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UNPREDICTABILITY IN INTERPRETATION OF THE LAW ON PUBLIC PROCUREMENT

PRB monitoring report
(1 June - 31 December 2018)



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April 2019

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LIST OF ABBREVIATIONS

AI	Administrative Instruction
CA	Contracting Authority
CAO	Chief Administrative Officer
CBK	Central Bank of Kosovo
CEO	Complaining Economic Operator
CPA	Central Procurement Agency
DUD	Unique Customs Documents
EO	Economic Operator
GUIDELINES	Rules and Operational Guidelines for Public Procurement
KEK	Kosovo Energy Corporation
LPP	Law on Public Procurement
MEST	Ministry of Education, Science and Technology
MH	Ministry of Health
MKSF	Ministry of the Kosovo Security Force
MPA	Ministry of Public Administration
OI	Ombudsperson's Institution
PPRC	Public Procurement Regulatory Commission
PRB	Procurement Review Body
TAK	Tax Administration of Kosovo
UCCK	University Clinical Center of Kosovo

SUMMARY

This report looks into the PRB decisions and practices to assess the effectiveness of this institution and, above all, to see how impartial PRB is in administering justice to the parties. The period monitored for this report is 1 June - 31 December 2018, 479 decisions analysed and compared.

The findings of the report indicate a lack of consistency in a number of PRB decisions that contradict previous ones. D+ has continuously highlighted the need for greater standardization of PRB decisions, in order for decisions to be reasonably predictable by parties, as a result of previous precedents. The PRB does not seem to have a methodology of referring to previous decisions, when handling complaints. Such practice could have led to a lower number of inconsistent decisions.

The number of complaints in 2018 has increased significantly, with 210 additional complaints filed at PRB compared to 2017. This represents a 38% increase in the workload of PRB, which operates with minimal resources. In addition, the PRB is further limited by the number of board members sitting for hearings; due to ongoing indictments of two board members, there are only three members of the five-person board currently sitting for hearings. This is also causing delays in decision-making. The average time to take a decision in the period between June 1 and December 31, 2018 was 38.34 days, while the legal deadline is 34 days.

Another issue addressed in this report, which was also a frequent issue for the PRB, is the review of cases where the claims included no violation of the Public Procurement Law, but other specific laws or bylaws. In some decisions, PRB reasoned that the Tender Dossier (TD) failed to require compliance with the Labor Law and, consequently its non-compliance does not constitute a violation within the PRB's mandate. However, in another decision, it stated that the complainant economic operator (EO) had failed to offer signaling tables as per the respective Administrative Instruction, which was not requested in the Tender Dossier. In both

cases the dispute was whether the PRB should consider other applicable laws when there are claims for violations. As described above PRB inconsistently tackled this matter. This is just one example of how PRB decisions on issues of the same essence are decided differently by the panel.

The fact that PRB does not render final decisions but rather returns cases for re-evaluation by transferring back the responsibility to the contracting authority, in many cases causes delays and repetition of complaints for the same issue.

Another issue is the erroneous recommendations that in some cases have been provided by experts. The Panel, lacking adequate knowledge in certain areas, in some cases takes the decision based entirely on experts' recommendations, although the recommendations may be erroneous.

This report also provides recommendations on avoiding inconsistent decisions, recommendations on decisions about the blacklist, ways to increase PRB's transparency, and increasing cooperation with the prosecution.

INTRODUCTION

A company which has been declared non-responsive in a public procurement activity in violation of the rules and practice in public procurement should have the right to appeal. In Kosovo, companies have such a possibility through the Public Procurement Review Body (PRB) mandated to protect them from unlawful decisions of contracting authorities.

Democracy Plus has been monitoring the open sessions of the PRB since December 2016. The purpose of this monitoring is to check consistency and impartiality in decision-making. Through previous and current reports, D+ aims to improve the quality of decision-making in the PRB, to ensure that decisions are taken in a prompt and fair manner to the parties. In addition, D+ strives to ensure that the PRB reasons its decisions well, so that a decision does not only serve the parties in proceedings, but also constitutes a precedent for future cases.

Of note is also the broadcasting of the PRB hearings in real time, which enables interested parties to follow the sessions of the PRB. Not only does this increase the transparency of the institution, but contracting authorities will also be more attentive to their representation of their respective institutions in the PRB. According to the assessments of D+ monitors, some institutions are poorly represented in the PRB. There is a suspicion that this is also done deliberately in order to favor certain economic operators. By broadcasting sessions online, all representatives of the institutions can be held accountable for their work and the representation of their institution.

The report also highlights the remaining major issues of the PRB, while providing recommendations on how the PRB should address them. In the end, the report provides recommendations for both the PRB, to improve decision-making and increase transparency, as well as other institutions such as the Assembly, Prosecution and Government.



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PRB BETWEEN JUNE - DECEMBER 2018

Between 1 June and 31 December 2018, D+ monitored the open hearings of the PRB.¹ A total of 479 decisions were taken during this period. From the monitoring of sessions,

panel decisions, expertise and complaints, D+ found that for this period, PRB processed:

Decision	Panel decisions	Expert recommendations
Decision in favor of the complaining EO	269	255
Decision in favor of the Contracting Authority	158	206
Notices	32	
Withdrawal of complaint	20	
Total	479	461

Table 1: Proceedings in PRB during the period June-December 2018

Of 479 decisions that PRB received in this period, 269 (63%) are in favor of complaining economic operators (EOs), in 20 cases the complaint was withdrawn and 158 decisions were taken against the complaining economic operators (CEO), or 37%.² In 19 decisions in favor of CEOs, PRB has also issued orders for failure to comply with preliminary decisions by contracting authorities (CA). Notice means that the EO and the CA have agreed with the recommendation of the expert, and the panel only issues a notice regarding the case.

Review experts have given recommendations in favor of CEOs in 255 cases, and against CEOs in 206 cases. The dis-

crepancy between the number of decisions and the number of recommendations is due to the fact that in some cases, withdrawals of complaints have taken place without the expert's recommendation.

EOs mainly complain against the contract notices, contract award notices and the tender annulment notices. The largest number of complaints is made against contract award notices. However, there are many cases when EOs complain against the contract award notice, but the complaint lists many points pertaining to the tender criteria, in which case EOs must appeal the contract notice.

- 1 The PRB holds two types of meetings, those open to the parties and the public, and internal meetings where other parties are not allowed to attend. D+, as a monitoring organization, despite having a Memorandum of Understanding in place with PRB, is not allowed to monitor the sessions where the parties are not invited.
- 2 Decisions on withdrawal of complaints are not calculated in this percentage, as the panel does not take a decision in favor or against the complainant, but rather only accepts the withdrawal of the complaint.

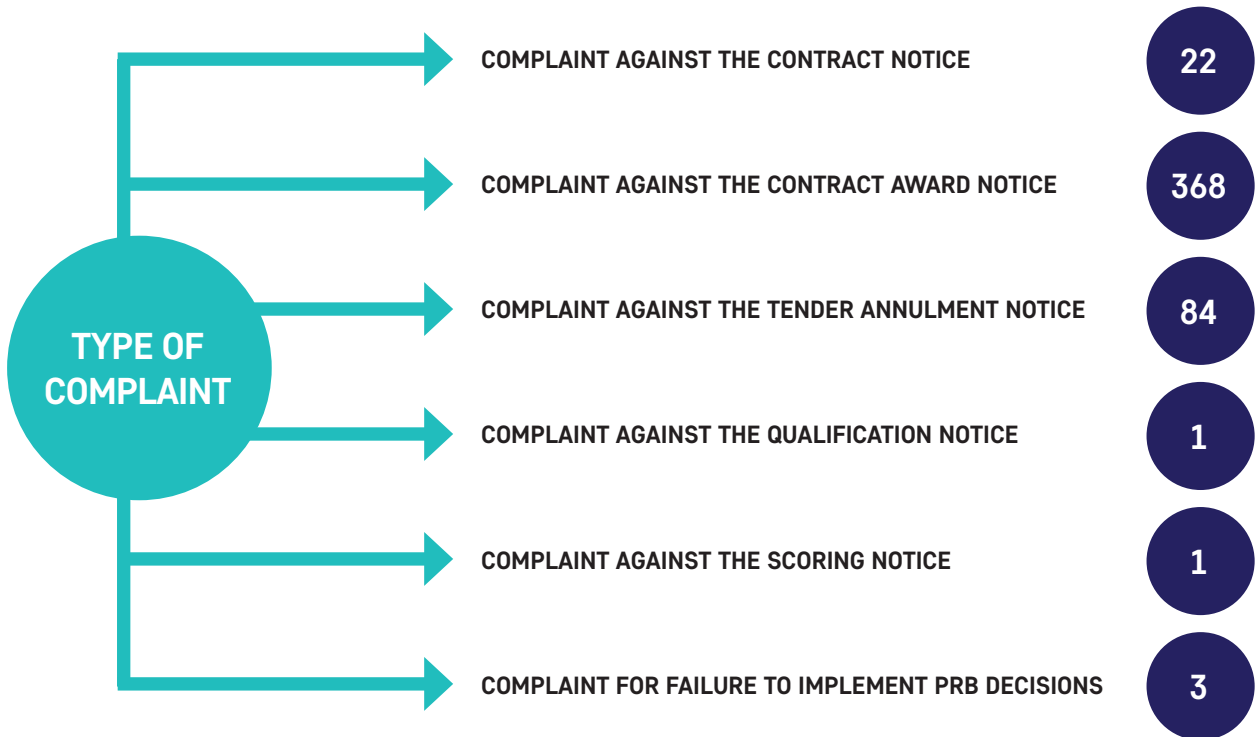


Table 2: Breakdown of complaints by type of complaint for the period June-December 2018

Of 479 decisions taken during this period, hearings were held for 427 cases, with 386 of them open and 41 closed. No hearing session was held for 52 decisions, as a result of

the withdrawal of the EO from the complaint, or because of the agreement of the EO and CA with the expert's recommendation.

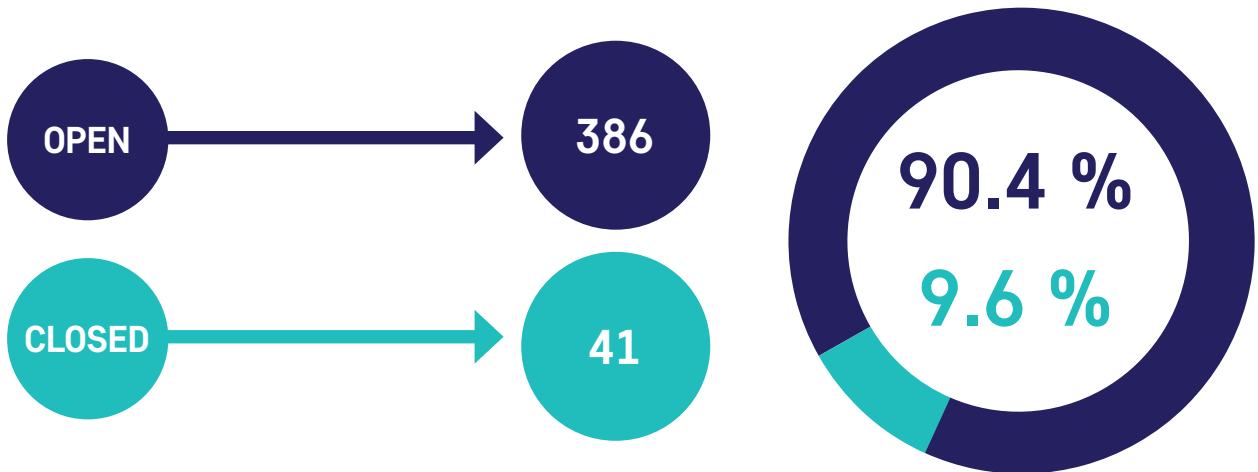


Table 3: Number of hearings for the period June-December 2018

Differences between expert recommendations and panel decisions

In 269 decisions in favor of complainant companies, experts have given an opposing recommendation in 84 cases (31%). In 158 decisions of the panel against complainant companies, experts have given recommendations contrary to the panel in 46 cases (29%). Overall panel decisions and expert recommendations do not match in 130 cases or 30%.

Expert	Recommendations in favor of CEO	Recommendations against CEO	Decisions of the panel in favor of the CEO	Decisions of the panel against the CEO
Abdurrahman Çunaku	3	0	2	1
Abetare Prebreza	4	7	5	6
Agim Sheqiri	9	6	8	7
Basri Fazliu	18	28	33	13
Besnik Mehmeti	4	2	4	2
Bujar Sopi	9	5	9	5
Burim Guri	2	6	2	6
Es'heme Beka	4	0	3	1
Hasim Krasniqi	16	16	22	8
Hysni Muhadri	10	20	16	14
Muhamet Kurtishaj	8	9	7	10
Nazmi Statovci	8	6	11	3
Qazim Hoxha	5	9	7	7
Safije Saramati	10	6	10	6
Sahit Beqiri	16	8	15	9
Visar Basha	20	19	25	14
Visar Bibaj	22	11	22	11
Vjollca Balaj	7	3	8	2
Xhevdet Bushi	13	6	13	6

Table 4: Recommendations in favor and against CEOs according to experts and panel decisions for those recommendations

The table above indicates that in the complaints dealt by experts Basri Fazliu and Hysni Muhadri, a significant differ-

ence between the recommendation and the decision of the panel was observed.

