedure requires justification by the contracting authority and may be used only in specific circumstances. Furthermore, the only award criterion allowed in this procedure is the lowest price. This variant of the restricted procedure has nothing in common with the restricted procedure provided for by the EC Directives. Instead, it is based on UNCITRAL's model law¹ and consequently does not comply with Directive 2004/18/EC. In addition, the restricted procedure is rarely practised by contracting authorities.

Qualification documents

In order to prove their professional, economical and technical standing, tenderers have to submit 10 or more individual documents with each bid (article 51, PPL). These documents relate to, inter alia, licences, liquidity, bankruptcy, commercial court proceedings, petty crime and taxes. The 2006 PPL requires even more documents than the previous legislation. These documents have to be either originals or photocopies that have been certified as genuine copies by a municipality or court (the cost of certification usually amounts to 100 EUR). Tenders that are submitted with an incomplete set of these documents are rejected. Preparing this formal part of the tender can be very costly and time-consuming, especially for tenderers participating in dozens or even hundreds of tenders. More time can be spent collecting and processing the required documents than on the substance of the tender. The law is not clear as to whether these documents are also needed for the simplified shopping method, but they are required in practice.

A related problem is the fact that the 2006 PPL does not include an equivalent of Article 51 of Directive 2004/18/EC, which allows contracting authorities to invite tenderers to supplement or clarify the documents that have been provided.

Cost of tender documents

In Montenegro's economic context, tender costs of up to 100 EUR are relatively high, especially when the contract value is small.

Opportunities for using electronic means are only rarely provided in practice and never for the tender documentation. Article 42 (2) of the PPL is rather precise: "costs of copying and distribution only". However, it appears that in practice contracting authorities often ignore this limitation and overcharge for tender documents. The discretion over these costs enjoyed by contracting entities has been criticised.

Time limits

The PPL's minimum time limits for submission of tenders (applications for participation) for the open, restricted and negotiated procedures (articles 62-64) are significantly shorter than those prescribed by the EC Directives.

Formal procedures for low-value contracts

Contracting entities have to apply the normal procedures laid down by the law (open, restricted and negotiated procedures, framework agreements) for contracts exceeding 10,000 EUR (supplies or services) or 30,000 EUR (works). However, the EC Directives intend these procedures to apply to

¹ UNCITRAL is the United Nations Commission on International Trade Law.

much larger contracts (130,000 EUR for supplies or services contracts, 5 million EUR for works). The use of procedures that are disproportionate to the size and nature of a contract unnecessarily complicates the procurement process, which may discourage potential candidates from taking part in the procedure and thereby limit competition.

Low-value public procurement contracts (between 2,000 EUR and 10,000 EUR, 30,000 EUR for works) are governed by article 77 of the PPL (shopping method): "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." This limitation has frequently been criticised by stakeholders, especially municipalities, and there is still uncertainty about its application, which means that it is not used as widely as it could be. It is difficult to understand the rationale behind limiting the use of the shopping method to six times a year, since the threshold of 10,000 EUR (or 30,000 EUR for works) during a year is what matters.

Another issue that causes great irritation among contracting authorities is that the procurement procedure must be cancelled and relaunched if fewer than three responsive tenders are received following an invitation for tenders. This specific provision, in connection with the shopping method, is not applicable in the context of the open procedure, where a contracting authority is allowed to conclude a contract with only one responsive tenderer.

However, there are also other matters of principle related to this procedure. The shopping method is normally designed for the purchase of supplies and for simple works contracts of a recurrent nature, where the lowest price is the only criterion, but not for services contracts, where factors other than price need to be considered in the evaluation. Sigma recommends the introduction of a new simplified competitive procedure for low-value contracts of all types. The introduction of a more suitable and transparent procedure would also facilitate a raise in the thresholds for low-value contracts.

