



DEMOCRACYPLUS

(IN)JUSTICE in procurement

Report of Three
Month Monitoring of
the Procurement
Review Body (PRB)

December 2016 – February 2017



Prishtinë
April, 2017

(IN)JUSTICE in procurement

PRB is the tender tie-breaker, deciding on the fate of millions of Euros in disputes between public institutions and the private sector.

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Abbreviations

CA	Contracting Authority
CPA	Central Procurement Agency
D+	Democracy Plus
TD	Tender Dossier
KDI	Kosovo Democratic Institute
KEK	Energy Corporation of Kosovo
PPRC	Public Procurement Regulatory Commission
MI	Ministry of Infrastructure
EO	Economic operator
OECD	Organization for Economic Cooperation and Development
PRB	Procurement Review Body
UCCK	University Clinical Center of Kosovo
SIGMA	Support for Improvement in Governance and Management
NAO	National Audit Office

Why PRB?

Public procurement in Kosovo is a sector which in all analyses and reports is considered to be one with a significantly low public confidence. In addition, reports by oversight institutions, such as the National Audit Office, internal auditors, Anti-Corruption Agency, and Public Procurement Regulatory Commission, indicate a large number of repeated violations in public procurement. The State Prosecution, as the investigative institution, also paid more attention to recent corruption allegations in this sector. However, success was symbolic in prosecuting senior officials and confiscating unlawfully acquired assets.

Legally, the PRB is the guardian of economic operators' rights vis-à-vis public institutions in public procurement procedures. In cases of disputes over the selection of winning companies for procurement activities, the PRB is the supreme administrative institution, which issues final judgment whether there are grounded allegations in complaints. Decisions of the PRB can only be challenged in courts.

Due to the nature of its work, this institution is considered to have a high risk of corruption. This is because it judges cases which are ultimately translated into business profits and given the local culture and the lack of an effective oversight over this institution, there is a possibility that decision-making is not always impartial.

Former President of the PRB Board, Hysni Hoxha, has been found guilty regarding a decision issued within the work in this institution. Moreover, this was not the only indictment filed since the board of this institution along with a number of review experts was a target of several prosecution investigations. The media have mentioned at least eight tenders which have been the target of prosecution investigations.

The sentencing of the president of this institution, frequent investigations on the decision-making of PRB members and the voices of unhappy operators with the work of PRB, have all contributed to a serious decline of public confidence in this institution. Furthermore, the Public Procurement Law was amended in terms of the work of PRB and how complaints are handled. With the new legislation PRB is the second instance, after complaints are first addressed by the contracting authorities themselves.

What is monitored?

Democracy Plus (D+) has taken an initiative to ensure full monitoring over the institution, to assess the PRB's impartiality in handling complaints, transparency and integrity of this body. The purpose of the monitoring is to identify concrete problems and rectify them through advocacy. Another purpose is to advocate for an increase in transparency on violations by the state administration in the award of public contracts, through the publication of violations in D+ reports.

For this purpose, D+ is present at all court hearings where members of the public are allowed to attend. Additionally, all , published decisions, expert opinions, complaints and other decisions issued by PRB are monitored.

One of the priorities of PRB monitoring is to compare the standards of decisions, to see if previous decisions of this institution are enforced as precedents for decision-making in similar cases. A PRB decision issued on a prior case must serve as a norm to adjudicate other cases, if the facts are similar. This is to ensure that economic operators and contracting authorities learn from previous PRB decisions which in turn can avoid complaints and irregularities in procurement in all future activities.

Attention in monitoring is also focused on the expertise, analyzing the quality of expertise with experts of procedures and technical issues, and the number of cases where such expertise was taken into consideration by panels and what was the performance of PRB experts in general.

Regularity of hearings

During the three-month period, December 2016 - February 2017, PRB has held 105 hearings, in which 119 complaints were reviewed. Of these complaints, 58 were dealt with in open hearings and with the access of third parties, whereas 61 complaints were addressed in closed hearings, only in the composition of the panel and the PRB expert.

In rare cases PRB hearings were monitored by the media, including Koha Ditore and Kallxo.com portal. In one case, journalists were not allowed to film inside the courtroom, initially with the reasoning that there isn't enough space in the room, and that media presence is not permitted in PRB .