Delays in decision-making

After the receipt of the complaint, the PRB has 34 days to take a decision and publish it on the website. From 1 June to 31 December 2018, the PRB has taken 479 decisions. The

average time from the date of the complaint to the date of publication is 38.34 days, which in average exceeds the legal deadline of 34 days.

No.	Procurement activity	Complaining EO	CA	Days
1	Supply with horizontal centrifugal pumps for removal of water	ND	KEK	77
2	Supply with decorative trees in spaces and parks of the city of Pristina	Lulishtja Buçaj	MA Pristina	73
3	Summer and winter maintenance of roads in the villages and the city of Gjilan/ Gnjilane Municipality Lot 1	Zuka Commerce	MA Gjilan/Gnjilane	73
4	Supply with medicines from the Essential List Lot 6, 8, 9, 12, 16, 34, 39 and 40	Liri Med	MH	69
5	Physical security of facilities for AK – Vushtrri/ Vuçitrn	Commando	MA Vushtrri/Vuçitrn	68
6	Supply, installation and commissioning of lighting in Obiliq	Risamont	KEK	66
7	Physical security of KFA facilities	SFK	Kosovo Forestry Agency	63
8	Projection and design of infrastructure projects for the needs of MKSF and KSF	Arhiko Ing	MKSF	62
9	Transport services for the employees of KEK Lot 2	Autotransporti	KEK	60
10	Construction of the roundabout in Gjakova/ Djakovica Lot I	PeVlaku & Joos & Krasniqi Bazë	MA Gjakova/ Djakovica	60

Table 5: The ten decisions where PRB had the longest delays in taking decisions.

Contracting Authorities and economic operators with most decisions

During this period, the highest number of decisions was taken against the following CAs:³

CONTRACTING AUTHORITY	NUMBER OF DECISIONS	WON ↑	LOST ↓
MINISTRY OF INFRASTRUCTURE	55	15	40
KEK	47	23	24
MUNICIPALITY OF PRISTINA	21	7	14
MINISTRY OF HEALTH	19	9	10
MUNICIPALITY OF GJAKOVA/ DJAKOVICA	18	5	13
KOSOVO POLICE	17	5	12
MUNICIPALITY OF GJILAN/GNJILANE	16	6	10
UCCK	11	6	5
MUNICIPALITY OF VITI/VITINA	11	3	8
MUNICIPALITY OF LIPJAN/LIPLJANE	11	8	3

Table 6: Contracting authorities with most decisions by PRB in June - December 2018

The table above shows that only UCCK and the Municipality of Lipjan/Lipljane have won more cases in PRB than they have lost. All other authorities have lost more cases than

they have won. The Ministry of Infrastructure has lost 72% of decisions, while the average of cases lost for this period is 63%.

³ Complaints of an EO against two lots are counted as two complaints as there are cases when the complaint for one lot was rejected and the other approved.

COMPLAINING EO	NUMBER OF DECISIONS	WON ↑	LOST ↓
JOOS & KRASNIQI BAZË	10	8	2
LIRI MED	9	4	5
ESKAVATORI	8	4	4
EL BAU	7	5	2
SFK	7	6	1
INTERLAB	6	3	3
CTA	6	3	3
SALLAHU	6	6	0

Table 7: Economic Operators with most decisions by PRB in June - December 2018

In table 7, decisions on economic operators also include cases when they were in a consortium with another EO.

TRANSPARENCY

During this reporting period, notices to parties were generally communicated in time; however, in certain cases there were mistakes such as wrong emails, thus leading to one of the parties not appearing on the session. Publication of announcements for sessions on the PRB website is usually done in time, except in cases when the announcement is published the day the session is to be held. Absence of parties in sessions, either because they were not been notified or for unknown reasons, does not prevent the hearing. Only in rare cases the session is postponed due to the absence of parties, upon the request of the parties, addressed to the panel. Since this period included the summer season, most experts were on annual leave and during the month of August, and as a result many were absent from the sessions. This has made decision-making difficult for the panel because of the inability to provide additional clarifications to the expertise provided to the panel.

As a result of continuous advocacy by D+, the number of open hearings increased which led to a higher monitoring by both non-governmental organizations and the media and citizens.

Moreover, in December 2018 PRB launched live broadcasting of open sessions with the support of the United States Agency for International Development (USAID) Project for Transparent, Effective and Accountable Municipalities (TEAM). After testing, as of 2019 there will be live broadcasts of open sessions.

As noted in previous reports, there is a lack of transparency in the publication of complaints, where only the first two pages are published, excluding CEO's appeal claims. Another document which is not made public is the expertise delivered to the parties and the panel. Although PRB publishes its decisions, their electronic format is hardly readable and editable. In this format one cannot search the decision to find the required words more easily.



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INCONSISTENT DECISIONS

Many complaints have similarities with each other in terms of appeal claims. This is because many institutions commit, according to PRB, unlawful actions which are then repeated by other institutions. These cases may include companies being awarded contracts with wages that are in violation of the minimum wage, or not calculating annual leave of employees, not validating university degrees, or similar issues. In these cases, D+ evaluates whether PRB treated the complaints with the same standards. Decisions of

PRB contradicting previous decisions are identified by D+ as inconsistent. In the following section, you can read more about inconsistent decisions on many issues. Inconsistency has negative impact on many dimensions, including the creation of legal uncertainty in public procurement, loss of trust of parties in PRB, and increased suspected partiality when cases are addressed by experts and the panel.

Decisions related to the Labor Law/Minimum Wage

In order to obtain data regarding inconsistent cases, D+ has analyzed all decisions taken in the period June - December 2018. A concern regarding these decisions is the attention the PRB gives only to violations of the PPL, but not necessarily to other laws. Despite the fact that violations of any applicable law should render the procedure invalid, in some cases the PRB tolerates them. In general, if there is a claim stemming from another law but is not listed in the Tender Dossier as a specific requirement, experts and the panel consider that the “request was not part of the Tender Dossier”. However, the panel has started to take into account the requirements that derive from other laws. For tenders requiring compliance with Central Bank of Kosovo (CBK) tariffs, the panel makes a decision considering these fees, regardless of whether they are required in the Tender Dossier or not.

However, this is not the case when it comes to the Labor Law and the Decision of the Government of Kosovo determining the minimum wage. For instance, tenders for phys-

ical security of premises saw panel decisions and expert recommendations reasoning that compliance with Labor Law or the decision on minimum wage was not a required criterion. In a 2017 decision, the Panel gave importance to an Administrative Instruction which was not required in the Tender Dossier. The Panel, in the Decision 394-402/17⁴ decided to annul the tender because the Complaining EO, RSM Company, had not provided the street signs in line with AI 13/2012 of the Ministry of Environment and Spatial Planning,⁵ while this AI was not listed as a requirement in the Tender Dossier. However, the panel failed to do the same in tender dossiers requiring compliance with the Labor Law, or even in cases where, when requested, the law was not complied in full.

Failure to comply with the Labor Law and the minimum wage leads to workers working under difficult conditions, with long working hours, and hourly wages under the minimum wage. Even when the request for Labor Law compliance is part of the Tender Dossier and the wages defined in

4 PRB. Decision 394-402/17. 2017.
https://oshp.rks-gov.net/repository/docs/vendimet/2017/394-402-17vendim_1.PDF

5 Administrative Instruction No. 13/2012 on Physical Placement of Address Posts in Public Districts, Buildings, Houses, Objects and Free Cadastral Areas. Official Gazette of the Republic of Kosovo. 2012.
<https://gzk.rks-gov.net/ActDetail.aspx?ActID=8190>

the file, experts and the panel make basic calculations to see whether the complaining or recommended EO will manage to fulfill the obligations towards employees with the prices offered. The calculation made includes the wage (gross or net), wage tax, pension contribution of the employee and the employer. According to the Labor Law, Article 56.2 the following payments are also made on top of the basic wage:⁶

2. *Employees are entitled to additional remuneration in the percentage of the basic salary as follows:*

2.1. *20% an hour for night shift;*

2.2. *thirty percent (30%) per hour for night shift;*

2.3. *thirty percent (30%) per hour for extended working hours;*

2.4. *fifty percent (50%) per hour for work in national holidays; and*

2.5. *50% per hour for work in weekends.*

These other calculations are done neither by experts nor the panel. Net wage + wage tax + pension contribution of the employee + pension contribution by the employer + additional payment based on Article 56.2 constitute an expense for the EO. This is a threshold, implying that any bid below it would result in abnormally low prices. The PRB could develop a formula on this issue, calculating such prices, particularly in cases of tenders for physical security of premises, or cleaning services in premises, where this problem occurs most often. On the same issue, the PRB could also consult

with the Labor Inspectorate within the Ministry of Labor and Social Welfare, as foreseen in the Law on General Administrative Procedure.⁷

D+ raises the need for the PRB to pay greater attention to violations of specific laws in cases when such a thing is observed. In cases where the PRB considers itself incompetent, it should refer such issues to the relevant institutions, but must ensure that these issues don't remain unaddressed. Moreover, General Terms of tender dossiers state that an EO must operate in accordance with the applicable laws in Kosovo. Article 7.3 of the Tender Dossier for Supplies states:

7.3 The Supplier shall respect and abide by all laws and regulations in force in the Republic of Kosovo and shall ensure that his personnel, their dependents, and his local employees also respect and abide by all such laws and regulations.⁸

The same is provided in Article 8.2 of the General Terms of the Tender Dossier for Works.

SFK v. Ombudsperson Institution, 210/18

SFK Company filed a complaint against the Ombudsperson Institution (OI) for the tender "Physical security of the OI facility" with the allegation that Article 61 of the PPL was violated. The review expert, Besnik Mehmeti, said that the evaluation of the price is a prerogative of the CA, and since CA had no doubts as to the price, he recommended that the complaint is rejected. The Panel decided to reject the complaint based on the expert's recommendation.⁹

6 Law No. 03/L-212 on Labor. Official Gazette of the Republic of Kosovo. 2010. <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2735>

7 Article 34, Administrative assistance 1. A public organ may request the assistance (herein after referred to as "administrative assistance") from another public organ, for the performance of one or more necessary procedural actions, within an administrative proceeding. 2. The administrative assistance is requested: 2.1. if for justified reasons such actions cannot be performed by the requesting organ; 2.2. if the performance of such actions by the requesting organ is not effective, or if its costs would be significantly higher than those that would result from the performance by the organ whose assistance is requested; 2.3. when knowledge of facts, documents or other evidence in the possession of the other organ is required; 3. If not provided otherwise by law, a public organ may choose the organ to be requested for administrative assistance, based on the cost-efficiency principle.

8 Public Procurement Regulatory Commission. B15 Tender Dossier - Supply - Open Procedure. 2016. <https://krpp.rks-gov.net/krpp/PageFiles/File/STRforms2016/Shqip/B15.docx>

9 PRB. Decision 210/18. 2018. <https://oshp.rks-gov.net/repository/docs/vendimet/2018/210-18vend.pdf>

OI had budgeted 10,000 Euro for the physical security of the premise for 24 hours a day, for 12 months. Since the OI did not specify the wages of employees in the Tender Dossier, the minimum wage was calculated as per the Decision 04/33 of the Government of Kosovo,¹⁰ where the minimum wage is set at 130 Euro for employees under the age of 35 and 170 Euro for those over 35 years of age. Administrative Instruction (AI) 09/2017 of the Ministry of Labor and Social Welfare¹¹ stipulates that the minimum wage is gross salary, and that the maximum number of working hours within one month is 176 hours.

The bid of the winning EO Commando was 6,512.18 Euro for 12 months, namely 542.68 Euro per month. Since OI requested 24 hour security, there are 720 hours (24 hours * 30 days) in a month. To work 720 hours, four workers are required, with 180 hours a month each. If we were to make basic calculations where a worker is paid 130 Eur gross per month, working 176 hours, plus 5% contributions as the share of the employer, the costs to the EO would have been:

130 * 1.05 = 136.5 Eur

4 employees * 136.5 = 546 Eur

The costs of the EO Commando are higher than its offer, excluding the four additional hours that employees would have to work per month (180-176), additional payment of 30% per night, holiday pay, and annual leave.

The Panel should have returned the case for re-evaluation and force the CA to calculate the cost threshold under which the bids are abnormally low. This is also stated in Article

18.25 of the Rules and the Operational Guidelines for Public Procurement (hereinafter the Guidelines)¹² which states:

18.25 In case the price offered by the Tenderer does not cover the minimum wages and salaries of the employees to be involved in the execution of the contract, regulated by Ministries in different sectors, the bid can be considered as abnormally low bid. By deciding the minimum wages and salaries to be paid to the employees, the Contracting Authorities and Tenderers have to respect the minimum requested salaries and corresponding taxes and social contributions published in the relevant sectors. The Contracting Authority might request information concerning the relevant applicable minimum salaries and wages from the economic operator during the evaluation of the justifications submitted by the economic operators.

It is a right of the CA to evaluate the abnormally low price, but this does not excuse any institution from the obligation to comply with the minimum wage rule or other legal obligations. The law does stipulate that in the exercise of discretionary powers, the principle of legality is explicitly cited as a requisite for an administrative action to be considered legitimate.¹³

Rojet e Nderit v. State Prosecution, 415/18

In the tender procedure “Physical security for the facilities of the Kosovo Prosecutorial System” the panel took an inconsistent decision compared to the decision on OI. In this decision, the PRB requested the case to be returned for re-evaluation with the reasoning that the CA should prove whether the winning EO can pay the employees with the offered price, as per the requirements of the Tender Dossier

¹⁰ Government of Kosovo Decision 04/33. 2011.

http://www.kryeministri-ks.net/repository/docs/Vendimet_e_mbledhjes_se_33-te_te_Qeverise_2011.pdf

¹¹ Administrative Instruction 09/2017 determining the minimum wage. Official Gazette of the Republic of Kosovo. 2017.

