

**PROCUREMENT REVIEW PANEL**, appointed by the President Pursuant to the article 105 as well article 106 of the Law on Public Procurement of the Republic of Kosova no.04/L-042, amended and supplemented by Law No. 04/L-237, amended and supplemented Law no.05/L-068, amended and supplemented Law no.05/L-092, composed of: Mr. Goran Milenković – President, Mr. Nuhi Paçarizi – referent, Mr. Blerim Dina - member, deciding according to article 24 of the Rules of Procedure of the PRB with regard to the complaint lodged by the EO “Astraplan” - Prishtina, regarding the non-implementation of the decision of the PRB PSH. Protocol no.233/17 of the 23.08.2017, regarding with the procurement activity with title: “Maintenance of Telecom Telecommunication Networks of Kosova - Prishtina Region” Lot 1, with procurement no:TK17/1343/521, initiated by the Contracting authority (CA) – Telecom of Kosova, on the 21.11.2017 has issued this:

### **ORDINANCE**

**I. Ordered**, contracting authority / Telecom of Kosova, to respect the decision of the review panel PSH.Nr.233/17 of the 23.08.2017, regarding the procurement activity with the title “Maintenance of Telecom Telecommunication Networks of Kosova - Prishtina Region” Lot 1, with procurement no:TK17/1343/521.

**II. Ordered**, the contracting authority / Telecom of Kosova, within 5 (five) days to notify the PRB and complaining economic operators regarding the implementation of the preliminary decision of the PRB, no.233/17 of the 23.08.2017, regarding the procurement activity with the title: “Maintenance of Telecom Telecommunication Networks of Kosova - Prishtina Region” Lot 1, with procurement no:TK17/1343/521.

**III.** Failure to respect this Ordinance will oblige the Review Panel to act in conformity with article 131 and article 25 paragraph 8 and 9 of the LPP, to impose sanctions foreseen by these provisions of the LPP.

**IV.** Obligated Contracting authority within 5 days to inform the Review panel for all actions taken regarding with this procurement activity.

**IV.** Complaining economic operator “Astraplan” - Prishtina, it is returned the insurance fee of the complaint in the amount deposited when filing a complaint, since the complaining claims are grounded.

**VI.** Obligated complaining economic operator that conform article 33 point 6 of the Rules of Procedure of the PRB, within sixty (60) days is obliged to request to take back the funds, otherwise these funds will be confiscated and will pass to the budget of the Republic of Kosova.

## REASONING

Complaining economic operator “Astraplan” - Prishtina, as a dissatisfied party, has lodged a complaint at the PRB, on the 20 of November 2017 with protocol no.401/17 against the notice for cancellation of the procurement activity with the title “Maintenance of Telecom Telecommunication Networks of Kosova - Prishtina Region” Lot 1, with procurement no:TK17/1343/521, initiated by the Contracting authority (CA) – Telecom of Kosova, claiming that the contracting authority has acted in violation of the legal provisions of the LPP:

- Article 105 Competencies of PRB,
- Article 7 - Equality in Treatment / Non Discrimination
- Article 27 Tender Dossier
- Article 59- Examination of evaluation and comparison of tenders
- Article 61- The tender not normally low
- Article 40 of the ROGPP
- Article 40.2 of the ROGPP
- Section 40.6, Administrative Instruction No.3 / 2015,
- Article 30.1 of the TDS

On the 23 of August 2017 the Procurement Review Body has taken a decision on PSH no. 233/17, with which was approved as grounded the complaint of the EO “Astraplan” - Prishtina, regarding the procurement activity with the title “Maintenance of Telecom Telecommunication Networks of Kosova - Prishtina Region” Lot 1, with procurement no:TK17/1343/521, and the case has been returned for re-evaluation.

Procurement Review Body, conform article 113 and 114 of the LPP on the 24.10.2017 has authorized the review expert to review the validity of all complaining claims of the complaining party.

Procurement Review Expert in the report of the 08.11.2017 has ascertained: “For this procurement activity PRB on the 23 of August 2017 has issued the decision no.233/17, whereby it was requested from the CA to re-evaluate the tender, so the case has returned for re-evaluation. CA has re-evaluated the bids and according to the re-evaluation results the reasons for the elimination are the same, which means that the tender's cancellation is made because all bidders offer abnormally low tenders. Pursuant to Article 24 paragraph 12 of the Work Regulation of the PRB no.01/2017 the expert recommends that the case to be treated as a judged matter “Res Judicata” after being repeated the complaining claims, the assessment was the same, the subject of the context is the same and the parties are the same. In the decision of the review panel 233/17 and in the expertise of the review expert it is proved that CA during the evaluation did not take into account the criterion of evaluation and the case was returned for re-evaluation, and CA has given the same reasoning during the re-evaluation and eventually abolishes the procurement activity, therefore on this case the review expert recommends the CA and the review panel to return the case to re-evaluation and during the re-evaluation to be taken into basis the criterion determined for evaluation, which was the accountable tender with the lowest price with the scoring, being that the CA considers that the bids are abnormally low then

the abnormally low tender regulation should be applied which regulates and clarifies the manner of handling the bids when considered at abnormally low prices. Therefore the review expert evaluates that the complaining claims are stable and recommends the CA to evaluate the bids of the bidders in accordance with the requirements of the tender dossier concretely according to the criterion determined for evaluation, respectively in accordance with article 30.1 of the TDS Annex 6 of the tender dossier.