Lack of hearing rules

We have observed in the monitoring of PRB hearings a lack of detailed rules on representation of parties and the structuring of plenary hearings. In some cases, parties were allowed to talk endlessly and submit their claims, while in other hearings parties were interrupted and not given the right to submit all claims. It is understandable that parties cannot be allowed to speak in unreasonable periods; however, the PRB shall adopt basic rules that apply equally to all parties in procedure. This because if parties are not given equal time for presentation, it implies discrimination on the ability to convince panel members.

Perhaps the PRB, depending on the contract value, small, medium, or large, can allocate parties 5, 10 or 15 minutes for presentation of claims before the panel members. Parties then may have one or two minutes to comment or challenge the opening remarks of the opposing party. This would allow the PRB and the panel to hear all parties equally.

Moreover, in some cases, parties have offended, insulted and threatened each other, or members of the panel, and no measures, be it penalties or exemptions from hearings, were taken. For example, in the hearing of January 22, 2017, on the complaint of consortium Krasniqi LLC, Beni TSC and Shafenberg GMBH, against the University Clinical Center of Kosovo, the hearing was tense, with insults and threats by the parties. Despite this, the PRB panel failed to take any measures against parties which failed to keep order or comply with the principles of mutual respect. Also, in the hearing of January 27, 2017, on the complaint of companies Çlirimi, Pevlaku and Alko-Impex against the Ministry of Health, the representative of Alko-Impex, Valon Ademi, at all times interrupted other parties in their presentations. No measures were taken against him. Another problematic hearing was the one in the case of the complaint of company El-Bau against the Municipality of Viti, where the Procurement Director, Fadil Abazi, insulted and interrupted the representative of El-Bau Company during his presentation of the claims.

The panel chair must ensure that parties respect the institution as well as other parties, and in cases of violations, measures are taken against them. Measures against parties may include exclusion from the hearing, fines or other appropriate measures to discipline them. This should be done by adopting the practices of regular courts, arbitrations or other institutions similar to the PRB.

Costs of proceedings

The PRB budget for 2016 was 329,883.00 euros. The majority of this budget goes for wages and salaries, namely 210,428.00 euros, for 23 employees. The remaining 114,355.00 euros are spent for goods and services. All PRB expenditures are covered by budget allocation by the Assembly. The PRB is a body which currently generates revenues, but could do more to fully comply with the Procurement Law and the Rules of Procedure. This should be done by requesting the losing parties in disputes to cover the costs of proceedings.

Currently, the only source of revenues for the PRB is penalties for institutions which fail to comply with the decisions of this institution and deposits of complaints for businesses, complaints are then rejected as unfounded. However, in most cases complaints of economic operators are declared inadmissible or partially grounded, and in both cases, they have the right to take back their deposits. Moreover, it has been noted that although businesses fail to have their claims confirmed, the PRB will still return their deposits. However, parties must pay for their complaints, similarly to regular courts, arbitration or administrative institutions. The party that loses the dispute must bear the costs of the proceedings.

A good way to avoid unfounded complaints, which are only intended to use the PRB as a last resort to influence the procurement activity, is to apply penalties and withdraw deposits. Thus for example, if the company cannot verify any of its allegations, or fails to justify key complaint claims, the deposit should not be returned. If the company manages to confirm a partial number of its claims, the deposit shall be returned in part. In cases where the complaint is made on clearly unsustainable grounds, and does not correspond to the truth in any form, then in accordance with the law, economic operators should be sanctioned. Partial confiscation of the deposit is currently not envisaged in a PRB law or regulation, although it is the best practice applied in some countries to avoid unnecessary burdens of the institution.