<https://gzk.rks-gov.net/ActDetail.aspx?ActID=15812>

¹² Public Procurement Regulatory Commission Rules and Operational Guidelines for Public Procurement 2017.

<https://krpp.rks-gov.net/krpp/PageFiles/File/2018/04/rruopp13042018.pdf>

¹³ Law No. Law 05/L-031 on General Administrative Procedure, Article 4. Official Gazette of the Republic of Kosova. 2016

<https://gzk.rks-gov.net/ActDetail.aspx?ActID=12559>

and the contract notice.¹⁴ This PRB decision was issued even though such a thing was not required explicitly in the Tender Dossier. The panel states this without making any calculation of whether the winning EO made the bid in accordance with the Labor Law and the minimum wage.

Review expert, Hasim Krasniqi, had given a recommendation for a complaint to be rejected because the CA had failed to request, in the Tender Dossier, compliance with the Labor Law, while Article 61 and the formula for determining a bid with a low price could not be used, as there was only one offer under the planned budget. PPL, in Article 61, states that if a tender appears to be abnormally low, the CA must seek clarification from the economic operator. Article 61.6 states that the PPRC shall issue a sub-legal act to determine the abnormally low price. PPRC has issued document B57

- Rules on Abnormally low tenders.¹⁵ To qualify a tender as abnormally low, the following three conditions must be met:

- 1 *the price offered is more than 30 % lower than the average price of the responsive tenders*
- 2 *the price offered is more than 10 % lower than the price or costs of the second lowest tender*
- 3 *at least 3 (three) tenders have been submitted*

If an offer exceeds the budget, it is responsive but is not selected for award as there are usually lower bids. There were four offers in this tender process;

OPERATOR

PRICE

COMMANDO & GROUP FOR SECURITY & JONI

36,540.48 Eur

ROJET E NDERIT

48,545.28 Eur

ALPHA PRIVATE SECURITY & SAS

51,517.44 Eur

AS SECURITY & BESA SECURITY

55,480.32 Eur

Table 8: Bidders in a procurement activity and prices offered

14 PRB. Decision 415/18. 2018.
https://oshp.rks-gov.net/repository/docs/vendimet/2018/415-18vendim_1.PDF

15 PPRC. B57 Rules for abnormally low tenders - amended version. 2017.
https://krpp.rks-gov.net/krpp/PageFiles/File/STRforms2016/Shqip/Rregullat%20per%20Tenderet%20Jo-Normalisht%20te%20Ulet_v2_07_07_2016.docx

CA had chosen as winner the Commando & Group for Security & Joni consortium. Using the formula above, the threshold to qualify an abnormally low price is:

$$36,540.48 + 48,545.28 + 51,517.44 + 55,480.32 = 192,083.52$$

$$192,083.52 / 4 \text{ bids} = 48,020.88 \text{ average bid}$$

$48,020.88 / 1.3 = 36,939 \text{ Eur}$ is the threshold under which all bids are abnormally low.

$$48,545.28 - 36,540.48 = 12,004.8$$

$12,004.8 / 48,545.28 = 0.247$ or **24.7% lower than the second bid, also three responsive bids.**

Had the review expert done this calculation, his recommendation should then have been to uphold the complaint, while declaring the winning EO non-responsive.

However, after re-evaluation, the CA again awarded the tender to the same EO, while EO Rojet e Nderit again filed a complaint. The panel returned the tender for re-evaluation once again,¹⁶ but now giving an opposing reasoning. While the first decision had stated that the CA must confirm whether the winning EO will be able pay the workers with the prices offered, the second decision stated that the Tender Dossier did not require compliance with the Labor Law and minimum wage rule. In the same decision, two paragraphs above, the panel stipulates that the previous decision was not complied with. The Panel also reasons that the conditions for

the tender to be considered as abnormally low, based on the formula, have not been fulfilled, when in fact they are fulfilled as evidenced by the calculation above.

The review expert changed his recommendation in the second decision, recommending that the appeal be partially upheld and the tender returned for re-evaluation. While in the first decision it had stated that the Labor Law and the minimum wage did not have to be observed, in the second decision, based on the reasoning of the panel given in the first decision, he stated that the CA failed to prove whether the winning EO will be able to pay the workers with the offered price. The reasoning referring to Article 61 was repeated as in the first decision. In fact, in the second decision, the expert's recommendation and the reasoning of the panel had the same text.

After the re-evaluation, the State Prosecutor's Office annulled the tender reasoning that all offers were non-responsive.

Rojet e Nderit v. Municipality of Gjakova/ Djakovica 547/ 18

Municipality of Gjakova/Djakovica announced the winner of the tender "Physical security of Gjakova/Djakovica Municipality buildings" to the consortium Internat Security Association & M-GR Security with the price of 251,269.20 Eur. The duration of the contract would be 24 months. Against this decision, EO Rojet e Nderit filed a complaint to the PRB, claiming that the Tender Dossier requirements for wages were not respected. The required wage was 300 Eur gross plus all other obligations arising from the Labor Law. The Municipality had noted the warning that if an EO fails to reach this gross wage, its tender would be considered abnormally low and would be rejected. Based on the recommendations of the review expert, Abetare Prebreza, the panel confirmed the contract award notice.¹⁷ The panel's justification was a verbatim copy of the expert's recommendation, stating that

¹⁶ PRB. Decision 627/18. 2018
<https://oshp.rks-gov.net/repository/docs/vendimet/2018/627-18vend.pdf>

¹⁷ PRB. Decision 547/18. 2018.
<https://oshp.rks-gov.net/repository/docs/vendimet/2018/547-18%20vend.pdf>

according to the calculation made and the CA's requests, the winning consortium can pay the workers with the offered price.

Review expert Abetare Prebreza recommended the complaint to be rejected because according to her calculation, a worker's salary for one month would be 327.17 Eur:

$251,269.20$ (consortium offer) / 24 months (duration of contract) / 32 (number of employees required) = 327.17 Eur.

However, the expert made an incorrect calculation, failing to take into account the requirements of the Tender Dossier and the Labor Law. Specifically, the employer's contribution (which is a cost to the company) and other payments such as night-shifts and annual leave were not calculated at all. Had the night shift been calculated with an additional 30% per hour, the hourly rate of 1.17 Eur and the fact that it includes 24 months, meaning 730 night shifts (2 years with 365 days), and the night shift calculation according to the Law of Labor which is from 22:00 to 06:00, then the additional cost would be:

**$1.17 * 0.3 = 0.35$ Eur
additional costs per hour.**

**0.35 Eur * 8 hours *
730 days = **2,044** Eur**

In the Tender Dossier, the municipality requested guards in seven locations, 24 hours a day, which means that each will have a night shift.

$2,044 * 7 = 14,308$ Eur

**is the additional cost only for
the night shift payments.**

This calculation indicates that the winning EO would be able to cover the gross wages and other costs.

Another problem that the expert failed to notice, which the complaining EO mentioned during the hearing session, is the number of hours a worker will have to work. The number of hours required in the Tender Dossier is 182,000 hours for 24 months. Divided by the number of employees, a worker will have to work 237 hours per month.

$182,000 / 24 / 32 =$

237 hours per month

With these two calculations in mind, not that a worker will not be able to be paid 300 Eur of gross wage, including the pension contribution share of the employer and other legal payments, but he/she will also have to work 61 hours more per month than the norm allowed by the law and the AI.

The expert further argued that the municipality had already clarified, through EOs requests for clarification, how the basic rights according to the Labor Law are defined. The municipality responded that it made reference to the wage and annual leave, and added that the workers are entitled to all the rights clearly stated by law. The municipality's only concern is that not all employees can be off on holidays, and that a solution has to be found for this. The expert interpreted this as if the municipality requested compliance only for wages and holidays. However, neither the municipality nor the expert can determine the fundamental rights provided by the law.

The expert further stated that no financial analysis was required. This is true, but the financial analysis is done to see if the EOs offer complies with the terms of the Tender Dossier and the Labor Law. A financial analysis would reveal that the amount of hours required and the number of employees cannot be covered by the estimated budget of 290,000 Eur. As a result, the tender should have been annulled, considering that the estimated budget is not sufficient to cover payments for 32 workers, working 176 hours per month. The following calculation reveals that for 182,000 hours requested, for 24 months, at least 43 workers would be needed.

$$182,000 / 24 / 176 =$$

43.08 employees

For 43 employees, calculating only the wages and pension contributions (300 Eur plus 5% of the employers' share), the costs would be:

$$43 * 315 * 24 =$$

325,080 Eur

The review panel in this case took a decision contrary to that on the State Prosecution, as in this case the Tender Dossier required compliance with the Labor Law. However, the panel took the wrong decision based on an erroneous calculation done by the expert.

SFK v. Kosovo Forestry Agency, 553/18

Another decision was taken on the tender "Physical security of KFA buildings" where the panel upheld the complaint of EO SFK and returned the tender for re-evaluation.¹⁸ The only reasoning of the panel was that the CA should calculate the prices offered by the EO and consider the Tender Dossier criteria. The Tender Dossier had no explicit request for compliance with the Labor Law, but rather it requested a statement from the winning EO that it would comply with the Labor Law and other rules regarding wages. This request of the CA was reiterated in the request for clarification to EOs, stating:

We requested that the service provider complies with the Labor Law, and as far as price calculation is concerned, price

calculation falls with the service provider. The calculation should be done for the amount of hours requested and per unit.

The claim provided by EO SFK was that the winning EO Com-mando, with the offered price, cannot cover even the minimum wage of 130 Eur. Review expert, Bujar Sopi, stated that "the lowest-priced responsive bid" was used as an evaluation criterion. The expert, however calculated the costs that an EO would have, but only accounting for the wages and the employees' pension contribution. With regards to the number of employees needed, he relied on the complaining EO stating that they needed 15 employees to carry out this service. Thus, the expert made no calculation according to the Tender Dossier document, but rather relied on the words of the complaining EO. At the end of the calculation, the expert says that additional payments as per the Labor Law have not been calculated. In the next sentence, the expert states that based on the explanation above (his calculation) the claim on this item is unfounded.

Had the review expert accounted for the night-shift costs, he would have seen that the winning company's bid is lower than the costs to be incurred. Calculating the payment per hour of night-shift as above, and taking into account that the tender is for 36 months (comprising 1095 days) and that there are five locations in the Tender Dossier with night shifts, the additional cost would be as follows:

$$0.35 * 8 * 1.095 = 3.066 \text{ Eur}$$

for 36 months per guard

$$3,066 * 5 = 15,530$$

According to the expert, the winning company's costs are 73,710 Eur, while its offer was 88,689.74 Eur. When adding to the expenses calculated by the expert the amount

¹⁸ PRB. Decision 553/18. 2018.
<https://oshp.rks-gov.net/repository/docs/vendimet/2018/553-18vendim.PDF>

of 15,530 Eur, the total cost reaches 89,040 Eur. With this calculation included, the costs of the winning EO exceed its offer, even without accounting for the payments for holidays and annual leave. In this case, the panel took a decision contrary to that on the tender of the Municipality of Gjakova/Djakovica. Both cases required compliance with the Labor Law, but in the decision on the Municipality of Gjakova/Djakovica the panel confirmed the award of the contract, whereas in the decision on the Kosovo Forestry Agency, it returned the tender for re-evaluation. The Panel must treat equally all cases pertaining to the compliance with the Labor Law and at the same time ensure that the review experts know how to calculate the wages, contributions and additional payments.

Decisions on validation of diplomas

When a person completes his/her studies outside of Kosovo, according to Administrative Instruction 16/2016 of the Ministry of Education, Science and Technology, Article 3.1, his/her diploma must be validated, as employment is not allowed prior to this process.¹⁹ In some decisions, the Panel took contradictory decisions, with one decision stating that the EOs diplomas of the staff were not validated, and the other stating that the validation of diplomas was not a Tender Dossier requirement. There was no requirement for validation of diplomas in any of the tender dossiers included in all the PRB decisions.

Dorearti & Beni Com, RSM Company, Sinjal & Papenburg v. Ministry of infrastructure, 159-169-173/18

Three companies, Dorearti & Beni Com, RSM Company, Sinja & Papenburg, complained to the PRB on the tender “Signaling and maintenance of equipment on national and regional roads of the Republic of Kosovo”. The Panel took the decision to return the tender for re-evaluation. Review expert, Visar Basha, did not mention the issue of diploma validation. The panel’s reasoning, among other, states that the winning EO, Select Prima, had provided staff diplomas in Macedonian and German and this, according to the panel, is in violation of Article 13.4 of the PPL, which states that such documents must be in Albanian, English or Serbian. The Panel further added:

“Staff diplomas, to fulfill the requests of CA for technical and professional capacities, should be validated by MEST”

The panel stated the same in the decision 131-132-138-140-143-148/18,²⁰ page 23, which provides:

“The review panel clarifies that persons who have completed studies abroad must have their diplomas validated, but this issue could have been clarified in accordance with Article 72 of the PPL.”