Other questionable rules and practices

In addition to the observations and comments made above, the following provisions of the PPL are questionable from a good practice standpoint:

- The minimum tender validity period of **60 days** (article 56) is questionable, since it may prevent contracting authorities from receiving the most accurate and competitive market prices for products, especially those that are subject to strong price fluctuations in the market. It would be better to let the contracting authorities decide the duration of the tender validity period. The tender validity period must be indicated in the tender invitation and documentation.
- The definition of abnormally low price as **30%** lower than the second lowest price (article 59) should be reconsidered, since any determination of whether a price is abnormally low may vary from one situation to another. As an example, in the case of procurement of fuel, a 10% difference may raise concerns with respect to this issue. Therefore, it is better to give to contracting authorities the right to take this decision of defining the abnormally low price.
- The **mandatory point system** in the tender evaluation process (as laid down in article 66 of the PPL as well as in secondary legislation) appears to be difficult to apply correctly, especially for quality *versus* price factors. We strongly encourage further discussion on the appropriateness of this method.
- Some of the **reasons for invalidation of tenders** are questionable (article 68) and should be reconsidered. Examples include situations where the total price is not stated as an absolute amount and where arithmetical errors are greater than 3%.
- If **no contract can be concluded** with the winning tenderer, the contracting authority may instead conclude a contract with the next most favourable tenderer, provided that the price difference is not larger than 10%. This rule is questionable and seems to be based on incorrect assumptions about how the market operates. It should be at the discretion of the contracting

authority to determine whether it is reasonable to continue the award process with the second-ranked tenderer.

Other relevant legislation

The 2006 PPL is accompanied by a wide range of secondary legislation, which covers, inter alia:

- conditions and methods for estimating the value of public contracts;
- a public procurement plan;
- methodological regulations for expressing criteria as an appropriate number of points and regulations for tender evaluation, comparison method and procedure;
- tender documents for goods, works and services;
- tender public opening report;
- tender notices;
- evaluation and comparison of tenders;
- recording of public procurement data.

Summary

The legal situation under the new 2006 Public Procurement Law (PPL) is generally considered to be a major improvement on the old law. However, there is an almost unanimous view on both sides of the procurement relationship that there is still room for improvement. The PPL is still considered to be too complex, inflexible and bureaucratic. Some provisions are still not fully harmonised with EU legislation (acquis communautaire). Several areas of possible improvement are outlined above. Sigma understands that the Public Procurement Directorate (PPD) plans to revise the PPL in the near future. The revision will aim to harmonise the PPL more closely with EU law as well as remedy a number of other deficiencies in the PPL that are outside the scope of the EC Directives. This revision will be a very positive step in the right direction.

The qualification process and documentation requirements should be simplified for suppliers. One solution would be to establish an optional qualifications list, where tenderers could have all of their required documents checked every six months or every year. They could receive a certificate to include in the tender in place of the copies of all of the documents. This option would be particularly attractive for tenderers preparing many tenders. The list would also be available for utilities. This idea, which has the unanimous support of both contracting officers and tenderers, has been discussed for some time now. The major obstacle is deciding who would administer the system. Giving this responsibility to the PPD would put an additional strain on its already overstretched capacity.

Other options would be to reduce the number of documents required, to make the number required proportional to the size and complexity of the contract, or to permit photocopies rather than originals or officially certified copies, except in cases where there are serious doubts about the authenticity of the documents.

2.2 Concessions Legislation

A new Law on Concessions was adopted by parliament on 26 January 2009 and became effective on 12 February 2009. This law replaces the Law on the Participation of the Private Sector in Delivery of Public Services (*Official Gazette*, no. 30/02). It is an attempt to establish a coherent concessions law covering all aspects of concession activities and to some extent it is modelled on EU procedures and practice. However, the Concessions Law fails to satisfy some fundamental EU requirements, especially in terms of definitions and procedures. It can also be strongly questioned whether the law will further satisfy the requirements normally set up by the private sector community for participation in tenders for concession contracts. The law requires secondary legislation to be adopted within 90

days of the entry into force of the law. This secondary legislation should regulate the maintenance of a concessions register, the opening and evaluation of tenders, minimum values of concession contracts, and concessions on the use of mineral resources. However, no secondary legislation has yet been adopted. The length of a concession contract can be up to 30 years (duration to be decided by the government) or up to 60 years (duration to be decided by parliament). Parliament's decision is also needed for all contracts with a value exceeding 150 million EUR.

