



Absence of criminal prosecution for cases of forgery of documents in public procurement

Introduction

Public procurement represents one of the most sensitive processes of public spending, through which public institutions contract work, goods, and services. Public Procurement Law¹ (LPP), requires from all contracting authorities to ensure that public funds are used in an economizing manner, treating economic operators equally and without discrimination.

Efficiency, transparency, and equality are the basic principles of a functional procurement system, yet, not infrequently, this process is tainted by suspicions of corruption, due to the complex nature of tendering procedures, large contracts awarded in the contracting of works, goods and services, but also doubts of undue political influence in the selection of awardees. Fighting corruption in public procurement requires a comprehensive approach from all stakeholders, in which each stakeholder takes an active role in preventive and sanctioning measures, especially in cases it is manifestly clear that abuse has taken place.

One of the most frequent forms of damage to the integrity of public procurement is the forgery of documents and the presentation of false data in the submission of bids. Falsification of documents and presentation of false data in tendering are only two of the ways in which violations in public procurement are manifested. However, these two forms of violation have a single legal basis for quick administrative sanctions, which in the case of Kosovo is disqualification for participation in tendering for a certain term.

¹ Law nr.04/L-042 on Public Procurement of the Republic of Kosovo. Article 1 See: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2772> (last accessed on 10.11.2023).

The LPP provides on the disqualification of economic operators who submit false data, or falsify documents for procurement activities, for a period of up to one (1) year². Such disqualification is conducted by the Procurement Review Body (PRB), upon a request of contracting authorities, without need for the claims raised to be proven by a Court³.

“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.”

Submission of false data or any falsified document by economic operators, in addition to the LPP, is also sanctioned by the Criminal Code of Kosovo⁴, which provides:

Whoever intentionally violates the public procurement rules during a bid for awarding a public procurement contract, presenting false documentation, illegal secrecy agreement or undertakes any other illegal action for the purpose of fraud in public procurement procedures and for purpose of influencing the decision of a contracting authority in the public procurement procedure, shall be punished by a fine and by imprisonment of up to five (5) years.

The reasons that may lead to disqualification by the Public Prosecution Office serve at the same time as a legal basis for a criminal investigation, therefore each disqualification would have to be subject to investigative procedures by the prosecution. Although the names of all economic operators who are disqualified are published in what is known as the “Black List”, together with the corresponding decisions containing the reasoning and terms of such disqualification, this research paper shows that in most cases, these economic operators are not criminally prosecuted by the prosecution.

The lack of criminal investigation against economic operators who present false data and falsify documents, results in the misuse of public funds by irresponsible economic operators and, the loss of credibility of conscientious economic operators and citizens in public institutions and the entire public tendering process.

² Law nr.04/L-042 on Public Procurement of the Republic of Kosovo. Article 99.2. See: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2772> (last accessed on 10.11.2023).

³ Ibid.

⁴ Law no.06/L-074 Criminal Code of the Republic of Kosovo. Article 415 “The abuse and the fraud in public procurement. See: <https://md.rks-gov.net/desk/inc/media/6A2D4377-6AE1-4530-909F-3FB2680CD1EC.pdf> (last accessed on 20.11.2023).

Disqualification as an insufficient administrative measure

From January 1, 2021, to November 1, 2023, the Public Procurement Agency disqualified 30 economic operators from participating in public procurement, on the grounds that these companies had presented false data or falsified documents⁵.

The number of disqualified economic operators is not high, since it is a period of almost three years. However, the small number of disqualifications can be explained through several factors. Initially, the PRB had been left without a functional board for a period of 14 months (April 1, 2021 – June 23, 2022)⁶, during which time it could not examine the complaints requiring the disqualification of economic operators.

Another factor contributing to the absence of imposing such a measure is the delay on the part of the PRB in handling motions for disqualification. For example, in the last three cases of disqualification, it took the PRB more than a year to decide on the motions of the contracting authorities as follows:

- NPB v. “Dona Impex”, the motion was filed on March 22, 2022, while the decision of the PRB was only rendered on July 27, 2023, or after 492 days.
- Municipality of Gjakova v. Lux Carpet LLC., the motion was filed on June 6, 2022, while the decision of the PRB was only rendered on November 15, 2023, or after 527 days.
- Kosovo Police v. NTSh Trio Med, the motion was filed on August 15, 2022, while the decision of the PRB was only rendered on November 15, 2023, or after 457 days.

Delays in rendering decisions regarding the disqualification of economic operators who falsify documents or present false data have a negative impact on all parties involved in this process, because:

- Irresponsible economic operators continue to participate in public tenders, leading to financial losses for honest businesses.
- In the absence of a decision from the PRB, the contracting authorities are compelled to sign contracts with economic operators for whom they themselves have submitted motions for disqualification (the case of Municipality of Prizren v. Matkos Pharm LLC 7).
- Loss of citizens’ trust in justice and integrity of the public procurement process.
- In the absence or delay of disqualification, irresponsible economic operators are encouraged to continue fraudulent practices in tendering.

In addition to delays in decision-making by the PRB, contracting authorities are reluctant to initiate motions for disqualification, even in cases where such suspicion is confirmed by the relevant authorities.

Such was the case regarding the contract concluded between the Municipality of Gjilan and the company “ARF Sh.PK”, in the amount of 155 thousand euros, for which research had confirmed the suspicion that the contract-awarded economic operator had submitted its bid containing a false Ministry of Defense reference⁸. In this line, Democracy Plus (D+) had asked the Municipality

⁵ Records from the official website of the PRB. Active Blacklist and archive. See: <https://oshp.rks-gov.net/sq/Reports/ComplaintBy-BlackList> (last accessed on 20.11.2023).