¹⁹ Ministry of Education. AI 16/2016 on Principles and Procedures for Recognition of Diplomas, Degrees and Qualifications of Higher Vocational Schools and Universities acquired outside the Republic of Kosovo. 2016 <https://masht.rks-gov.net/uploads/2016/09/16-ua-masht-16-2016-per-proc-e-njohjeve-te-dip-rotated.pdf>

²⁰ PRB. Decision 131-132-138-140-143-148/18. 2018 <https://oshp.rks-gov.net/repository/docs/vendimet/2018/131-132-138-140-143-148-18-vend.pdf>

The Panel took a contradictory decision, compared to the reasoning above in the decision 248/18²¹ confirming the award of the contract. The claim related to the validation of diplomas was considered by the panel as unfounded, stating that diploma validation was not a Tender Dossier request. The Panel justified its decision with article 56.3 of the PPL, which provided that a bidder cannot be eliminated for requests that are not listed in the Tender Dossier and the

contract notice. The same reasoning was also provided by the review expert, Abdurrahman Çunaku.

The Panel should treat equally all cases in which the complaint revolves around the validation of diplomas. The inconsistency of the decisions above can be used by EOs as precedents in future complaints.

Decisions on certificates that companies have no debts to TAK

When the CA chooses a winner, prior to contract signing, one of the documents to be submitted is the tax clearance certificate issued by the Tax Administration of Kosovo (TAK) confirming that the EO has no debts towards TAK.

Astraplan v. Ministry of Internal Affairs, 130/17

A complaint was filed against the decision for the award of the contract to PRB by Astraplan, claiming that the winning EO, Mercom Company, had debts owed to TAK. Review expert, Visar Bibaj, recommended the tender to be returned for re-evaluation, as the winning EO did submit a confirmation that they have an agreement with TAK for the payment of debts in installments, but this certificate was dated after the opening of bids. Indeed, this certificate is only required for the winner, which is selected after the opening of bids, but again, all documents in the case must be dated prior to the opening of the bids. In this tender, the CA had requested confirmation that the EO is not late in payment of taxes for the last quarter, prior to the publication of the contract award notice.

The Panel took the decision to return the tender for re-evaluation.²² The decision's reasoning cited article 65.4.8 of the

PPL, which provides:

4. *An economic operator shall not be eligible to participate in a procurement activity or in the performance of any public contract if such economic operator:*

4.8 is currently delinquent in the payment of any social security or tax contributions in Kosovo or the economic operator's country of establishment, except where such debt is deemed to be insignificant in Kosovo;

The Panel also noted that the winning EO submitted a debt settlement agreement with TAK, but that this agreement was dated after the bid opening. As noted by this decision, the PRB made two important conclusions, firstly that the winning EO cannot submit a debt settlement agreement with TAK, but rather proof that there are no debts thereto, and that the date of this decision must be before the bid opening.

Olti Trasing & Alba Group v. Ministry of Internal Affairs, 391/18

The PRB took a decision contrary to Decision 130/17, returning the tender for re-evaluation, in which it upheld the complaint of Olti Trasing, who had been eliminated because

²¹ PRB. Decision 248/18. 2018
<https://oshp.rks-gov.net/repository/docs/vendimet/2018/248-18%20vend.pdf>

²² PRB. Decision 130/17. 2017
<https://oshp.rks-gov.net/repository/docs/vendimet/2017/130-17vend.pdf>

he had not submitted a tax clearance certificate for the last quarter of the period prior to the contract award notice.²³ The CA, in fact, had declared as a winner the consortium Olti Trasing & Alba Group, and had invited them to sign the contract. The consortium member had brought the tax clearance certificate, which stated that this EO was in debt. According to article 71.4 regarding consortia, the eligibility requirements, including the tax clearance, apply to all members of the group. Since Alba Group had a certificate stating that it had debts, with no settlement agreement for repayment in installments, the CA proceeded to announce the second EO with the lowest price as the winner.

The Panel, in the reasoning of the decision, states that the CA must ask for clarification under Article 72 and considers that the complaining EO has the cheapest price. This decision is not in line with decision 130/17, since the panel in that decision stated that the winning EO cannot submit a debt settlement agreement with TAK, dated after the bid opening. The debt settlement agreement means that EO had debts owed to TAK and was unable to provide a tax clearance certificate dated prior to the opening of the bids. In decision 391/18, the panel stated that clarifications are to be sought, which in this case implies that the consortium member provided a debt settlement agreement with TAK dated after the bid opening. The Panel also says that the complaining EO is cheaper than the winning EO, and that the CA should consider the objective of the procurement which is to ensure that public funds are spent more economically. For this tender, Olti Trasing & Alba Group's offer was cheaper for 21,660.02 Eur than the offer of winning EO, Euroing. However, in decision 130/17, the panel had not stated that public funds should be spent more economically, as in that case the bid of the winning EO Mercom Company was cheaper by 57,742.8 Eur than the bid of the complaining EO.

The review expert in the case, Hasim Krasniqi, recommended the complaint to be rejected as Alba Group had failed to provide a tax clearance certificate. To support the recom-

mendation, the expert referred to Article 65.4.8 of the PPL and Article 26.8 of the Guidelines.

The issue with this PRB decision is that according to Article 65.4.8 which the panel had cited in decision 130/17, an EO is not eligible to participate in a tender if it has debts towards TAK. The CA in this case also followed the Guidelines which, according to Article 26.8, pages 61-62, state that if an EO is declared winner and fails to provide the required eligibility certificates (including the tax clearance), its tender will be rejected, the tender security will be forfeited and the CA will initiate the disqualification procedure (blacklisting) according to article 99.2 of the PPL.²⁴ In this case, the CA only continued with the second bidder but failed to request a disqualification procedure. In cases where an EO fails to provide a tax clearance certificate from TAK, Panel must always decide against the EO, as the debt to TAK implies that an EO is not paying taxes regularly, which is a serious violation also envisaged in PPL, which even prevents EO from bidding if in debt.

After re-evaluation, the CA selected the same EO as the winner, Euroing. A complaint was filed again to PRB by Olti Trasing & Alba Group. During the re-evaluation procedure, the CA requested clarification from Alba Group and asked for the provision of proof that it had no debts to TAK, but that this certificate should be dated prior to July 4, 2018. This date was after the opening of the bids, but prior to the contract award notice. The review expert stated that the CA could not set a fixed date, but rather should have acted upon the requirement, for the winning EO to submit a tax clearance certificate dated prior to the publication of the contract award. In fact, Alba Group had failed to comply with this request, just before the contract award notice. Alba Group had submitted a certificate of debt settlement agreement in installments on October 1, 2018, issued on August 31, 2018. However, the expert, citing the previous decision and considering that the complaining EO had the lowest bid, recommended the tender to be returned for re-evaluation.

23 PRB. Decision 391/18. 2018
https://oshp.rks-gov.net/repository/docs/vendimet/2018/391-18vendim_1.PDF

24 Public Procurement Regulatory Commission Rules and Operational Guidelines for Public Procurement 2017
<https://krpp.rks-gov.net/krpp/PageFiles/File/2018/04/rpuopp13042018.pdf>

Based on the expert's explanations, the Panel, stated that the bid of the complaining EO was cheaper by 21,660.02 Eur. The Panel states that the CA cannot set a fixed date on the date of TAK's certificate. The Panel interprets this as the CA acted in violation of Article 56.3 of the PPL which states that an EO cannot be eliminated for a criterion or request that was not required in the tender dossier. The Tender Dossier requested a tax clearance certificate submitted prior to the publication of the contract award notice. According to Article 26.8 of the Guidelines, the winning EO has five days to provide the eligibility requirement documents. In this case, Alba Group has significantly exceeded the five-day deadline, as it was awarded the contract in early July 2018, while it submitted the TAK certificate on October 1, 2018. Based on these reasons, the panel again returned the tender for re-evaluation.²⁵

After re-evaluation, the CA annulled the tender for the following reason:

The Procurement Department was unable to implement the re-evaluation Decision of the PRB No. 578/18, because AME failed to form the Bid Re-evaluation Commission and the PRB was notified on this by CA-MIA, therefore the public procurement procedure for this activity was annulled.

By January 25, 2018, no new complaint was filed to PRB regarding this tender.

The panel takes two inconsistent decisions, with the above. In Decision 130/17 the Panel rightly refers to Article 65.4.8 of the PPL. This article should also be used as reference in decision 391/18, as prompt payment of taxes is a condition to participate in the tender. If an EO is selected as a winner and has debts due to TAK, this is a violation of Article 65.4.8 of the PPL.

Decisions on complaints regarding the Tender Dossier criteria

It often happens that, when drafting the Tender Dossier, CAs appear to set criteria that favor a particular manufacturer or, at worst, require a specific product of a manufacturer without adding the word "equivalent to". Complaints against Tender Dossier criteria should be made at least five days prior to the bid opening, as stipulated by Article 108/A of the PPL.

Carpet v. Assembly of Kosovo, 14/18

Company Carpet complained to the PRB against the decision of the Kosovo Assembly to award the contract to Company Gjini. Carpet claimed that the technical specifications of the Tender Dossier were fully adapted to the convenience of Company Gjini. Company Carpet called on Article 28 of the PPL, which states that a CA shall not draft specifications that favor a particular manufacturer. The CA can do this only if it adds the words "equivalent to". The review expert,

Visar Basha, stated that Company Carpet should have lodged a complaint before the bids were opened, based on article 108/A of the PPL. The expert completely ignored the complaint claims for adjustment of criteria, but rather only recommended the rejection of the complaint.

The panel agreed with the opinion of the expert and decided to reject the complaint, stating that complaints regarding the criteria must be filed prior to the opening of bids.²⁶ With this decision, PRB establishes a standard of not addressing complaints against technical specifications of the tender if they are not filed within the legal deadline of five days before the opening of bids. As you will read below, this decision is in contradiction with the latter PRB's precedent.

²⁵ PRB. Decision 578/18. 2018
<https://oshp.rks-gov.net/repository/docs/vendimet/2018/578-18vend.pdf>

²⁶ PRB. Decision 14/18. 2018
<https://oshp.rks-gov.net/repository/docs/vendimet/2018/14-18vendim.pdf>

DWH Kosova v. Municipality of Gjilan/Gnjilane, 241/18

The panel took a decision inconsistent with decision 14/18, in the complaint of DWH Kosova against the decision of the Municipality of Gjilan/Gnjilane to award the contract to EO Ageo-co, as it decided to annul the tender.²⁷ DWH Kosova complained regarding the Tender Dossier criteria, stating that the technical specifications were tailored to a specific company but had done this after the opening of bids, and after Ageo-co was awarded the contract.

Expert Abdurrahman Çunaku, recommended the annulment of the tender because the CA, in the specification, had requested/used the name of a manufacturer and, according

to him, this was in contradiction to Article 27.8 of the PPL. CA acknowledges that they specified the name of the manufacturer in the line item for batteries, as it is the only type of battery that meets the requirements of the devices used by the CA. In its reasoning, the panel stipulates that Article 27.8 of the PPL was violated, which in fact is not the case, as batteries of other manufacturers would not be compatible with the equipment the municipality was using. However, had the panel used the reasoning under Article 108/A it would have confirmed the decision of the CA for the contract award, as DWH Kosovo had failed to file a complaint regarding the criteria prior to the opening of bids.

Decisions on “in-house” procurements

In 2017, the Municipality of Gjakova/Djakovica published the tender procedure “Mobile telephony services for the Municipality of Gjakova/Djakovica”. After the bid opening, Kosovo Telekom lodged a complaint claiming that Article 9.4 of the PPL was violated. The interpretation made by PPRC on Article 9.4, published in the Frequently Asked Questions provides as follows:²⁸

36. Taking into account the dilemmas raised by the Contracting Authorities and their numerous requests (addressed to the PPRC) to clarify action in cases where a Contracting Authority (Public Authority) needs to secure services provided by another, Public Authority?

If the Contracting Authority is a public authority, such public authority shall take reasonable measures to ensure that supplies meeting such needs are not available from another public authority. Thus, the provision cited above regulates cases where the Contracting Authority (Public Authority) needs the provision of services the

operator of which is also a public authority. PPL does not further clarify how public authorities will regulate the fulfillment of their needs (between themselves) as this is a matter of the public authorities and/or other rules. However, it is clear that these cases relate to exemptions from the implementation of legislation regulating public procurement when a form of public-private partnership is realized (a CA may require the provision of a service to its services or services of another Contracting Authority without initiating any tendering procedure, the so-called “in-house” exception). In conclusion, after the analysis stated above (Article 9.4 of the PPL) and your requests, since there is no other provisions of the PPL which obliges the Public Authorities to take measures to prevent “distortion of competition” (as in the case of EU Directive, Article 12.1) the PPRC must address this matter as decided in Article 9.4 of PPL.