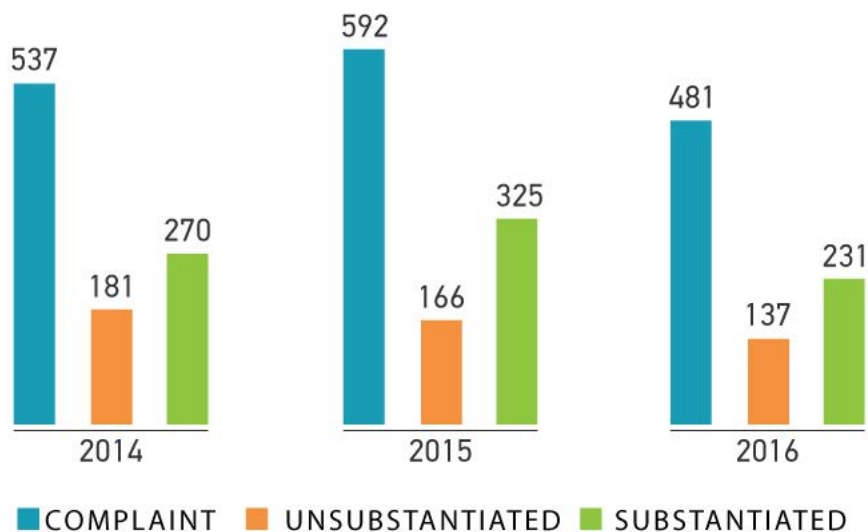
The PRB response to the findings of the report stated that the PRB has no legal mandate to sanction economic operators who submit unfounded claims. Rather, the PRB stated that their mandate is to address all complaints until the final stage. However, the Public Procurement Law stipulates the right of this institution to sanction operators who submit unfounded claims with a fine of 5,000.00 euros .

The importance of sanctioning clearly unfounded complaints is because it relieves the workload of PRB and avoids complaints that have no serious claims, but are rather only submitted to postpone the procurement procedures. Moreover, in many cases companies submit as many claims as possible only to make their complaint more convincing, which in turn overburdens the institution, including the Rapporteur of the case, the panel and review experts. For this reason, companies should be held responsible for any claim individually.

PRB as the second instance of complaints

With the amendments to Public Procurement Law in 2016, PRB is not the only appeal instance. The law provides that in the initial stage, complaints are addressed to the contracting authority itself, or the institution which managed the procurement activity. This led contracting authorities to have an additional opportunity to improve their potential errors.

COMPLAINTS FILED IN THE LAST THREE YEARS



The table below shows the number of complaints that businesses filed with the PRB in the last three years. Amendments to the Public Procurement Law have led to institutions addressing complaints before they are filed to the PRB. This meant that the number of complaints decreased significantly from previous years.

Although exact number of complaints in the first instance in all contracting authorities is not known, PRB has received 111 complaints less than the previous year. This represents a steady progress in relation to the workload of the PRB, since the fewer complaints the board of this institution handles the more time and attention it can afford to issues that are really important. Many decisions of PRB are not only important for the relevant case, but also for the precedent they create. For example, if the institution states in the decision that a procurement activity cannot be canceled after the completion of the bid evaluation process, then this should become a standard that will be applied to all future cases. This means that the PRB decisions can affect future behavior of operators and contracting authorities, as a result of past decisions.

Consistency of decisions

The large number of complaints affect review panels in having less time to review them in detail. In many cases, addressing complaints requires professional research and crosschecking of expertise, as complaining parties often have serious complaints against expertise. If in the course of a year PRB manages 592 complaints, which it did in 2015, and a panel member participates in the review of 400 complaints and this is divided by 220 working days in a calendar year, it means that a panel member can invest slightly longer than half a day in reviewing a procurement case.

This large volume of cases, together with the lack of consistency of decisions from case to case, increase the of risk a superficial examination of cases instead of a thorough research and review. So far, although it is allowed with the law and the Rules of Procedure of PRB, this institution has not introduced a practice of unifying decision standards. Blerim Dina, head of this institution, said that it is not possible as every case is different from the other, in terms of facts and circumstances, and therefore cannot be treated as unified. However, the introduction of standards in certain matters is the best legal practice, through which institutions administering justice establish some basic rules that can be used as precedents in future adjudications. This could be the case with the adjudication of unusually low prices in the sector of insurances of buildings, hotel services contracts and specific issues in cleaning service contracts.

⁵ This number excludes the official holidays, weekends and legal annual leave.

⁶ Blerim Dina, personal interview (03/24/2017).

Creating certain decision-making standards, where a number of key facts are largely the same or similar, would help this institution to establish a uniform decision-making. This way the PRB will increase the confidence of economic operators and the general public. In some cases, operators cite previous decisions of the PRB in their complaints, in cases which they consider to be precedents, but with no apparent impact.