⁶ Board of the Procurement Review Body. See: <https://oshp.rks-gov.net/sq/Pages/Details?id=195> (last accessed on 20.11.2023).

⁷ Democracy Plus “Monitoring public procurement in five municipalities”. Available at https://dplus.org/wp-content/uploads/2023/01/17-01-23_Monitorimi-i-prokurimit-publik-ne-pese-komuna.pdf (last accessed on 11.11.2023).

⁸ Ibid.

of Gjilan, as the contracting authority, to initiate a motion with the PRB to disqualify this economic operator. However, the Municipality of Gjilan had not responded at all, and failed to initiate a motion to disqualify, although in this example of contract, an indictment had already been filed against this economic operator, on the suspicion that he was involved in abuse and fraud in public procurement.

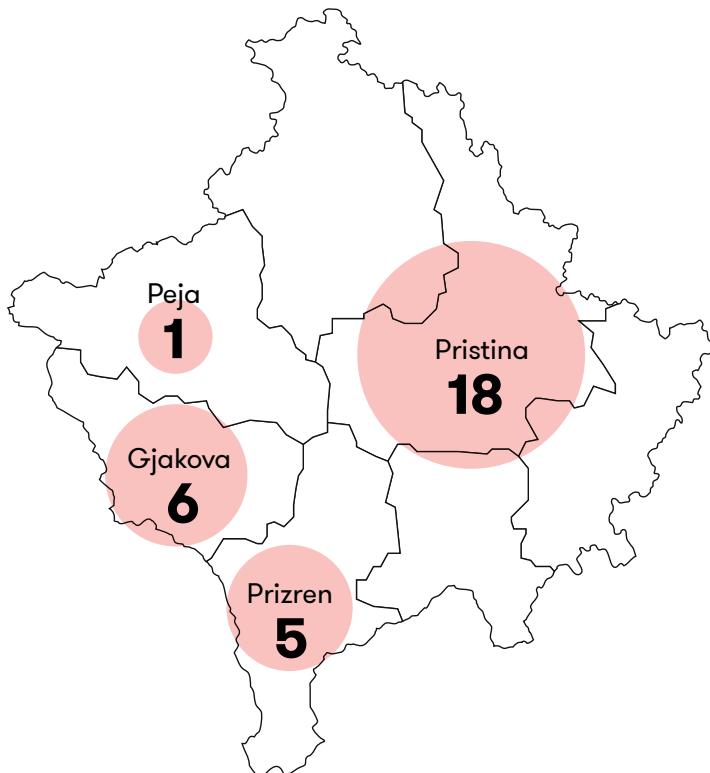
Lack of criminal prosecution for economic operators disqualified by PRB

Any case of barring from participation in procurement activities should be the starting point of an investigation and prosecution proceeding, which may eventually result in criminal sanctions upon a ruling of a competent court. In practice, in most cases, disqualification represents the end of institutional measures against these irresponsible operators.

D+ has submitted requests for access to information in four Basic Prosecution Offices, in whose jurisdiction it is suspected that the disqualified companies have bid with forged documents/ false data.

Of the 30 cases of disqualification during the period January 2021 - September 2023:

- **18 cases** occurred in the jurisdiction of the Basic Prosecution Office in Pristina;
- **6 cases** occurred in the jurisdiction of the Basic Prosecution Office in Gjakova;
- **5 cases** occurred in the jurisdiction of the Basic Prosecution Office in Prizren;
- **1 case** occurred in the jurisdiction of the Basic Prosecution Office in Peja.



To the question by D+, whether there is, or has been, any initiation of investigation by the prosecution, and based on the search of records and registry of such Prosecution Offices⁹, it follows that:

- The Basic Prosecution Office in Pristina identified seven cases it was handling/had handled in terms of disqualifying 18 economic operators during this period.
- The Basic Prosecution Office in Gjakovë has not initiated any cases regarding the disqualification of 6 economic operators during this period.
- The Basic Prosecution Office in Prizren has not initiated any cases regarding the disqualification of 5 economic operators during this period.
- The Basic Prosecution Office in Peja has not initiated any cases regarding the 1 disqualification of economic operator during this period.

This data clearly shows that in most cases, economic operators who end up being disqualified are not simultaneously subjects of criminal investigation, although the legal basis on which they were disqualified does represent a criminal offense.

CONCLUSION

In Kosovo, any motion to disqualify approved by the PRB is a legal basis for a criminal offense, whereas the inaction of the justice authorities, in cases where there is a decision that economic operators have filed, in public tenders, forged documents/false data, is an encouragement to economic operators to further engage in this behavior, taking advantage of the absence of criminal sanctions, further undermining the integrity of this process.

To fight this form of corruption, a comprehensive and proactive approach is required, with the Prosecution Offices encouraged to take up and prosecute each case of disqualification in public procurement. Initiation of criminal prosecution would also serve as deterrence to other economic operators, that there cannot be impunity against corrupt practices, and such legal actions would strengthen the integrity of the public procurement process in general.

Fighting this form of corruption, which occurs in the tendering phase, reinstates honest competition between economic operators and encourages fair competition between them, which ultimately benefits the citizens.

⁹ In order to protect the preliminary criminal investigation and the prosecution of criminal offenses, the answer required was whether any of such cases were opened or were under handling of the Prosecution Office.

