



The Black List: a Tool to Prevent Public Procurement Abuses

Introduction

Public procurement is one of the main forms of spending public money. In Kosovo, more than nine thousand public contracts with a value of 429,622,215.80 EUR (17.8% of the annual budget) were concluded only in 2021¹. However, there are economic operators who fail to comply with laws and regulations, undermining the integrity of the public procurement process. One of the most efficient tools in preventing abuses in public procurement is the disqualification of irresponsible operators from participating in the process (in which case economic operators are included in the so-called Black List).

Law on Public Procurement in Kosovo (LPP)² envisages this punitive measure against economic operators who submit false data, or forge documents for procurement activities. In such cases, the Public Procurement Review Body (PRB) has the authority and responsibility to disqualify economic operators from participating in public procurement activities for a period of up to one (1) year.

Disqualification from participation in public procurement, in addition to being a sanction, also serves as a form of prevention of fraudulent practices, as economic operators risk losing financial income and reputational damage if blacklisted. The disqualification is done by the PRB, without having the need for the Court to confirm the request of contracting authorities.

PRB decisions for disqualification of economic operators are public and can be found on its official website³. All decisions on disqualifi-

1 Public Procurement Regulatory Commission. Annual report 2021. <https://e-prokurimi.rks-gov.net/Home/ClanakItemNew.aspx?id=349> (last accessed on 22.02.2023).

2 Official Gazette of the Republic of Kosovo. Law No. 04/L-042 on Public Procurement Article 99, par 2. <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2772> (last accessed on 22.02.2023).

3 Procurement Review Body. Blacklist. <https://oshp.rks-gov.net/>

cation, approving or rejecting the request of the contracting authority to blacklist the economic operator, are made public and include a reasoning and the eventual duration of the disqualification. The website also includes an archived list⁴ of economic operators who were disqualified in the past from public procurement activities. However, the PRB does not have the right to disqualify economic operators ex officio, even when it identifies evidences on the basis of which it should be disqualified, provided there is no request for disqualification from the contracting authority.

The Blacklist remains an inefficient tool to guarantee fair competition in public procurement for several reasons: firstly, the language used in the LPP is overly generic and restricts PRB in decision-making; secondly, PRB decisions on disqualification are not consistent; and thirdly, the Public Procurement Regulatory Commission (PPRC) is yet to ensure that blacklisted economic operators are suspended from the e-procurement platform.

The legal basis for disqualification, and the interpretation of the Public Procurement Regulatory Commission

The Public Procurement Law, in Article 99, prohibits Blacklisted economic operators from participating in public procurement activities for a period of up to one (1) year. However, the language used in this provision does not prevent the same economic operators from being awarded public contracts while disqualified.

Article 99 of LPP provides that:

“Upon a written request of a contracting authority regarding the submission, by an economic operator, of false information or documents forged, the PRB is obliged and is authorized to review and disqualify the economic operator from participation in public procurement up to a period of one year.”

This provision falls short of clarifying whether the ban applies only to the procurement activities published after the publication of the disqualification decision, or it also applies to the procurement activities that were initiated prior to inclusion of the economic operator in the Black List.

In the absence of legal clarity, PPRC⁵ has issued an opinion stating that the suspension does not apply to procurement activities initiated prior to the publication of the exclusion decision. Consequently, blacklisted economic operators continue to conclude public contracts⁶ for procurement activities initiated before the decision on their disqualification. This interpretation weakens the efficiency of the Black List, given that economic operators can potentially be awarded public contracts even while disqualified.

According to Article 99.2 of LPP, economic operators can only be disqualified when they are alleged to have submitted false data or forged documents. This legal basis is very narrow and other situations where an economic operator can be excluded from participating in public procurement must be explicitly foreseen by law. In practice, contracting authorities make

[sq/Reports/ComplaintByBlackList](#) (last accessed on 14.02.2023).

⁴ Ibid.

⁵ Public Procurement Regulatory Commission. Opinions. Question 8. 22.11.2022 <https://www.reuters.com/business/energy/oil-price-set-surge-further-iranian-talks-delays-2022-03-06/> (last accessed on 14.02.2022).

⁶ “Blacklisted company is awarded a 690 thousand Euro tender”. Paparaci. 02.02.2023. <https://dpl.us/r58> (last accessed on 14.02.2023).

requests for disqualification of economic operators on other grounds too, such as withdrawal of economic operators from the implementation of the public contract.

PRB decisions are also inconsistent regarding the grounds for disqualification of economic operators, and exceed the basis specified in the law. In the case of HUČSK⁷ vs. Matkos Pharm (No. 274/22), the PRB rejected the request of the Contracting Authority, on the grounds that the non-implementation of the contract by the economic operator is not a basis for disqualification.