Sigma's assessment of the Concessions Law is as follows:

- It does not distinguish clearly between a concessions contract and a public contract that falls under the PPL. It also does not include a correct definition of the term "works concession".
- The concept of works concessions *versus* service concessions is not addressed in either the Concessions Law or the PPL.
- It allows for the open procedure, the restricted procedure, and competitive dialogue (the last procedure does not exist under the PPL). There is also an accelerated procedure and the option of direct initiative by an economic operator. However, neither the restricted nor the competitive dialogue is correctly transposed from the EC Directives. In normal circumstances, open and restricted procedures are not appropriate for awarding concessions, since such contracts frequently require a dialogue between the parties during the award process.
- Some of the award criteria listed in the law include criteria that refer to the qualification phase and should therefore be classified as selection criteria (tenderers' references). Others are extremely difficult to relate to the subject matter of the concessions contract and should not be used to determine the most economically advantageous tender, i.e. such criteria as public interest and the effects on employment, infrastructure and economic development.
- Institutionally, the law provides for the establishment of a concessions committee to handle complaints about the award of concessions, keep a concessions register, and approve the use of certain procedures. However, the committee has not yet been formed, despite the fact that it was to have been established no later than 60 days after the Concessions Law came into effect.

No concessions contract has yet been awarded under the new law. There is a major highway concessions contract in the award process, but this project is governed by a special government regulation.

Summary

Sigma concludes from the number of critical procedural problems listed above that the new Concessions Law does not comply with EU requirements or European good practice. Subsequently, there is a clear need to revise the law extensively in order to bring it in line with European standards. This process should preferably be co-ordinated with the planned revision of the Public Procurement Law.

2.3 Central Public Procurement Organisation

The 2006 PPL provided for the establishment of a new central institution: the Public Procurement Directorate (PPD). The PPD's tasks include:

- participating in the preparation of laws, subsidiary legislation and other regulations;
- designing appropriate standard forms for applying this law;
- monitoring and reviewing the implementation of the public procurement system in terms of compliance with EU legislation, and proposing measures to ensure compliance;
- giving prior approval to contracting authorities for the choice of procedure in cases envisaged by the PPL;

- offering advisory and consulting services on public procurement to contracting authorities on request;
- organising staff training in public procurement activities;
- preparing, publishing and updating a list of parties covered by the PPL on the website;
- monitoring public procurement procedures and ensuring that they meet the needs of the general public;
- publishing procurement notices; and
- collecting statistical data.

Under the previous legislation the State Commission for the Control of Procurement Procedures (State Commission) carried out most of the above functions. Under the 2006 PPL, the State Commission is now tasked with reviewing appeals submitted by aggrieved tenderers.

The setting up of the PPD was delayed, and the director was only appointed in June 2007. The PPD is now more settled in both organisational and staffing terms. Its website has been improved, giving better access to contract notices and to the procurement plans of contracting entities. This increased transparency will benefit the functioning of the procurement system generally. Contracting entities report that they have good co-operation with the PPD, partly as a result of the PPD's policy to open its doors two days a week.

The PPD checks notices, and finds and corrects errors in more than three out of every ten notices, which would seem to indicate that contracting entities need more training and guidance and that the PPD should work more with contracting entities on these problems.

The PPD is expecting to receive a budget increase in the coming financial year, although this is likely to be scaled back because of the general financial difficulties.

Summary

The establishment of the PPD was a step in the right direction. The separation of a review function (the State Commission) from other central public procurement functions is in line with EU standards. The PPD is still a young institution; to reach its full potential it needs to be strengthened in terms of staff, resources and technical assistance.