Complaining economic operator on the 08.11.2017, by memo, has notified the PRB that agrees with the opinion of the review expert.

The contracting authority through written memo dated 10.11.2017, has notified the Review Panel that it does not agree with the report of the review expert.

At the hearing session of the main review of the 21.11.2017, where were present the review panel, representative of the contracting authority, representative of the complaining EO, PRB expert, were reviewed the case files by checking and analyzing the documentation for the procedure procurement, which consists of: authorization of initiation of the procurement activity, notification for contract, minutes on the bid's opening, decision on establishment of the bid's evaluation commission, bid's evaluation report, notification on cancellation of the procurement activity, complaint of the economic operator, the report of the PRB expert, the memos of the parties to the proceedings.

During the presentation at the hearing session the representative of the complaining EO stated: "After the notification on the elimination and cancellation of this procurement activity, despite having an earlier decision of the PRB, we as EO respecting the rules of the LPP have applied for reviewing in accordance with Article 108/A of the CA-MI, where CA returns the decision on rejecting our request as unfounded. Further we continued with a complaint at the PRB with complaining claim that CA has violated the provisions of the LPP and the following: Article 105, Article 7, Article 27, Article 59, Article 60, Articles 61 and 108 / A of the LPP. Article 40 of ROGPP, and violation of Administrative Instruction No.3/2015. Initially we should elaborate in more detail the violation of Article 105. This article is violated for the fact that CA-MI was obliged by the decision of the panel of the PRB no.233/17 to cancel the notification on the cancellation of the procurement procedure for this lot. The thing that to this day, Gjonbalaj did not, and as a reason after re-evaluation of bids has once again canceled the lot.1, which has actually been canceled and in this case has committed two breaches. In order not to take the time to the panel, I provide in writing all our justifications and responses for the violations made by the CA. The reason for the elimination and cancellation is the same reason for the earlier cancellation of the same activity and it is interesting that in the two cases it is mentioned that a provision of the LPP requires the cancellation of the procurement activity, but in the meantime nowhere does it emphasize in accordance with which article this annulment is required. CA contends that all tenders contain an abnormally low price. On page 3 of the submitted memo we have presented the table on the basis of Administrative Instruction No.3/2015 where is the concrete case when the condition for awarding the tender is the lowest price tender based on the pointing, as it was in the concrete case this procurement activity. As for notification, I offer to the panel also this memo of the tender dossier on the points of emphasis and the criterion for contract award, namely page 16 of the dossier point 30.1. We further think that the main Procurement Official at the CA intentionally is canceling this procurement

activity by the fact that we have fulfilled the criteria of the contract notice and the criteria of the tender dossier and as I said in the previous hearing session that he accounts only beyond the PRB and therefore does not enforce the decisions of the PRB. Article 61 of the LPP is violated by the CA because in this article it is clarified for the tenders that are not normally low in the case of work contracts, with all quantity. While in this article there is nowhere mentioned treating an abnormally low tender when the award criterion is with points. Not extending too much we ask from the review panel conform article 105 point 2.16 as the complaining claims, object of dispute and parties are the same, and reviewed with the decision PSH.nr.233/17, to be treated by the PRB as a judged matter and the case return to re-evaluation for this lot, as we meet the contract award criteria and the criteria of the dossier and we have the cheaper price. Also analyzing the course of this activity, we ask from the panel of PRB that conform article 30 of the LPP to submit the case to MI, in the Department for Economic Crimes at the Kosova Police. Also considering the consecutive violations, we ask the panel to take punitive measures in conformity with article 131 and article 25.8 of the LPP on the repeated recidivistic circumstances and violations of the main public procurement official at the Telekom of Kosova based on a new regulation published on the page of PPRC No. 2/2017, Article 7 serious violations, point 6 non-compliance with decisions of the PRB. A condition that Mr. Gjonbalaj has met tens of times in the last two years”.

During the presentation at the hearing session the representative of the CA stated: “First I wanted to interconnect with some of the complaining claims of the EO that represents as a violation of the CA. Regarding the article 105 decision of the review panel and to annul the cancellation as the EO claims, the process is through electronic procurement and the platform does not support it. There is no standard form for canceling the tender cancellation. Regarding non-compliance with Article 61 of the LPP, in accordance with Article 61, we have respected the regulation for abnormal low price, which correctly describes that the abnormal low price also applies to the position. Furthermore, we have sent information from the PPRC to the panel and we have received a letter from the PPRC who consider that Article 61 of the LPP is applied on the basis of the price offered. By linking that there has not been a cancellation on the basis of the abnormally low price in the weight of the prize, it is done according to the price per position. We have also asked preliminary questions in the PPRC and this was sent with email in the PRB, and the PPRC response was “abnormal low pricing rules are applied even when the tender is with the lowest price based on the points” because according to the PPRC is not excluded such a thing. CA has given its answer on the 10.11.2017 in the expertise of the expert and according to the answer we still state that we stand by the decision of the CA and do not agree with the expertise of the review expert. Having in mind another fact, because of the same tender there were 4 lots, the other lots were canceled and we are left only with Lot 1 because of the complaint. We propose to the panel to cancel the complaint of the complaining EO based on explanations-interpretations from the PPRC (which I offer the panel) and to approve the decision of the CA for cancellation of the procurement activity.

