



Unusual Dismissal of the PRB Board member: How much was the Law Obeyed?

2023

Introduction

The Procurement Review Body (PRB) was established by the Public Procurement Law (LPP)¹ as an independent administrative body, responsible for reviewing public procurement complaints from private sector companies (known as economic operators). Hence, the PRB is a collegiate body mandated by law to examine, at a second instance, complaints coming from economic operators against contracting authorities (ministries, municipalities, agencies, etc.). The PRB enjoys the status of an independent agency under the Assembly, it has five (5) members who are appointed by the Assembly, and through the functional Committee, they report to the Assembly. The functional committee in the case of the PRB is the Committee on Budget, Finance, Labor and Transfers of the Assembly of Kosovo.

When an economic operator files a written complaint to the PRB against any decision made by a contracting authority, the PRB has the mandate to examine and decide on the complaint claims. Upon such review, the PRB issues a written decision that addresses the specific complaint (the party's claim) and the accompanying procurement activity. If the party (economic operator) is not satisfied with the decision of the PRB to resolve the complaint, the party may initiate an appeal with the competent court (commercial court).

PRB is known as one of the bodies/agencies which has very often operated without a complete board. After an absence of the board for a period of time of approximately 15 months, the new PRB board was appointed by the Assembly in June 2022. However, the new board was soon left without a member, because one of them (Nita Bejta) resigned only four months upon being appointed by the Assembly (October 2022).

¹ The new PRB board. Available at <https://oshp.rks-gov.net/sq/Pages/Details?id=195> (last accessed on 24.10.2023).

To make matters worse, in May 2023, the Government of Kosovo initiated the dismissal of another member, Kimete Gashi. On July 13 of this year, upon a vote of 58 deputies of the Assembly of Kosovo, she was dismissed from the position of a Board member of the PRB. This process was accompanied by many controversies, both within the Assembly and in the public opinion, thereby raising questions about how this case was initiated, because Article 93 of the PPL was not obeyed, since it clearly provides on the cases upon which the dismissal of a PRB Board member may be initiated.

The purpose of this short document is to address this fact against the rules of the PPL, as regards the dismissal of the PRB member, but also in terms of the Law on the organization and functioning of the state administration and independent agencies (LOFSAIA). Hence, in addition to the PPL as a sectoral law, LOFSAIA also deals with the item of when a member of the collegiate body of an independent agency should and may be dismissed².

The Government proposal to dismiss a PRB Board member in contradiction to the PPL

On May 10, 2023, the Government of Kosovo proposed to the Assembly of Kosovo to dismiss one of the members of the PRB board, due to a tender for Insulin of the Ministry of Health (MoH).

According to the PPL, the suspension and dismissal of a member of the PRB is subject to the same rules and procedures as for the members of the Public Procurement Regulatory Commission (PPRC). Therefore, according to Article 93³ of PPL: “If, at any time, the Government or the Assembly considers that there are grounds for the removal of any member of the PPRC, it may refer the matter to a court of competent jurisdiction for decision, furnishing its substantiated reasons and all evidential documents required by the court”. On the contrary, in the case of this PRB board member, the proposal for her dismissal came at the meeting of the Government of Kosovo, by which her dismissal was proposed to the Assembly on the grounds that she violated professional ethics, but without providing evidence or any court decision, as specified in the Article 93 of the PPL⁴.

The Government’s decision on such dismissal has the following content: *The Procurement Review Body, in the case of decision-making on the case PSH No. 397/22, contrary to the primary legislation, specifically Law No. 04/L-190 on Medicinal Products and Equipment, tried to allow insulin to be placed on the market without marketing authorization, thereby endangering public health. Considering that the chair of the panel in this case was Mrs. Kimete Gashi, the Government hereby decides as in the enacting clause of this Decision, that is, a proposal for her dismissal’.*

However, the decision of the PRB in the case of insulins was not final, since the matter was just remanded to a re-assessment to the contracting authority (Ministry of Health), and no final decision was made on it. However, the Government’s proposal was sent to the Assembly, where it was voted on in July 2023. In the same month, the political entity Democratic League of Kosovo (LDK), sent the decision of the Assembly for review of constitutionality and legality to the Constitutional Court.