2.4. Procurement Operations and Practices

In 2008 (not including December), about 1,845 contract notices were published. Supplies made up 43% of all contracts, works 34% and services 23%. The total value of these public procurement contracts was about 481 million EUR.

Detailed statistics on participation rates in response to tender invitations are missing. Interviews with contracting authorities indicated that the competitive side of the public procurement market appeared to be satisfactory, while it was also noted that some areas were problematic.

The number of procurement operations differs depending on the size of the entity and its budget. The Public Works Authority has conducted about 270 public tenders since the introduction of the new law in 2006, Montenegrin Railways conducted 75 in 2007, the Public Supplies Agency conducted 38 in 2007, the (smallest) municipality of Danilovgrad 11 and the (largest) municipality, Podgorica, 20 (excluding works awarded by the administratively independent municipal works authority). In addition to these formal tenders, the shopping method is frequently used for smaller contracts. For example, in 2007 it was used 25 times by the Podgorica municipality (for an average value of about 6,000 EUR) and six times by the Danilovgrad municipality.

The number of procurement officers in Montenegrin contracting entities depends mainly on the size of the entity and its procurement budget. A small municipality like Danilovgrad has one contracting officer; a utility like the Montenegrin Electric Enterprise has five; and a larger utility, such as

Montenegrin Railways, has 32 (public procurement and warehousing form one department). Larger contracting entities employ lawyers, economists, and engineers in these departments. Smaller municipalities and utilities usually have only one officer dealing partly or completely with public procurement. These officers often receive internal administrative training or management training. Procurement personnel do not receive specific independent or internal public procurement training; they learn largely on the job. Public procurement is not a recognised profession and there is little procurement training in general.

There is room to improve the availability of training and professional support for contracting officers. The PPD has held workshops for contracting entities, with the help of the Human Resources Management Authority, but there is almost no sustainable and independent national training programme. Electronic procurement has been developed and is partly in use in some locations.

There are no rules that specifically favour national tenderers, although some stakeholders would appreciate some form of protection against such discrimination.

2.4.1 Observance of the PPL

It appears that contracting authorities do not always observe the requirements of the PPL; however, they are subject to no sanctions for this behaviour. There appear to be some cases where contracting officers favour certain bidders. For example, payment dates might be indicated as a decisive sub-criterion of the contract, but tenderers might offer different payment dates, e.g. 120 days or 240 days after delivery of the goods or services. Tenderers who offer 240 days might win the contract, but there is no way for the other tenderers to check whether this payment date was an important factor in the contracting authority's decision or whether the successful tenderer was in fact paid much later than the other tenderers would have been.

Incorrect application of selection criteria and award criteria

A frequently discussed issue was the correct application of selection/qualification criteria versus award criteria. It appears that many contracting authorities have difficulty distinguishing correctly between a selection criterion and an award criterion, which implies that typical selection criteria are often included on the list of award criteria.

Ad hoc tender committees

Ad hoc tender committees are established for each tender procedure. They are composed of members appointed for one year, plus experts for the opening and evaluation of tenders. At the same time, procurement officers are appointed and assigned a number of procurement responsibilities. With the future need for co-ordination, continuity and professionalisation, the current reliance on ad hoc committees may be insufficient. Instead, more permanent solutions should be sought, involving a stronger dependence on line organisation and on procurement departments.

Summary

Considerable efforts have been made to support contracting entities, as well as the private sector, with training, information and the publication of secondary legislation (including model tender and contract documentation). However, better support to purchasers will be required to strengthen the operational side of public procurement. It will be extremely important to increase professionalism in public procurement by reducing the reliance on tender committees. The line organisation should instead be strengthened by appointing more procurement officers or establishing procurement departments, where justifiable, within the contracting entities. The option of co-ordinated purchasing between small contracting entities should also be considered. This recommendation becomes particularly important in the light of the implementation of new procedures and instruments, such as e-procurement and framework agreements. The competitive side of the public procurement market appears satisfactory in certain areas (although detailed statistics are missing), while it was also noted that some areas were problematic. The absence of

any preferential treatment rules is a positive factor. A crucial area in the procurement process is the evaluation of tenders, and further guidance and training in this respect are needed.