It seems that the drafting of decisions also influences the lack of unified cases. In most cases, decisions only include the case facts and information about the procurement activity. They also explain the expertise and position of parties, if they accept the expertise or not, but the essence of the problem and the reasons that have led to the review panel to issue a decision are not adequately explained. For example, in the hearing of March 15, 2017, addressing the case *Pastro-Kosova, Professional-Alarm vs. Energy Corporation of Kosovo*, 45/17, the hearing failed to specifically mention the inadequate equipment which, according to KEK, did not meet the required conditions. Information is presented in abstract terms and with general references without specifying which product and with what number. Here, although catalogues of the manufacturer were accessible in Albanian and Serbian language, panel members and the expert did not raise this issue.

Lack of witnesses present in hearings

Although summoning witnesses and persons who can provide information relevant to this institution is possible, during the reporting period, the PRB has not invited any person in any of the cases. In isolated cases, it was observed that PRB requests written information from institutions or persons as needed, however often the information from operators and those from contracting authorities on the same issue are diametrically different. For example, in the case *Reforma v. Kosovo Police*, 429/16, the parties didn't agree if the company which provided equipment for vehicle servicing had a manufacturer's reference for selling parts or not. This issue could have been verified if the PRB would have invited the manufacturer's representative in Kosovo to testify regarding the required reference. Moreover, the testimony would provide an opportunity to the members of the panel and the parties to ask questions and clarify the circumstances. In this case, the company which submitted a written manufacturer authorization was declared irresponsible, after the Police stated that they received clarifications from the company's representative in Kosovo that they no longer support this company in its application in the retendering procedure.

The unilateral withdrawal of the authorization should have been one of the issues to be clarified in the proceedings, as it raised the project costs for about 600,000.00 euros. In such cases, it is in the public interest for PRB to take all necessary measures to confirm if the actions of the company authorizing the economic operator to bid, and the actions of the Kosovo Police were in accordance with the Law.

It is important that in cases where disputes are diametrically opposed, or where even material evidences such as references or other documents are opposed, to ensure testimonies and statements of representatives of institutions or private persons who have information. According to the Head of PRB, Blerim Dina, his institution prefers a communication in written letters with witnesses and third parties . This could be one of the working methods, but only applied in cases where witnesses' participation is not possible. Before taking decisions the practice of hearing witnesses should be applied in all cases where witnesses can be secured. In the absence of witnesses in hearings, the panel would use the questions addressed by the case rapporteur or the expert, which may be incomplete or fail to address the substance of the complaint.

Transparency

The most serious shortcoming identified in the work of the PRB is transparency. This was noted in numerous dimensions of the work of this institution, which together give a low index of public accountability. For example, about 60% of the PRB hearings in the reporting period were behind closed doors. All meetings, in addition to hearing sessions, were held without the presence of the public and the parties to the dispute. As such, only sections of hearings where parties present their claims are made public, and they are then closed in phases of reviewing the facts, evidence and decision-making. Moreover, in addition to decisions, minutes of such meetings, or members' discussions, evidence deliberated in hearings and the eventual voting of members are not published. The number of votes cast, in favor or against, is also not made public.

In relation to issues highlighted in the report as lacking transparency, PRB argues that they are in compliance with the applicable law and regulations, which provide that hearings should not be public. The exception is meetings where the main points of the compliant and the defense of the contracting authority are presented. On the other hand, other documents are accessible to requests from parties, in accordance with the Law on Access to Public Documents.

⁷ Blerim Dina, personal interview (03/24/2017).

Moreover, PRB explains that “each trial panel in courts of Kosovo has closed its hearings for deliberation and voting, and does not make public the vote of the panel, but only the final decision. This is what we also do, as the review panel” . With regard to the meetings of this institution without the presence of the public, the PRB believes that “in terms of closed meetings, PRB as an independent administrative review body, and the LPP governs the confidentiality and disclosure of information to the public or unauthorized persons. In all cases (meetings) discussing internal matters for the course of the institution, analysis and review of the case, and hearings for deliberation and voting are closed to parties, and as we have stated this is provided in the law. However, the examination of facts and evidence is done in open hearings, where each party presents its facts and those facts are in a way only examined on the spot by members of the review panel.”