²⁷ PRB. Decision 241/18. 2018
<https://oshp.rks-gov.net/repository/docs/vendimet/2018/241-18vend.pdf>

²⁸ Public Procurement Regulatory Commission. Frequently Asked Questions No. 36. 2017
https://krpp.rks-gov.net/Default.aspx?PID=HelpInfo&LID=1&PPRCMenu_OpenNode=109

This interpretation implies that if a service is provided by a public authority, in this case Telekom providing mobile telephony services, all other public authorities must receive such services from Telekom. In this case, since the Municipality of Gjakova/Djakovica is a public authority and Telekom is a public authority providing mobile telephony services, the contract should be awarded to Telekom. The Municipality rejected the request for reconsideration made by Telekom, which then filed a complaint to PRB. The review expert recommended that Telekom's complaint is approved because Article 9.4 was violated. The Panel decided to reject the Telekom's complaint with the reasoning that it failed to file a complaint before the opening of bids.²⁹

In another tender, the PRB took a decision inconsistent with the decision above, allowing the Municipality of Ferizaj/Uroševac to annul its tender after the bid opening, in order to conclude a contract with the municipal company following Article 9.4. The Municipality of Ferizaj/Uroševac has published the tender for "Summer and winter maintenance and cleaning of roads". The recommended winner was EO Rahovica. A complaint was filed against this decision in the PRB by EO El-Bau. El-Bau claims were not related to Article 9.4 but rather to other articles that were not complied with. The Panel, based on the recommendation of the expert, decided to send the tender for re-evaluation.³⁰

After doing the re-evaluation, the municipality decided to annul the tender procedure, in absence of responsive bids. El Bau again complained to the PRB, claiming that Article 62 of the PPL was violated, which envisages when a tender can be annulled. The expert, Hasim Krasniqi, had requested clarification from the municipality regarding the claim, stating that there were errors in the preliminary calculations, which then failed to provide convincing explanations. The reply sent by the municipality to the expert stated that the procurement office and the Mayor, in consultation with the PPRC's Rules Department, and in accordance with Article 9.4, decided to hire the local company RWC Pastërtia for summer maintenance,

while continuing with the procurement procedure for winter maintenance. The expert recommended the tender to be returned for re-evaluation as it could not be annulled on the ground of mistakes in the CA's calculations. The Panel supported the decision of the Municipality, confirming the decision to annul the tender.³¹ The panel's reasoning was that the municipality will enter into a contract with RWC Pastërtia, which is a public enterprise, owned by the municipality. In this decision, the issue is that the municipality was aware that it has its own company and that it could have signed a direct contract without initiating any procurement procedures. Moreover, if it were not for El-Bau's complaint, the municipality would have concluded a contract with EO Rahovica. The first decision of the panel required re-evaluation of the tender. The re-evaluation does not imply annulment of the tender. This PRB decision is contradictory to the decision of the Municipality of Gjakova/Djakovica since the tender was not annulled after the bids were opened, although the alleged violation of Article 9.4 occurred. On the other hand, in the tender of the Municipality of Ferizaj/Uroševac, the procedure was annulled after the bids were opened, on the grounds that Article 9.4 will be applied to enter into a contract with the municipal company. The municipality, on this occasion, violated the previous precedent of the Municipality of Gjakova/Djakovica.

29 PRB. Decision 13/17. 2017
https://oshp.rks-gov.net/repository/docs/vendimet/2017/13-17vendim_1.PDF

30 PRB. Decision 12/18. 2018
https://oshp.rks-gov.net/repository/docs/vendimet/2017/13-17vendim_1.PDF

31 PRB. Decision 194/18. 2018
<https://oshp.rks-gov.net/repository/docs/vendimet/2018/194-18vend.pdf>

Decisions on Article 61 - an abnormally low tender

Inconsistent decisions were also identified on abnormally low tenders, which are very common in public procurement activities. The disputed issue in this case remains whether PRB delves into price evaluation, whether they are in line with market prices. Or this is the responsibility of the CA which, through Article 61, should seek clarification and see if the price is in line with the market value and if the contract can be implemented smoothly. Thus, the essential issue is how cases are treated when a CA requests clarification and is convinced that the contract can be implemented with the prices that initially did not appear abnormally low, and whether this decision of the CA should be believed. Until now, the PRB has not established a standard, neither at experts' level nor in review panels. As explained in the cases below, the PRB applies more than one standard when addressing this issue.

Auto Beka v. Basic Court Ferizaj/Uroševac, 202/18

EO Auto Beka filed a complaint to the PRB against the contract award notice issued by the Basic Court Ferizaj/Uroševac on the tender "Servicing, maintenance and cleaning of vehicles". Auto Beka complained after the recommended EO "Universal Commerce" offered abnormally low prices. The CA says it requested clarification from the winning company, in line with Article 61 of the PPL, and was satisfied by the answer provided by the EO. The PRB rejected the complaint and took a decision in accordance with the recommendation of the review expert, stating that the CA observed procedures under Article 61 and the Regulation on abnormally low tenders.³²

Vlora v. Municipality of Shtime/Štimlje, 188/18

Another decision on the same Article was taken on 7 June 2018. The decision was to partially uphold the complaint of Vlora Company, annul the contract award notice and return the case for re-evaluation.³³ The complaining EO Vlora claims are that the EO recommended for contract award, Star-Graf, offered abnormally low prices. The Municipality of Shtime/Štimlje requested clarification from the recommended EO and was satisfied with their explanation. During the main hearing, the CA stated they complied with the procedures under Article 61. The review expert was not satisfied with the reply provided by Star-Graf and recommended the approval of the complaint and the return of the case for re-evaluation. The review panel supported the recommendation of the expert, justifying the decision by stating that "the Contracting Authority has acted in violation of Article 61 of the PPL when recommending for contract award an economic operator who has offered prices that do not reflect the market value".

Global Parajsa, Shqiponja v. Kosovo Assembly, 26-27/18

The PRB Panel, in another decision, 26-27/18,³⁴ in its reasoning, states:

"The Contracting Authority will itself assess whether a tender is abnormally low, therefore the right and responsibility falls on the Contracting Authority to treat a tender, or tender position, as abnormally low."

32 PRB. Decision 202/18. 2018
<https://oshp.rks-gov.net/repository/docs/vendimet/2018/202-18vend.pdf>

33 PRB. Decision 188/18. 2018
<https://oshp.rks-gov.net/repository/docs/vendimet/2018/188-18vendim.pdf>

34 PRB. Decision 26-27/18. 2018.
<https://oshp.rks-gov.net/repository/docs/vendimet/2018/26-27-18vendim.pdf>

The two decisions above, one on the Ferizaj Basic Court and the other on the Shtime/Štimlje Municipality, are inconsistent. In the decision on the Basic Court, the Panel took into account the fact that CA was satisfied with the clarification of the winning company. While in the decision on the Municipality of Shtime/Štimlje, it failed to take into account the reasoning of the CA, which, similarly to previous one, states that it was satisfied with the reasoning of the winning company. Had the PRB reasoning been used that the CA itself

must assess whether a tender is abnormally low, Star Graf Company would be awarded the tender of Shtime/Štimlje Municipality, as the municipality was satisfied with the clarification the company provided on abnormally low prices.

Decisions on the use of abnormally low formula calculation

Promix v. KEK, 204/18

In the tender on office supplies initiated by KEK, Promix company was eliminated because in 141 items, 76 were offered for a price of 0.01 Eur. KEK had asked for clarifications on these prices, while Promix replied that it stood behind the prices offered without giving any detail on the cost of the product, planned profits, etc. After elimination, Promix filed a complaint to the PRB. The expert, Xhevdet Bushi, stated that since the difference between the complainant's bid and the winning EO is only 9,036.68 Eur, the PPRC formula for the calculation of abnormally low prices should be used. He also proposed that, since the complainant's bid has the lowest price, in case of doubts, the amount of performance security could be increased. The Panel did not agree with the recommendation of the expert and decided to uphold the decision to award the contract to the winning company, Grafo-Loni.³⁵ In its reasoning, the panel stated that the CA followed all procedures provided under Article 61.

Shqiponja v. RWC Prishtina, 285/18

In the tender on catering services initiated by the Regional Water Company Prishtina (RWC Prishtina), the panel decided differently. RWC Prishtina had declared as "non-responsive"

Company Shqiponja, on the grounds that it offered abnormally low prices. The CA had asked the company for clarification on a number positions where it thought there were abnormally low prices. Shqiponja failed to send a reply to the request for clarification, whereas RWC Prishtina eliminated it as non-responsive. In this case, even though the prices were seemingly abnormally low, the CA used the abnormally low price formula for 6 positions rather than for the entire tender, comparing them to the average price obtained from other bidders. Unsatisfied with the decision of the RWC Prishtina, Shqiponja filed a complaint to the PRB claiming that the regulation on abnormally low tenders has not been respected (Rule B57 of the PPRC). Expert, Visar Basha, ascertained that the CA complied with the procedures of Article 61 and that EO Shqiponja was rightly eliminated. He also stated that, in accordance with Article 61, price evaluation is a right of the Contracting Authority. The Panel took a decision to return the tender for re-evaluation as the CA failed to comply with the Rules for abnormally low tenders, B57, and Article 61.

These are two contradictory decisions of the PRB. In both tenders, the Contracting Authority eliminated the abnormally low tenders, but failed to use the formula provided under Rule B57. In the decision on KEK's tender, PRB stated it was conducted in accordance with article 61, whereas in the tender of RWC Prishtina it stated non-compliance with article

³⁵ PRB. Decision 204/18. 2018
<https://oshp.rks-gov.net/repository/docs/vendimet/2018/204-18vendim.pdf>

61. There were different experts in these two cases. In the KEK tender the expert mentioned the formula according to regulation B57, while the panel decided differently, stating that Article 61 was complied with. In the RWC Pristina tender, the expert mentioned the formula for the calculation of the abnormally low tender, however the reasoning of the panel stated that the formula was not used. Had the for-

mula been used in both tenders, neither would have been qualified as abnormally low, as the bids of other companies had very similar prices. The Panel must ensure that it uses the same criteria regarding the use of the abnormally low tender calculation formula.

Expired vehicle registration

The numerous decisions and tenders analyzed by D+ revealed that many EOs do not provide their valid registrations and permits for equipment. This may happen for a number of reasons, but mainly because businesses want to save money by not registering the vehicles they own and use, while they have no active contracts. They register them as soon as they are awarded a tender and they need the vehicles in operation. Non-renewal of vehicle registration is also allowed by the Law on Vehicles, provided they deregister vehicles, and deliver the license plates to the vehicle registration center. However, valid vehicle registration is a requirement for participation in traffic.³⁶ Submission of vehicle registrations as evidence is a frequent requirement in Tender Dossiers. D+ has observed inconsistent decisions also regarding this issue.

registration documents had expired prior to the bid opening. On this issue, the review expert, Basri Fazliu, stated that valid vehicle registration was not requested in the Tender Dossier. The same opinion was shared by the panel, which added that even if vehicle registration were a requirement, it cannot constitute grounds for elimination.³⁷

R&Rukolli, Bajraktari v. Municipality of Mitrovica, 476-478/18

The Municipality of Mitrovica had eliminated Bajraktari Company for failing to fulfill one tender requirement, the submission of valid vehicle registration documents. Tender Dossier required provision of evidence for vehicles through valid registration. Bajraktari was eliminated because its submitted

Aome & Diari v. Municipality of Klina, 668/18

In its Decision 668/18,³⁸ the panel stated that the winning EO, Agoniti, submitted an expired vehicle registration for a truck. The Tender Dossier's request in this case was similar to that of the Municipality of Mitrovica, for submission of registration documents for vehicles. The review expert, Es'hema Beka shared the same view with the panel.

There are two decisions for an identical tender requirement, where the panel decides differently, creating an inconsistency which can be used by EOs in the future as a precedent, in similar Tender Dossier requests.

³⁶ Law No. 05/L-132 on Vehicles. Article 39.1 Official Gazette of the Republic of Kosovo. 2017 <https://gzk.rks-gov.net/ActDetail.aspx?ActID=14671>

³⁷ PRB. Decision 476-478/18. 2018 <https://oshp.rks-gov.net/repository/docs/vendimet/2018/476-478-18vendim.pdf>

³⁸ PRB. Decision 668/18. 2018 <https://oshp.rks-gov.net/repository/docs/vendimet/2018/668-18%20vend.pdf>

Decisions for failure to complete the tender submission form

The Tender Submission Form (Part C in the Tender Dossier) is the main document that an EO has to complete, in order to be considered responsive. In two cases, the PRB took inconsistent decisions, in the first considering the failure to fulfill this item as a minor deviation, and in the second finding that the EO failed to appropriately complete this form.

Blendi v. Municipality of Suhareka/Suva Reka, 408/18

EO Blendi complained that the winning EO failed to complete line six of the tender submission form. Line six states that an EO should list its nationality and that of its subcontractor, if any. The review expert confused this issue, and claimed that this was valid only for the subcontractor, rather than for the winning EO, who was bidding alone in this tender. The expert, rejecting other claims, recommended the rejection of the complaint. The same reasoning was used by the panel, which confirmed the contract award notice.³⁹

Blendi v. UCCK, 111/17

During the hearing session 408/18, EO Blendi cited to the Panel the fact that in a similar case, in Decision 111/17, when this company was the complainant, the Panel had decided differently, rejecting the complaint as inadmissible.⁴⁰ In that tender, EO Blendi had not specified the CA and the title of the contract, and, only based on this issue, the panel concluded that EO Blendi was rightly eliminated. In its

Decision, the Panel cited article 18 of the Guidelines, which provides that if the Tender Submission Form is not complete and signed, it implied that no bid was submitted.⁴¹

Mobelland v. Minister of Education, Science and Technology, 624/18

For a more serious violation committed by EO Mobelland, the panel had approved the complaint and returned the tender for re-evaluation.⁴² Mobelland had not specified the name and address of one member of the consortium, which the panel had classified as a minor deviation, according to Article 59.4 of the PPL. Not only that this decision is inconsistent with the decisions above, but it is also inconsistent with the previous decision on this tender.