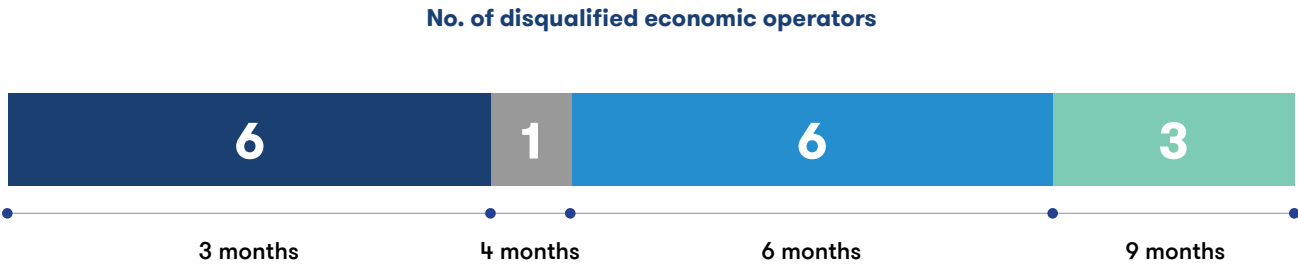
One month later, in the case of NPB⁸ v. Bajram Ha. Gashi B.I (No. 409/22), PRB took a decision to disqualify the economic operator for three (3) months, on the grounds that this economic operator had failed to implement the contract awarded by the contracting authority.

Duration of disqualification for participation in public procurement activities

The LPP foresees that disqualification of economic operators can be for a maximum period of up to one (1) year, but fails to categorize violations and the disqualification period.

In 2022, PRB issued 16 decisions approving the blacklisting, where economic operators were disqualified for an average of 5.3 months from participating in public procurement activities. No economic operator received the maximum punishment, i.e. disqualification for a period of one (1) year.

FIGURE 1: Duration of decisions on the disqualification of economic operators from participating in public procurement activities in 2022.



⁷ Hospital and University Clinical Service of Kosovo.
⁸ Public Housing Enterprise.

PRB decisions are not consistent even in terms of the duration of disqualification, with different decisions given for violations of the same nature.

In the case Municipality of Gjakova v. Ero Project (No. 386/22), due to the failure to submit documentation of the Tax Administration of Kosovo (TAK) and the Court, PRB disqualified the economic operator for six (6) months from participating in public procurement activities. Whereas in the case of ICMM⁹ v. Mediatech & Print Sh.P.K., (No. 885/21), for the same reason, i.e. failure to submit documentation of TAK and the Court, the PRB disqualified the economic operator for three (3) months.

In addition, the LPP does not envisage longer or permanent bans from participating in procurement activities for repeat offenders, namely economic operators which continuously violate public procurement rules.

Linking the Black List with the e-Procurement platform

Another relevant issue is the link between the Black List and the E-procurement platform¹⁰. Despite efforts to address this issue, PPRC is yet to achieve full link between the Black List and the e-Procurement, ensuring that disqualified economic operators are unable to upload bids while blacklisted.

In the absence of this mechanism, many economic operators have uploaded bids while they were disqualified¹¹, and, moreover, there were cases where disqualified operators submitted complaints to PRB¹², without having any possibility to be awarded the contract, thus blocking important tender procedures.

Removing any possibility for disqualified economic operators to upload bids in the e-Procurement or submit complaints to PRB would lead to an increased confidence in the public procurement process and would convey the message that there is no tolerance for illegal practices.

⁹ The Independent Commission for Mines and Minerals is an independent agency that reports to the Assembly of Kosovo.

¹⁰ E-procurement is the Public Procurement Portal which stores all relevant information related to the field of public procurement in Kosovo.

¹¹ Democracy Plus (D+) has found that from January 1, 2019 to August 2021, at least seven (7) economic operators have bid in 22 tenders while they were disqualified. See at: <https://dpl.us/zoq> (last accessed on 14.02.2023).

¹² The economic operator Interlab Sh.PK, filed a complaint to the PRB on April 26, 2021 against the decision of the Ministry of Health while blacklisted. See at: <https://dpl.us/zoq> (last accessed on 14.02.2023).

Recommendations

- Ensure that the new Law on Public Procurement (currently being drafted) clearly defines the legal provision on the prohibition of participation in public procurement activities. Clarify whether the Black List excludes economic operators from concluding any public contract, or only from participating in future procurement activities;
- Ensure that the new Law on Public Procurement allows PRB to disqualify irresponsible operators ex officio, even in cases where there is no request for disqualification from the contracting authority;
- Explicitly list in the Public Procurement Law the grounds on which economic operators may be disqualified from public procurement;
- Accurately categorize the disqualification period for economic operators proportional to the violation;
- Allow permanent disqualification for economic operators who are repeat offenders;
- Ensure a full connection between the Black List and e-Procurement, to ensure that the disqualified economic operators are automatically blocked from uploading electronic bids to e-Procurement.