During the presentation at the hearing session of the review expert stated: “Given the fact that the complaint filed in advance was addressed with expertise 233/17 and the decision of the review panel supports this expertise, where it resulted that the procurement activity to be re-evaluated. CA has re-evaluated the bids and the reason for the rejection it has based on the same arguments, by canceling the tender in terms of article 61 of the LPP for abnormally low tender. Regarding this, CA has used an excuse-interpretation taken by the PPRC regarding the reasons for the abnormally low tender elimination, and based on

the question that was made to the PPRC in my opinion in the capacity of the expert, I consider that the question was not because wherever they ask such a question, the answer would be the same, as the question was “is there any legal provision of the LPP or secondary legislation that excludes the application of Article 61 for an abnormally low tender. Article 4.2 (in the case of a tender or tender position appears to be abnormally low) for the award criterion. Responsive tender with the lowest price based on the points or any procurement procedure, and if so please explain what that provision is. “In response to the PPRC, it is stated that there is no such legal provision. This means that the answer is given based on the question asked. It is a basic principle of the law that the selection criteria and evaluation criteria should be applied until the final result, and regardless of whether the activity results in responsive or irresponsible bids then the contract is canceled or awarded. The criterion set out with points eliminates the possibility of abnormal prices, too low, so as such it should have been respected in the final evaluation. Although the case is considered reviewed the complaining claims are the same, the same CA and the same complaining EO I recommended the case to be treated as a judged matter according to the work regulation of PRB 01/2017”.

In the final words, the representative of the EO stated: “As for the mentioned allegations of the representative of the CA, as noted the expert in the reply of the PPRC, no article or legal provision is mentioned, but it is a text and a provocative question by the CA and we think that the answer is prepared at the CA because with the interpretations of the PPRC to cover Mr. Gjonbalaj's violations, we are used of that for a long time the PPRC has been covering for a long time for three years with illicit interpretations and as a result of these interpretations Although the PRB has taken the license, it has been obliged to return it. Regarding the interpretation of the PPRC is not obliged to apply because the LPP is and has higher jurisdiction because it was approved by the Assembly of Kosova and the PPRC has no possibility with interpretations to change the LPP. Regarding the cancellation mentioned earlier the representative of the CA is a guidelines to the page of the PPRC, with which by 31.12.2017 both CAs and EOs are free in the form of submission of documents, either electronically or by sending physical copies of the bid, and they may cancel by submitting the letter simply to the PPRC”.

In the final speech, the representative of the CA stated: “What we have requested from the PPRC, the question has been raised in the form that we have had trouble in the implementation of the procedures, and the PPRC has given us an answer with which we proceeded with the procurement process. We stand by the decision of the CA”.

In the final speech review expert Mr. Sheqiri stated: “I have nothing to add or change from the submitted report and I stand by the expertise's report and the recommendations given in the expertise”.

Review panel, after reviewing the memos of the case, reviewing the complaining points of the complainant, ascertainments, concrete analysis and recommendations of the review expert, statements of the parties to the proceedings, discussion and screening of the evidence as a whole during the hearing session of the main review explains that taking into account the preliminary decision issued by the PRB of the 23 of August 2017, the contracting authority was obliged to re-evaluate the tender for this procurement activity.

Review panel ascertains that the contracting authority did not act according to the decision of the PRB with protocol no.233/17, which during the re-evaluation with the

same reasoning has canceled the procurement activity again considering that all bids are not normally low.

The review panel obliges the contracting authority to respect the decision 233/17 of the 23 of August 2017 and obliges the contracting authority to take into account the criterion for evaluation, which was the responsive tender with the lowest price with the scoring. Therefore, the contracting authority during the re-evaluation must adhere to all the requirements set out in the tender dossier and the contract notice.

If this Ordinance is not being implemented the PRB shall act in conformity with article 25.9 by requiring the PPRC to revoke the procurement license to the manager of CA and according to the Article 131 of the LPP to impose a fine of not less than five thousand (5,000) Euro for the contracting authority.

The review panel conform article 24 of the Rules of Procedure of the PRB, as well based on the evidence presented above decided as in the provision of this ordinance.

President of the Review Panel

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Mr. Goran MILENKOVIĆ

Ordinance to be submitted to:

1x1 CA – “Telecom of Kosova”

1x1 EO – “Astraplan” - Prishtina

1x1 Archive of the PRB

1x1 For publication on the website of the PRB.