In Decision 407-433/18⁴³ regarding the complaints of EOs Mobelland and Metali, the Panel returned the tender for re-evaluation, upholding the claims of Metali. On the case of Mobelland, however, it only approved the appeal claim that Mobelland raised in its complaint, that the CA failed to suspend the procurement activity when the complaint was filed. The Panel considered that the next claim was unfounded, stating that Mobelland was qualified as non-responsive for failing to specify the name and address of the consortium member. The Panel incorrectly called on Article 32.4 of the Guidelines, which referred to the submission of tenders in hard copy, which must be done in a single envelope, and must specify on the front, the name and address of the bidder. CA had eliminated Mobelland for not listing

39 PRB. Decision 408/18. 2018
<https://oshp.rks-gov.net/repository/docs/vendimet/2018/408-18vend.pdf>

40 PRB. Decision 111/17. 2017
http://oshp.rks-gov.net/repository/docs/vendimet/2017/111-17vendim_1.PDF

41 Public Procurement Regulatory Commission Rules and Operational Guidelines for Public Procurement Article 18. 2016
https://krpp.rks-gov.net/krpp/PageFiles/File/STRforms2016/Shqip/A01_Rregullat%20dhe%20Udhezuesi%20operativ%20per%20Prokurimin%20Publik.pdf

42 PRB. Decision 624/18. 2018
<https://oshp.rks-gov.net/repository/docs/vendimet/2018/624-18vend.pdf>

43 PRB. Decision 407-433/18. 2018
<https://oshp.rks-gov.net/repository/docs/vendimet/2018/407-433-18vend.pdf>

the name and address of the consortium member in the tender submission form. The Panel therefore found that Mobelland was rightly declared non-responsive by Decision

407-433/18, whereas in Decision 624/18, which related to the same grounds for elimination, it had found it only a minor deviation.

Tender security

Submission of tender security in hard copies on the day of the bid opening was also a challenging issue for PRB. It remains disputable whether a Tender Dossier should require submission of tender security in hard copy, although this is a requirement in the Guidelines.

Doni Term v. Municipality of Gjilan/ Gnjilane, 01/18

Doni Term Company filed a complaint to the PRB, after the recommended EO for contract award, Adetex had failed to submit tender security in hard copy, after having bid electronically. Expert, Visar Basha, quoted Article 29.13 of the Guidelines which provide that if the tender is submitted electronically, tender security must be submitted in hard copy on the day of bid opening.⁴⁴ The Panel also moved with the recommendation of the expert, also citing Article 29.13 of the Guidelines, deciding that the complaint should be upheld and the tender returned for re-evaluation.⁴⁵

der security in hard copy, as this consortium had submitted the bid electronically. On this issue, expert Qazim Hoxha, although acknowledging Article 29.13 of the Guidelines, relied on the statement of the complaining EO, quoting an interpretation of PPRC dated 28 August 2017, which stated as follows:

The requirement of Article 29.13 of the Rules and OGPP should be defined in the Tender Dossier and the Contract Notice.

Thus, the expert recommended that the appeal is upheld, as the consortium Eng Idea & Lorenzo & Co cannot be eliminated on this ground. The panel gave the same justification as the expert, and decided that the appeal should be upheld and the tender returned for re-evaluation.⁴⁶

Both tenders were initiated following the interpretation provided by the PPRC. The panel of this case, decided differently on the same issue.

Eng Idea & Lorenzo v. Ministry of Infrastructure, 160/18.

In the tender “Drafting of the implementation project for construction of Istog-Deçan-Gjakovë-Prizren highway”, the CA listed as one of the reasons for eliminating the consortium Eng Idea & Lorenzo & Co, the fact that it failed to submit ten-

⁴⁴ Public Procurement Regulatory Commission Rules and Operational Guidelines for Public Procurement Article 29.13. 2017 <https://krpp.rks-gov.net/krpp/PageFiles/File/STRforms2017/sq/RREGULLAT%20dhe%20DHEZUESI%20OPERATIV-01062017.pdf>

⁴⁵ PRB. Decision 01/18. 2018 <https://oshp.rks-gov.net/repository/docs/vendimet/2018/01-18vendim.pdf>

⁴⁶ PRB. Decision 160/18. 2018 <http://oshp.rks-gov.net/repository/docs/vendimet/2018/160-18vendim.pdf>

Inconsistent decisions for the same tender

In some tenders, the PRB receives complaints continuously, so much that there are cases where a tender spends over two years in appeals and reevaluations. When possible, for example in unmeasurable requests, it is better to annul the tender and rectify the mistakes. It seems that the PRB does not refer to previous decisions on a tender, after the CA exhausts all practical opportunities, up to the point when the final decision is taken to annul the tender. The time lost consequently causes further complications, both in terms of budget as well in the loss of interest by the CA to continue with the activity.

Decisions on the tender “Asphalting of the road: Babush-Tërn-Luboc-Koshare-Slivovë”

EO Sallahu filed a complaint against the decision to award the contract for the tender “Asphalting of the road: Babush-Tërn-Luboc-Koshare-Slivovë”. The winner of the contract was EO Bageri. This procurement activity was a re-tendering of the first tender, for which D+ had written about in the previous reports.⁴⁷ In the first tender, the companies were eliminated due to CA’s request for unconditional support from the bank, a request that no EO could meet, as no bank issues unconditional loans. The Panel had taken five decisions, and then ultimately annulled the tender as all EOs were non-responsive.⁴⁸ Time lost, from the date of the first decision until the last decision, was 18 months.

In the second tender, one of Sallah’s complaint claims was that EO Bageri failed to submit audited financial statements for 2018. This tender was published on June 4, 2018. It is a known fact that financial statements of the present year are unlikely to be submitted, let alone audited. Thus, this is an impossible request that the CA included, and not doable for

any EO. In decision 419/18, expert Xhevdet Bushi considered that Bageri failed to meet this requirement, stating that it failed to submit audited financial statements for 2018 as requested by the Tender Dossier. Furthermore, the expert says that the CA must request clarification from the EO on this issue, in accordance with Article 72 of the PPL. However, the CA cannot seek clarifications for a report which is expected to be carried out in the future.

The panel agreed with this expert’s recommendation on the issue of audited financial statements for 2018, and then, also based on a number of other aspects, took a decision to return the tender for re-evaluation and declared the EO Bageri as non-responsive.⁴⁹

In this case, as a result of a requirement which cannot be fulfilled by any EO, the Panel should have either annulled the tender, or disregarded the requirement for financial statements for 2018. As a basis, the Panel could have used article 52.3 of the PPL which reads:

“Only measurable criteria that are previously set out in the Tender Dossier may be used for evaluation. The Contracting Authority may only use criteria that are directly relevant to the subject matter of the contract. Such criteria are, but not limited to: quality, price, technical merits, aesthetics, functional characteristics, environmental characteristics, running costs, cost effectiveness, after sales services and technical assistance”.

In this case, the requirement for audited financial statements for 2018 is not a measurable requirement. The Panel had the possibility to address this request under this Article, in order not to annul the tender procedure. Through this re-evaluation decision, the Panel opened the possibility for the tender to go through the complaint-re-evaluation-com-

47 Public Procurement Knot. Democracy Plus. 2017. <http://dplus-ks.org/wp-content/uploads/2017/10/02-Raporti-i-OSHPSse-Mars-Qershor-V8.pdf>

48 PRB. Decision 521-523/18. 2018. https://oshp.rks-gov.net/repository/docs/vendimet/2018/521-523-17vendim_1.PDF

49 PRB. Decision 419/18. 2018. <https://oshp.rks-gov.net/repository/docs/vendimet/2018/419-18vend.pdf>

plaint route, while citizens were left without the road pavement for almost three years.

Following the decision of the PRB, the CA re-evaluated the tender and awarded the contract to EO Renelual Tahiri. EOs Sallahu and Bageri filed complaints against this decision to PRB. The review expert, Hasim Krasniqi, stated that Renelual Tahiri fulfilled the request for audited financial statements for 2018, after having submitted an audited financial report for the first half of 2018, without providing clarifications as to how a six-month report would have fulfilled the request for an audited annual report. Moreover, the expert states that EO Bageri was declared non-responsive on this issue in the previous decision; however, in terms of Renelual Tahiri, it stated it was only a minor deviation.

The panel took a decision saying that Renelual Tahiri does not meet the request of the CA. The Panel took the decision to return the tender again for re-evaluation.⁵⁰

After re-evaluation, the CA awarded the contract to EO Eskavatori. Again, Bageri, Sallahu and Renelual Tahiri filed complaints to the PRB. As in the previous complaints, Bageri and Sallahu claimed that EO Eskavatori had no audited financial statements for 2018. Expert Hasim Krasniqi partially upheld EO Bageri's claim on this issue, stating that this issue has been addressed in previous decisions. Sallahu's claim was not reviewed with the reasoning that it was time-barred. The panel returned the tender again for re-evaluation.⁵¹ The claim regarding financial statements was considered to be partly grounded. However, the panel stated that Eskavatori submitted such statements to the CA. Eskavatori was in position to do this, as year 2018 had ended and it had the opportunity to prepare and audit them.

Approximately three years passed from the announcement of the first tender on 20 April 2016 until the last decision, without prejudice to further complaints being filed.

When the PRB notes, or when there are claims of a request that is unlawful or impossible to be fulfilled, it should either qualify it as an unmeasurable criterion under article 52.3, or annul the tender. This is a must, because if a request cannot be fulfilled by any EO, it will lead to complaints, and the complaints will continue indefinitely if the panel upholds them.

Decisions on the tender “Data Security”

The Ministry of Public Administration (MPA) announced a tender titled “Data Security”. Three EOs had submitted their bids. The tender was initiated on 19 May 2017. The CA annulled the tender on the grounds that all bids were non-responsive. A complaint was filed against this decision in the PRB by OE Virtuo. The Panel approved Virtuo's complaint and returned the tender for re-evaluation.⁵²

After re-evaluation, MPA awarded the contract to EO Virtuo. A complaint was filed against this decision to the PRB by EO Infosoft Systems, which the panel upheld and returned the tender for re-evaluation.⁵³

MPA implemented the decision of the PRB and, after re-evaluation, selected Infosoft Systems as winner. Virtuo appealed this decision. The Panel approved Virtuo's appeal and returned the tender for re-evaluation.⁵⁴

After the re-evaluation, CA annulled the tender, citing that technical specifications were unclear and two years had passed since the drafting of these specifications, taking

50 PRB. Decision 636-638/18. 2018.
<https://oshp.rks-gov.net/repository/docs/vendimet/2018/636-%20638-18vendim.pdf>

51 PRB. Decision 762/18 10-24/19. 2019.
<https://oshp.rks-gov.net/repository/docs/vendimet/2019/762-18%2010-19-24-19vend.pdf>

52 PRB. Decision 304/17. 2017.
https://oshp.rks-gov.net/repository/docs/vendimet/2017/304-17vendim_1.PDF

53 PRB. Decision 501/17. 2017.
<https://oshp.rks-gov.net/repository/docs/vendimet/2018/501-17vend.pdf>

54 PRB. Decision 95/18. 2018.
<http://oshp.rks-gov.net/repository/docs/vendimet/2018/95-18vend.pdf>

into account that technology advanced quickly. The review expert and the technical expert recommend the tender to be re-evaluated, while the panel decided to confirm the annulment of the tender, based on the reasons provided by the MPA.⁵⁵

The third company was declared non-responsive in the beginning and had not complained to the PRB. MPA had three options; award the contract to Virtuo, award the contract to Infosoft Systems, or annul the tender procedure. The CA had done all three by the third decision. Since this tender had several technical requirements regarding information technology, the panel relied on experts. However, there were different experts in the first two and the last two decisions. In cases of tender requirements that are highly technical, the Panel should ensure that it is the same expert throughout the process, in order to ensure consistency and prevent a recommendation, in the fourth decision, subjecting the tender to re-evaluation, after having exhausted all possibilities. Time lost in this case amounts to about 10 months.

Decisions on the tender “Supply with cytostatics from Essential List lot 6,14”

The Ministry of Health (MOH) published a tender for the supply of cytostatic drugs from the Essential List of Medicines, on July 17, 2017. Lots 6 (Cistplatin) and 14 (Fluouracil) in the tender were annulled by MOH because the bid of OE Liri Med exceeded the budget envisaged for the two lots. CA’s Tender Dossier provided the estimated value for each lot. Liri Med filed a complaint against the decision of the CA to the PRB. The review expert Xhevdet Bushi, although recognizing that the bid for Lot 6 exceeds the budget by 11.5% and for Lot 14 by 267%, stated that since MOH did not contract all lots, there were further funds available. He further added that since this was a framework contract for 24 months, the budget could be increased in the following year and recommended that the tender is re-evaluated.

Another reasoning of the expert was that after the request for reconsideration, MOH had qualified Liri Med’s bid as responsive but annulled the tender as it was over the budget. The CA corrected its mistake in this case, because if an offer exceeds the budget, it cannot be qualified as non-responsive. Furthermore, the expert added that Liri Med submitted invoices of a number of pharmacies, claiming that the price offered is lower than the market price. This was accepted by MOH in the hearing session, adding that the Chief Administrative Officer (CAO), in this case the secretary, instructed them to stay within the planned budget. Any increase in the budget over the projected value should be approved by the CAO. In this case it was not approved.