2.5 Review, Control and Integrity

2.5.1. Complaints review

The State Commission for the Control of Procurement Procedures is an autonomous body headed by a president appointed by the government on the proposal of the Ministry of Justice, and two members appointed on the proposal of the Ministry of Finance and the Community of Municipalities. The president must be a law school graduate who has passed the Bar examination and has at least 15 years of relevant work experience. The two other members must have tertiary education and no less than 10 years of relevant work experience. The president and the two members are appointed for four years. The State Commission has a secretary, appointed by the government on the proposal of the President of the State Commission. The secretary must be a law school graduate with no less than five years' experience in the public procurement area. The State Commission has three support staff and its annual budget amounts to 200,000 EUR.

Any person who considers that his/her rights may be harmed by a decision taken by a contracting entity may submit an objection to the contracting entity within eight days of the adoption of the decision. Objections can also be submitted to the State Commission by a competent state prosecutor, the SAI or other competent bodies. Such an objection prevents any further activities by the contracting entity, which must consider the objection within eight days of its receipt. A complaint may be lodged with the State Commission against the contracting entity's decision on this objection, or if the contracting entity fails to make a decision within the required eight days. In 2008, the State Commission decided on 223 complaints, of which 58 were approved, 138 refused and 27 rejected (for formal reasons).

The State Commission must decide on a complaint within 15 days of receiving the file and complete set of accompanying documentation. The State Commission can either reject a complaint as groundless or adopt it, and it can annul the public procurement procedure partly or fully by a reasoned decision: "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" (article 102 of the PPL).

The decisions of the State Commission have been criticised by some stakeholders, who consider it to be overly bureaucratic, for example by ordering the annulment of a tender for small formal irregularities.

Recent developments

In 2008 the State Commission designed a new website, which provides more information and has an expanded search function. All of the State Commission's decisions and their justifications are published on the website.

The number of complaints lodged with the State Commission doubled in the first quarter of 2009 compared with the same period in 2008 (from 40 to 80 decisions). The State Commission views this situation as a reflection of increased awareness and knowledge by the private sector of how the public procurement system works, as well as increased confidence in the review system. However, it may also be an indication that contracting authorities are having difficulties applying the legal framework correctly, possibly due to insufficient knowledge on the part of procurement officers. Other explanations might be a lack of clarity in the law or in secondary legislation on the application of various provisions. Some of the debatable provisions were described above.

An electronic register for filing complaints was introduced in 2008. The register shows that the average complaint processing time for a decision by the State Commission was only 12 days, which is very impressive.

The PPD and the State Commission have set up a working group to co-ordinate and prepare joint interpretative statements. Some members of the procurement community mentioned that they had experienced inconsistencies in the interpretative statements made by the two bodies.

Summary

The transfer of all functions except review to the newly established PPD is a positive step; it will allow the State Commission to focus on its main review role without being distracted and without risking any conflict of interest. The new Remedies Directive (2007/66/EC) has not been transposed and assistance in this regard will be requested.

The State Commission appears to work satisfactorily, but its capacity should be strengthened (in terms of legal support staff).

2.5.2 External audit

External audit activities are carried out by the independent State Auditors Institution (SAI), which was set up in 2004. Approximately two-thirds of the SAI staff are auditors and one-third is comprised of support staff. The total number of staff currently employed is 39, including the five members of the SAI Senate. Of these, 23 are auditors and the plan is to employ eight new auditors in 2009. The SAI performs audits and produces audit reports on auditees as a continuous process throughout the year. It also reports to parliament in an annual report. In practice, the annual report is a compilation of its report on the annual budget execution statement together with other audit reports that it has issued since its last annual report.

The audit reports include recommendations in connection with the SAI's findings. The SAI also follows up on the implementation of its recommendations. To date the SAI has been interested mainly in the legality of public expenditure rather than its efficiency and effectiveness.