² Law on the organization and operation of the state administration and independent agencies, see Articles 43, 46 and 47: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=18684> (last accessed on 10.11.2023).

³ Law on Public Procurement <https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=2772> (last accessed on 24.10.2023)

⁴ Law on Public Procurement, Articles 93,101 <https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=2772> (last accessed on 24.10.2023)

The Government proposal to dismiss a PRB Board member in contradiction to the LOFSAIA

The right to define the criteria for dismissal of the member of a collegiate body through a special law is also recognized by LOFSAIA. According to this law (Article 46, paragraph 1), the conditions for the appointment of the head or member of the collegiate body of an independent agency are provided by the law establishing the agency. Likewise, the procedure for the dismissal of the lead and member of the collegiate body is determined by the law on its establishment and the Rules of Procedure of the Assembly (Article 47). So, in the case of PRB, it falls under the Public Procurement Law. Also, the procedure of election, approval and consent for the head and member of the collegiate body is determined by the law on its establishment.

So, as noted, the procedure followed in the dismissal of the PRB board member was not according to the sectoral law.

In addition, LOFSAIA regulates the performance management system of agencies, be they executive, regulatory or independent. In the specific case, i.e. of independent agencies, as is the case with PRB, the activity of the agency is permanently overseen by an Assembly committee, which covers the relevant area of responsibility, in the case of PRB, the Committee for Budget, Finance, Labor and Transfers. The performance management system according to this law is related to the agreement on the annual performance plan between the agency and the relevant committee, while the agency reports on the current year through its performance report. So, initially the agency proposes a draft plan by November 30 of the respective year, then the objectives, indicators and goals are discussed and agreed with the relevant functional committee by December 31 of the respective year. Upon the approval of the performance plan, the agency reports within the first quarter of the year following the year for which the performance plan was made, through the annual performance report.

So, failure to achieve a satisfactory level of goals according to the performance plan for two consecutive years, is a reason for the Functional Committee to propose to the Assembly the dismissal of the entire board of the independent agency. Yet, even if it was due to poor performance, the Government still does not have the right to propose to the Assembly the dismissal of a member of the PRB. As stated in Article 93 of the PPL, the Government may initiate the issue of dismissal before the competent Court with evidence, and not in the Assembly without evidence, as happened in this case.

Conclusion

The procedure for dismissing a member of the board of the PRB is unusual because neither the sectoral law (PPL) nor the law on the organization and operation of the state administration and independent agencies (LOFSAIA) provide for such a procedure. So, in this case, the Government had asked the Assembly to dismiss her, while the PPL says that the Government may ask the competent Court to dismiss her. On the other hand, LOFSAIA provides that both the appointment and dismissal of a member of a collegiate body of an independent agency is performed in accordance with the sectoral law. Also, this law favors the performance management system as the main or basic criterion, on the basis of which a functional committee may initiate a request for the dismissal of the board or board member of the independent agency, by voting in a session.

Recommendations

- The initiation of the dismissal of a member or the chair of the collegiate body of an independent agency should be conducted only pursuant to the sectoral law or the law establishing that agency;
- Although the Government may propose the appointment by the Assembly of a member of a collegiate body upon election through an open procedure, the Government must apply the sectoral law when it comes to initiating the dismissal of a member of a collegiate body of the independent agency;
- In the case of a member of the PRB, if the Government is dissatisfied with the performance of one or more members, it must make a proposal for his/her dismissal to the competent Court, thereby filling reasons and evidence that underpin such an initiative. This procedure is applicable until the amendment of the PPL by the Ministry of Finance, Labor and Transfers (MFPT) and adopted by the Assembly of Kosovo;
- The government must constantly consult the LOFSAIA in terms of performance appraisal of independent agencies, in order to obey the legal rules in every case, when it comes to the appointment or dismissal of a member or members of an independent agency.