The expert’s interpretation of overbudgeting was incorrect, as it is the prerogative of the CA to accept or not an offer that exceeds the budget, as provided in Article 62 of the PPL. A CA can also err in budgeting, planning a lower price of a product than the market value, but this in no way implies that the CA should increase the budget if an EO’s bid is above the projected value. Another erroneous interpretation is the one on the lots and the framework contract. The allocation of the projected value for each lot means that intended funds for a lot cannot be used for another lot. The expert’s view that the product can be paid by the funds from other lots and in other years is incorrect because the CA places the projected value for the purchasing of products at a certain price, which is the maximum. For a more simple illustration, let’s take an example:

A CA wants to buy five packages of aspirin with a projected value of 10 Eur. This means that the maximum amount that the CA can pay for a package is two Eur. If an EO submits a higher offer, e.g. 15 Eur, it means that the OE is offering aspirin packages for three Eur each. According to the expert and the panel, as it is a framework contract, the CA can add funds from the next year’s budget. However, the problem here is that the CA wants to purchase five packages of aspirin for 10 Eur, not 15.

⁵⁵ PRB. Decision 312/18. 2018.
<https://oshp.rks-gov.net/repository/docs/vendimet/2018/312-18%20vend.pdf>

During the hearing session, Panel Chairman, Blerim Dina, asked the EO if they were willing to conclude a contract with projected funds of the CA. However, this question was not also addressed to the representatives of the CA. Liri Med agreed to conclude a contract with the funds available. The Panel decided to return the tender for re-evaluation with the reasoning that the CA projected an unrealistic market value.⁵⁶ Furthermore, the Panel added that given that the EO agreed to sign a contract for the available funds, the CA was obliged to countersign it. The Panel also took into account the importance of such medical products and the health of citizens, in order to ensure that there is no extensive time in the supply.

Out of 1,200 decisions that D+ analyzed since January 1, 2017, this is the only decision where the PRB obliges a CA to sign a contract.

After re-evaluation, the CA again annulled the tender, with the same reasoning: prices over the budget. Liri Med again filed a complaint to the PRB. The Panel, in addition to approving the appeal, also ordered the CA to enforce the previous decision.⁵⁷ The Panel qualified this a matter [already] judged, citing the reasoning from the previous decision. The same was confirmed by review expert, Xhevdet Bushi, who recommended the re-evaluation of the tender.

After the panel returned the tender for re-evaluation for a second time, during the re-evaluation period, CA announced another tender for the supply of cytostatics from the Essential Medicines List, including Cistplatin. Initially in lot 6, in the second tender, the CA placed it in lot 11. This was noted by Liri Med which filed a complaint to the PRB against the notification of this contract. Its complaint related to violation of Article 7 of the PPL, which provides for Equality in treatment/Non-discrimination. The review expert, Basri

Fazliu, recommended that the complaint is approved and the tender annulled, as the tender for this product was still open in PRB with a decision yet to be taken (the expert referred to the complaint 243/18). In his recommendation, the expert did not cite any article of the PPL or the Guidelines which prevent a CA from initiating new tender procedures if the first tender has still been open in PRB. During the hearing session, the CA declared that the first tender was annulled as it was over the budget and they announced a new tender because of the urgency for the supply of Cistplatin, which was missing since February 6, 2017.

The Panel decided that the tender should be annulled, as Cistplatin was included in the first tender, and the PRB issued an order for non-enforcement of decision 24/18.⁵⁸ In its Decision, the panel found that two procurement procedures cannot be conducted for the same supplies. The problem with this finding is that neither the PPL nor the Guidelines prevent a CA from conducting two procurement procedures for the same products at the same time. The second did not only request Cistplatin, but also 10 other products, and PRB annulled the entire tender procedure.

Following the order 243/18, the CA again annulled the tender, with the same reasoning: prices over the budget. Again, expert Xhevdet Bushi recommended a re-evaluation. Now, the expert rightly stated that the CA failed to comply with the two prior decisions, the first of which obliged the CA to sign the contract for the available funds.

The Panel, in violation of the two previous decisions, decided to confirm the annulment of the tender.⁵⁹ The Panel used as basis the MOH reasoning given in all three sessions that the Liri Med offer for lot 6 exceeded the budget by 11.5% and for lot 14 by 270%. The Panel stated that the annulment was made under Article 62 which provides that the CA may annul

⁵⁶ PRB. Decision 24/18 2018.
<https://oshp.rks-gov.net/repository/docs/vendimet/2018/24-18vendim.pdf>

⁵⁷ PRB. Decision 243/18 2018.
<https://oshp.rks-gov.net/repository/docs/vendimet/2018/243-18urdherese.pdf>

⁵⁸ PRB. Decision 287/18. 2018.
<https://oshp.rks-gov.net/repository/docs/vendimet/2018/287-18vend.pdf>

⁵⁹ PRB. Decision 479/18. 2018.
<https://oshp.rks-gov.net/repository/docs/vendimet/2018/479-18vendim.pdf>

the tender if it exceeds the budget. The Panel also noted that the CA conducted a market research in the region and confirmed that Liri Med's prices were higher than those in the region. Firstly, this research did not establish they were higher than the market prices in Kosovo and, secondly, it did not find they were higher than the projected value. The decision also stated that the panel took into account the public interest, that it tried not to damage the budget, while

order 243/18 stated that public health was a public interest.

In order not to waste the time, which for this tender meant around seven months, the PRB could have confirmed the annulment of the tender with the first decision, citing prices over the budget.

Inconsistent decision within a decision

In the tender "Summer and winter maintenance of national and regional roads", economic operators Joos Krasniqi and Alfa I & Vllaznia Ndertimi I.S. & Urban & Bageri were qualified as unsuccessful bidders, because they exceeded the estimated value for the lot in which they had bid. Expert Basri Fazliu recommended the rejection of two complaints due to offers over the budget, while the recommended EO had offered a lower price. The Panel approved the complaint of EO Joos Krasniqi and returned this lot for re-evaluation with the reasoning that this was a framework contract and allowed for a deviation of +/- 30%. However, the panel took a different decision in the case of consortium Alfa I & Vllaznia Ndertimi I.S. & Urban & Bageri⁶⁰ using the same reasoning on the framework contract, but stating that the consortium was a party without a legal and material interest, as there is an EO with a lower price, which has been recommended for contract award.

The Panel's interpretation on the framework contract was the same as in the tender of MOH, with EO Liri Med as the complainant. In this tender, MI had also provided an estimated value for each lot. In the lot in which Joos Krasniqi had submitted an offer, the estimated value was 1,579,083.20 Eur, while the offer of Joos Krasniqi was 2,115,616.40 Eur. The Panel stated that given the importance of this tender, pursuant to article 38.2 of the PPL, the contract was to be terminated as soon as the estimated value is spent. The

problem here is that the CA's intention was to purchase the maximum amount for the estimated value. The CA, in the Tender Dossier, designed the bill of quantities for offers per unit price. This method is used when the CA does not know the quantity, and according to article 56.11⁶¹ of the Guidelines, the threshold of +/- 30% does not apply. The CA had rightfully qualified Joos Krasniqi's bid as unsuccessful after it had exceeded the estimated value.

For the offer of the consortium Alfa I & Vllaznia Building I.S. & Urban & Bageri, the panel used the same reasoning as in the case of Joos Krasniqi, but added that it offered a higher price than the recommended EO. The same was done by Joos Krasniqi. The estimated value for the lot Mitrovica 1, where the consortium Alfa I & Vllaznia Ndertimi I.S. & Urban & Bageri was 1,330,298.96, while the offer was 1,731,902.40 Eur.

In its decision in the case of Joos Krasniqi, the panel only wasted the time, as the same EO RSM Company was awarded. In both complaints, the panel referred to Article 38.2 of the PPL, which provides for framework contracts. Both complainants had exceeded the estimated value. Whenever the estimated value is exceeded, if CA does not express an interest to approve additional budget, it is better to reject the complaint in this item. As it has happened in this case, the CA again failed to approve additional budget after the re-evaluation. This leads to time lost, and for this procurement activity time is of utmost importance.

60 PRB. Decision 337-343-349-354-357/18. 2018. <https://oshp.rks-gov.net/repository/docs/vendimet/2018/337-343-349-354-357-18v6ndim.pdf>

61 Public Procurement Regulatory Commission Rules and Operational Guidelines for Public Procurement 2017. <https://krpp.rks-gov.net/krpp/PageFiles/File/STRforms2017/sq/RREGULLAT%20dhe%20UDHEZUESI%20OPERATIV-01062017.pdf>

DECISIONS TO BLACKLIST

When it has doubts that an EO has submitted false data or has forged a document, the CA makes a request to the PRB to disqualify the EO from participating in procurement activities for a specified period. Disqualification decisions are categorized by PRB as black list decisions. An EO can be blacklisted for a maximum of 12 months, according to Article 99.2 of the PPL.

For the period June - December 2018 the PRB took 15 blacklist decisions. All CA requests for blacklisting of operators who have attempted deception have been rejected by PRB. As of 1 January 2017, the PRB has received 36 blacklist decisions, with only six of them being approved.

However, despite these decisions of the PRB, the black list has not had any impact, as one of the disqualified EOs, Pastor Kosova, applied and was awarded a tender even after being previously disqualified. With the decision 1135/17 dated 14 March 2018, PRB disqualified EO Pastor Kosova for six months after it falsified an authorization.⁶² According to the decision, Pastor Kosova would not be eligible to participate in procurement activities for the next six months. However, the company in question had offered bid and was awarded a contract in a tender announced after March 14, 2018. The Basic Court in Gjakova/Djakovica published the notification on the decision of the CA on June 1, 2018, awarding the contract to Pastor Kosova, with a value of 1,054.92 Euro.⁶³ This is a weakness in the procurement system, failing to take measures to prevent such operators from bidding, either by suspending them from the e-Procurement platform or through another suitable form.

In all 15 requests for disqualification rejected by the PRB, the panel's reasoning is virtually the same: "The CA has no evidence that the EO submitted false evidence or falsified

documents, as per Article 99.2 of the PPL". The interpretation as to what the panel considers a false evidence or falsification is also the basis for the rejection of these requests.

One request for disqualification was that of the Central Procurement Agency (CPA) against the EO Commando. The CPA had declared EO Commando the winner, and prior to the publication of the contract award notice, it had requested Commando to provide, among others, a tax clearance certificate from TAK. The CPA had waited for several days, while Commando stated, at the end of deadline, that it had debts owed to TAK. The Panel took a decision to reject the request with the reasoning that Commando had not provided false evidence or falsified documents.⁶⁴

When preparing its bid, the EO must sign the statement under oath, included in the tender dossier, which states:

"I hereby confirm that I have read the eligibility requirements pursuant to Article 65 of the PPL, respectively paragraph 6 of the Information on Bidders, and confirm that it meets the eligibility requirements for participation in this procurement procedure."

Article 65.4.8 of the PPL specifies the tax clearance certificate of TAK, as stated above, prevents an EO with debts owed to TAK from bidding. Since the tax clearance is requested for the last quarter prior to publication of the contract award notice, EO Commando could not have incurred the debt to TAK during the period between the announce-

62 PRB. Decision 1135/17. 2018.
<https://oshp.rks-gov.net/repository/docs/1135-17vend.pdf>

63 Basic Court of Gjakova. Notification for the decision of the CA. 2018.
https://e-prokurimi.rks-gov.net/SPIN_PROD/APPLICATION/IPN/DocumentManagement/DokumentPodaciFrm.aspx?id=159145

64 PRB. Decision 723/18. 2018.
<https://oshp.rks-gov.net/repository/docs/723-18lz.PDF>

ment of the tender and the selection of the winner, as this tender procedure had lasted for about one month. Thus, EO Commando knew it had debts to TAK, yet stated in the declaration under oath that it met the eligibility requirements under Article 65, which, according to D+, can be interpreted as having filed false data. Moreover, the signing of the declaration under oath bears additional responsibility on the EO. According to this interpretation, EO Commando should have been disqualified.

If there was a mechanism of information sharing between TAK and PPRC, Commando wouldn't have been allowed to bid, as Article 65.4.8 provides an EO is not allowed to bid if it has tax arrears.

Another decision related to TAK clearance is the decision on the request of the Ministry for the Kosovo Security Force (MKSF) against EO Astraplan. This request was rejected by the PRB using the same reasoning, that MKSF has no evidence that Astraplan submitted false data or falsified documents.⁶⁵

The CA had selected EO Astraplan as winner, although the latter had failed to submit a tax clearance, firstly with the justification that they were out of Kosovo, then claiming that when they logged into the TAK system to obtain the clearance, they were surprised it showed they had unpaid taxes. The strange statement of the expert was that the CA can take other measures against Astraplan. The Panel could have used the interpretation that the EO has failed to offer in accordance with the conditions it accepted in the declaration under oath.