It should be pointed out that the SAI's resources — especially the number of auditors — are very limited. Training for SAI staff in auditing public procurement is carried out in-house.

Despite the fact that the new PPL is a clear improvement on the previous law, the SAI finds that contracting authorities need much more training and guidance on its application, especially in problem areas, such as the use of the shopping method. However, the PPL seems to be correctly applied for larger projects. The SAI makes use of framework agreements in its own procurement. A positive development is that the SAI is planning to undertake a cross-cutting audit of several contracting entities in 2009, focusing on the larger spending authorities.

Summary

The SAI considers the new PPL to be clearer than the previous one, but further efforts are needed to support its implementation. The SAI focuses its work on the legality of the procurement process in order to determine compliance with the legislation. Its intention to undertake a cross-cutting audit is a positive development. There is also a need, however, to further increase the SAI's understanding of public procurement through training.

2.5.3 Integrity of procurement operations

The PPL includes basic rules for avoiding corruption (article 13) and conflicts of interest in public procurement procedures (article 14). It also includes penal provisions for infringements of procurement rules (both for contracting authorities and tenderers, articles 103 and 104). So far the provisions have never been applied and no one has been fined.

According to the Law on Free Access to Information of Public Importance, all documents related to the public procurement process are public (including all tenders submitted after the contract award decision). This access is important for many companies and NGOs, which frequently check the integrity of the process.

In August 2006 the government adopted an action plan for fighting corruption and organised crime, which contains a section on public procurement. In March 2007 a national commission for monitoring this action plan was established.

The Administration for the Anti-Corruption Initiative has worked with the PPD on joint training in anti-corruption issues, using the facilities of the Human Resources Management Authority. The Administration recognises that public procurement is an area that is vulnerable to corruption. It received no complaints about corruption in public procurement in 2007 or 2008; since the beginning of 2009 a helpline has been operated by the PPD. The Administration reported Transparency International's perception that in 2008 corruption in public procurement had been less of a problem than in 2007, and that this trend was expected to continue. They were conducting in-depth research in specific sectors, such as in local authorities, but disappointingly had no plans to specifically address public procurement.

Summary

The view of public authorities, supported by economic operators, is that corruption in public procurement is not a widespread problem. This situation is helped by a high degree of transparency in the public procurement system. There has not been any specific research in the area of public procurement to verify this view, however.

3. Reform Dynamics

Montenegro's public procurement system has noticeably undergone a number of positive changes in recent years, in particular the adoption of legislation based on the EC Directives and a comprehensive set of secondary legislation, the elaboration of a programme for training and provision of information for contracting entities and the private sector, and the creation of a review mechanism.

However, any capacity development will depend on the availability of central institutional resources for supporting and monitoring public procurement efficiently.

The establishment of the new PPD is another positive step, but this young organisation will need considerable capacity-strengthening support in the coming years. Currently the PPD is planning to prepare a development strategy for the public procurement system in Montenegro.

A new Law on Concessions came into force in early 2009. However, Sigma concludes that the new law does not comply with EU requirements or European good practice. There is consequently a clear need to revise the law extensively in order to bring it in line with European standards.

4. External Assistance

In October 2006 a technical assistance project began, managed by the EAR in Podgorica and amounting to 300,000 EUR, funded by CARDS 2005. The project, Capacity Building of the Public Procurement Commission (PPC), was initially envisaged to be completed in November 2007. It was extended for another seven months until early June 2008, and an additional amount of 150,000 EUR was allocated.

A technical assistance project under IPA 2007 will start in 2009. The beneficiaries will be the PPD, the State Commission and other stakeholders in the public procurement system. Its objectives include:

- further alignment of the PPL (including operational tools) with EU law and practice;
- establishment of a sustainable, independent national system of training in public procurement to develop the professional skills of procurement officers and other officials involved in implementing the PPL (*e.g.* judges, auditors);
- strengthening of the capacity of the PPD to implement its functions; and
- upgrading of the system for the publication of public procurement notices.