Another PRB decision rejecting the request for disqualification is that of the Municipality of Vushtrri/Vučitrn against EO Commando. The municipality had requested disqualification

because EO Commando, which had won the contract, had not paid the 5% pension contributions for a number of employees, as envisaged by the Labor Law. This finding of the municipality was supported by expert Basri Fazliu. In the Tender Dossier, the Municipality had explicitly stated that taxes, pension contributions of the employee and employer should be added to the net wages. The Panel, using the same reasoning as in the CPA's request, decided to reject the request for disqualification⁶⁶ The Panel further added that in case of disagreement regarding the implementation of the contract, the CA must resolve it following the Law on Obligational Relationships.⁶⁷

On this issue, the panel could have interpreted the Tender Submission Form which provides as follows:

2. We agree to submit an offer in accordance with the terms of the Tender Dossier and the conditions laid down, without reserve or restriction:

According to this Article, when submitting the tender, EO Commando agreed to the terms of the Tender Dossier, one of the conditions of which was payment of employer's pension contributions. The Panel could have disqualified the EO, which would be an administrative decision, while the municipality could forfeit the performance security and send the case to the court for violation of the Law on Kosovo Pension Fund.⁶⁸

⁶⁵ PRB. Decision 737/18. 2018
<https://oshp.rks-gov.net/repository/docs/737-18lz.PDF>

⁶⁶ PRB. Decision 1078/18. 2018.
<https://oshp.rks-gov.net/repository/docs/vendimet/2018/1078-18%20%20end%20disk.pdf>

⁶⁷ Law No. 04/L-077 on Obligational Relationships. Official Gazette of the Republic of Kosova. 2012.
<https://gzk.rks-gov.net/ActDetail.aspx?ActID=2828>

⁶⁸ Law No. 04/L-101 on Kosovo Pension Funds. Official Gazette of the Republic of Kosova. 2012.
<https://gzk.rks-gov.net/ActDetail.aspx?ActID=2815>

EXPERTS' RECOMMENDATIONS

PRB experts are people whom the panel selects to provide expertise regarding the complaints of EOs. There are two categories of experts; review experts, who review claims related to procurement procedures, PPL and the Guidelines, and technical experts, who have deeper knowledge of a particular field. Their selection is based on their education and knowledge of a particular field. Experts' recommendations are very important as the panel, in the absence of professional knowledge in many areas, must decide based on expert recommendations.

The following are cases where, in the view of Democracy Plus, experts made mistakes in their recommendations. In some of these cases the panel decided as per the expert's recommendation, while in others it decided differently.

Marisa & Gërlica v. Municipality of Gjakova/Djakovica, 450/18

Prior to filing a complaint to the PRB, an EO must initially submit a request for review within the CA within five days from the publication of the contract notice, the contract award notice or the annulment notice. Then, within three working days, the CA must reply to the complaining EO. If, for any reason, the CA fails to return a reply, the EO can file a complaint to the PRB, without waiting for the CA's response.⁶⁹

Consortium Marisa & Gërlica had filed a complaint to the PRB claiming that the CA had failed to respond to the request for review. Review Expert, Abetare Prebreza did not address the complaint claims, but rather recommended that the

complaint be declared as time-barred, as the complaining EO had passed the legal deadline of ten days for filing a complaint. According to the expert, Marisa & Gërlica filed the complaint to the PRB on the 12th day. The expert issued a wrong recommendation, as she failed to properly calculate the time limits.

Marisa & Gërlica filed the request for review on August 10, 2018. According to Article 108/A the CA has three business days to reply and, in exceptional cases, this deadline may be postponed for an additional three days, provided that the EO is notified, which the municipality had done. Since the EO had filed the request for review on August 10, 2018, which was a Friday, the CA had three business days to reply, namely the response should have been returned by August 15, Wednesday. On Thursday, August 16, the CA made a request to postpone the deadline for response for three additional days. With the new deadline, the CA would have been obliged to reply by August 21, Tuesday. The CA replies, however to the email address of the consortium member, rather than the consortium leader, with which the communication had taken place until that moment. Had this been interpreted as if the CA has failed to send a timely reply to the complaining EO, the EO then could have filed a complaint to the PRB as of August 22, Wednesday. Marisa & Gërlica lodged the complaint to the PRB on August 29, which is within the ten-day legal deadline.

The Panel disregarded the recommendation of the expert and decided to uphold the complaint and return the tender for re-evaluation. The Panel's reasoning is based precisely on Article 108/A.⁷⁰

69 PPRC. Article 8.2 of the Form F03 Rules for filing complaints-Version 2. 2016
https://krpp.rks.gov.net/krpp/PageFiles/File/STRforms2016/Shqip/F03%20Regullat%20per%20parashtrim%20te%20ankesave_26.04.2016.docx

70 PRB. Decision 450/18. 2018.
<https://oshp.rks-gov.net/repository/docs/vendimet/2018/450-18vendim.pdf>

SNR v. Trepça, 278/18

EO SNR filed a complaint to the PRB against the decision of the CA Trepça regarding the contract award, claiming that SNR was eliminated after having submitted an expired ISO 18001 certificate. Expert, Basri Fazliu, stated that an EO cannot be eliminated on the basis of a request that was not included in the Tender Dossier. The request for ISO 18001 certificate was added to the error correction notice, which the expert apparently had failed to notice. His recommendation was to send the tender for re-evaluation. Repeating the expert's reasoning, the panel took a decision to return the tender for re-evaluation, and the complaint was upheld.⁷¹ Had the review expert noticed that the ISO 18001 certificate was required in the Tender Dossier, his recommendation should have been to confirm the decision of the CA. With this recommendation, the panel could have also made a decision to confirm the decision of the CA.

Sigma v. Ministry of the Kosovo Security Force, 396/18

EO Sigma had lodged a complaint to the PRB against the decision of the Ministry for Kosovo Security Force for contract award. Sigma's claim was that the winning EO had not provided a reinsurance certificate in the Tender Dossier. The Tender Dossier required that EOs must be reinsured with larger companies with an A+ rating, according to Standard & Poor's rating. The winning EO had provided a document stating that Butcher Robinson & Staples International Limited will consider offering reinsurance coverage up to 100%. The expert stated that the term used in this instance implied an optional coverage of reinsurance up to 100%. Expert Hysni Muhadri considered that this fulfilled the request of the CA. The CA had requested reinsurance, rather than a document stating a company will consider reinsurance. On the other side, the complaining EO in the case had submitted the document as required by the Tender Dossier.

The expert, in our view, with this erroneous interpretation, recommended rejection of the complaint.

In its reasoning of the decision, the Panel took into account that the document of the winning EO read "can be provided", while the complaining EO states it was "reinsured". The decision also had the word "can" in bold, to indicate that the difference lies in this word. The Panel decided to uphold the complaint, and return the tender for re-evaluation.⁷²

CDC v. Municipality of Gjilan/Gnjilane, 542/18

EO CDC filed a complaint to the PRB against the decision of the Municipality of Gjilan/Gnjilane for contract award. The municipality had eliminated the EO on the grounds that on its request for mini-excavator of up to three tons, the EO had offered an abnormally low price. The CDC stated that the excavator had a capacity of 0.4 m³ but the unique customs document (DUD) listed its weight as 4250 kg, i.e. over three tons. The price offered by the CDC, according to the formula, was abnormally low. The municipality had followed the procedures and sent a request to clarify the price. CDC replied by clarifying the offered price, but the municipality was not satisfied with this clarification. Review expert Burim Guri, in his recommendation, stated that although EO CDC offered an excavator with a higher weight, this only constitutes a small deviation and is permissible under section 59.4 of the PPL. This reasoning was also used by the expert for the price offered by CDC, which was about 70,000 Eur lower than the price of the winning EO. However, according to Article 60 of the PPL, a tender must first be responsive and then evaluated for the lowest price. There are legitimate reasons for the CA's request for an excavator of under three tons, namely the possibility of damaging roads if it has a higher weight.

With regards to the abnormally low price, where the CA was not satisfied with the clarification of EO CDC, the expert did not take this into consideration and only stated that the CDC

⁷¹ PRB. Decision 278/18. 2018.
<https://oshp.rks-gov.net/repository/docs/vendimet/2018/278-18vend.pdf>

⁷² PRB. Decision 396/18. 2018.
https://oshp.rks-gov.net/repository/docs/vendimet/2018/396-18vendim_1.PDF

has clarified all its prices. This is, in our view, an erroneous interpretation of the expert, as in relation to the CDC bid, in addition to the formula indicating it was abnormally low, the CA was also not satisfied with the clarifications provided.

The Panel did not take into account the recommendations of the expert, and upheld the decision of the CA for contract award.⁷³ The panel's reasoning was that the CDC did not offer an excavator as per the request of the CA and its tender was abnormally low, since the CA was not satisfied with the clarifications provided.

Gërlica v. Municipality of Ferizaj/Uroševac, 616/18

EO Gërlica filed a complaint to the PRB against the decision of the Municipality of Ferizaj/Uroševac for contract award. One of the reasons for the CA to eliminate this company was the fact that the degree of the geodesist was in Macedonian and according to the PPL, Article 13.4, documents can only be submitted in Albanian, Serbian or English. Review expert Es'heme Beka stated that the Tender Dossier did not require translation of the diploma. This is an erroneous interpretation often made by experts. This request derives from the PPL and not all requirements of the law can be listed in Tender Dossier, as the dossier would be extremely large. The expert, for other issues that led to the elimination of the complaining EO, recommended the annulment of the tender as no EO had a valid bid.

The Panel did not take the interpretation of the expert on the diploma into account and referred to Article 13.4 of the PPL, whereas for the validity of the bids, it stated that the winning EO extended it itself. The decision was to uphold the CA's decision for contract award.⁷⁴

73 PRB. Decision 542/18. 2018.
<https://oshp.rks-gov.net/repository/docs/vendimet/2018/542-18vend.pdf>

74 PRB. Decision 616/18. 2018.
<https://oshp.rks-gov.net/repository/docs/vendimet/2018/616-18vendim.pdf>

Inconsistent expert recommendations

In decision 23/17 expert Muhamet Kurtishaj recommended that the decision of the CA for contract award remained in force, as according to the verifications the expert had made online, the complaining EO Euroing had not provided a product as per the KEK's request. The expert stated that the product missed the AR-alcohol resistant element. The Panel took a decision to confirm the contract award, as the product offered by the complaining EO lacked the "alcohol resistance" element.⁷⁵

Another decision of the same expert stated that it was not a Tender Dossier request for the product offered by the complaining EO Feroda Commerce to be compared to the manufacturer's website. According to him, not all manufacturers place their products on websites. The CA had doubted the technical specifications offered by Feroda, and then checked the specifications online, in Elan manufacturer's website. The verification of the CA in Elan's website found that the specific product temperature range was marked as 20-30 degrees, and the working conditions 20-30 degrees, while KEK had requested a temperature range of -20 to 40 degrees. The CA also clarified that the product is of particular importance, and that Elan should have it listed on the website. The suspicion came when Elan had deleted this product from its website. In the hearing session the expert stated that the CA did not request that the technical specifications provided by the EO should be in accordance with the technical specifications on the manufacturer's page. The expert could have requested the CA to seek clarification on such doubts with the manufacturer, but recommended the return of the tender for re-evaluation, upholding the complaining EO claims.

The Panel decided to return the tender for re-evaluation.⁷⁶

The Panel took into the expert's clarifications and stated that there was no requirement in the Tender Dossier for the products offered to be on the manufacturer's website. In the end, the panel added that the CA should clarify the matter with the manufacturer, in cases of doubts.

Indeed, tender dossiers do not request that products are found on the manufacturers' websites. However, this is a mechanism for the CA which can be used in cases of doubts that the product offered does not meet the technical specifications as found on the manufacturer's website. As D+ found in the report "Towards municipalities with open, accountable, and efficient public procurement"⁷⁷ there were cases where there were suspicions that EOs change the information in catalogs to fit them with the requested specifications. Checking the product in the manufacturer's site in this case is a reliable mechanism that the CA can use to verify that there is no potential fraud by the bidders.

75 PRB. Decision 23/17. 2017.
https://oshp.rks-gov.net/repository/docs/vendimet/2017/23-17vendim_1.PDF

76 PRB. Decision 292/18. 2018.
<https://oshp.rks-gov.net/repository/docs/vendimet/2018/292-18vend.pdf>

77 Towards municipalities with open, accountable, and efficient public procurement. Demokrasi Plus. 2018
<http://www.dplus-ks.org/wp-content/uploads/2018/12/2018-12-03-Drejt-komunave-me-prokurim-t%C3%AB-hapur-llogaridh%C3%AB-n%C3%ABs-dhe-efikas-ALB-Final.pdf>

RECOMMENDATIONS

Given the findings in this report, and the ongoing monitoring of PRB, D+ proposes the following measures in order to improve the complaints mechanism in public procurement:

- PRB should take a position regarding the review of claims concerning violations of specific laws or secondary legislation. PRB must decide whether it will address the violations or forward them to other bodies for an assessment of such violations;
- PRB should set up an advanced database of its decisions, to facilitate searches of decisions on particular issues, and ensure consistency in decision-making. This would add to the importance of precedents in reviewing complaints;
- PRB should monitor and control experts to ensure quality and impartiality, particularly when there are claims against them and their performance. Experts must be aware that a quality control will take place, tracking the success of their recommendations, deadlines for handling cases and other indicators, to determine whether they will be retained by PRB or replaced with others;
- PRB must take a stand on interpretations of the PPRC, as in some cases it considers the PPRC interpretations as mandatory and not so in others;
- PRB should change the interpretation on disqualification of economic operators, as the current interpretation is very narrow and allows for persons with false statements to go unpunished;
- Blacklisted operators must be suspended from the e-Procurement platform and PRB should require from PPRC to suspend blacklisted companies;
- PRB must pay greater attention to the enforcement of its decisions, establishing monitoring mechanisms for enforcement of decisions, and apply punitive measures against CAs that fail to comply with decisions or violate deadlines;
- PRB should hold open hearings on all complaints;
- PRB should publish all decisions, complaints, expert reports and other important documents in an electronic and readable format;
- PRB should increase cooperation with law enforcement, including prosecution and police, to address findings which have elements of criminal offenses.