The annual report, which is published on the PRB website, excludes the PRB budget. It is worth noting that it is the first time the finances of this institution are not published in the annual work report. In the past years, since this institution was established, its finances were public, at least in general terms. Regarding the lack of financial data in the annual report, PRB explained that “The annual financial report of the PRB is a standard form of the Assembly of the Republic of Kosovo, and since it is drafted on standard protected forms of the Assembly, it was not possible to put it in the annual report, but was only attached as an Annex to the annual report.”

In terms of transparency, PRB often argues that this is done to avoid jeopardizing the integrity of the decision-making process and reduce any pressure from PRB members. This is a somewhat valid argument, as PRB members may be subject to investigation, threats from businesses or even contracting authorities. However, this does not sufficiently justify the complete lack of transparency in this institution. The public has a right to know how decisions are taken regarding complaints on public procurement. This is a minimal accountability requirement of PRB members elected by the Assembly. As such, they must be held accountable by the Kosovo public as well as the electing institution, for the decisions they have taken. This would also serve the monitoring of possible conflicts of interest, potential bias of PRB members, and other important issues to the integrity of this institution. Adding to the lack of transparency in decision-making, the fact that the reasoning pertaining to decisions taken is unsubstantiated and marginal, it can be concluded that PRB does not have the appropriate standard of transparency.

8 PRB comments dated April 20, 2017 in relation to the findings of the report.

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Transparency of hearings

PRB hearings are only partially open. The media, NGOs and the public have access only to the presentation of the claims of parties, whereas other phases of the review and the decision-making are closed. It also lacks documents such as minutes or decisions of meetings, other than the final decision taken there is no information on the discussions, arguments provided, objections or other relevant information. Video and audio recordings of open hearings are not allowed by PRB members. In the observations of D+, PRB claims that “all hearings are public, and the media may participate”. Also, in terms of decision-making, except for the vote which is not public, the final decision is public to all media. If someone from the media is interested in the entire review procedure of a complaint, from the beginning until the final decision, upon a request for access to public documents, they can get all data. There were numerous cases of NGOs or mediums interested in obtaining more information than those published, and this can be checked in the PRB archive (see the case of KDI in the PRB archive, where the NGO in question filed a request for access to official documents and received all complaints, expertise reports and decisions of the PRB for the case CA – Ministry of Infrastructure)”. .

119 complaints of economic operators in a total of 105 hearing sessions were reviewed in the reporting period. Of these complaints, 61 were in closed hearings, without the presence of the parties which have filed the complaint.

The reason for holding hearings without the presence of parties and the public, according to the Head of the PRB is a recommendation that PRB received from SIGMA/OECD project in Kosovo, funded by the European Union Office. According to them, it increases the efficiency of this institution . However, despite this reasoning, a bigger issue for PRB is its institutional integrity and the lack of transparency can only worsen the trust of the public, institutions and the private sector.

10 PRB comments dated April 20, 2017 in relation to the findings of the report.

11 Blerim Dina, personal interview (03/24/2017).

Publication of complaints

According to the Rules of Procedure, the PRB is obliged to publish the complaints of economic operators. This is largely applied and a large number of complaints are accessible through the website. Despite the fact that these documents are public as per the Rules of Procedure, in many cases they are incomplete and disorganized. Although the website has a section dedicated specifically to complaints, not all complaints filed by economic operators are found therein.

The section of complaints of 2016 is also located in the section of Decisions, and complaints are not sorted by date, operator or contracting authority. Although these complaints are public, they are incomplete and not user friendly, thus cannot be found easily. Titles, parties and basic details of the contract cannot be searched and filtered in the PRB website.

Examples of incomplete publication of complaints of economic operators are as follows: *IPKO v. Ministry of Public Administration* 448/16. *Çlirimi v. Ministry of Health*, 443/16. *Alta, Elcom v. Energy Corporation of Kosovo*, 459/16. These complaints as well as the vast majority of other complaints were not adequately scanned and are not completely accessible. In these three cases, one cannot understand anything regarding the content of the complaints. Moreover, the complaint of consortium Alta and Elcom has only published the first page of the form, with general data on the complaint and furthermore the scanning is so poor that reading it is almost impossible.

Publication of decisions

Publication of decisions is also a legal requirement and PRB is obliged to do this within five days after the decision is taken by the review panel. Other than the parties, the PRB must also make the decision public in its official website. Another problem identified is non-publication of decisions within the legal deadline. This is a continuous violation in PRB, as most decisions are published late, some of them even in excessive delays. Delays in the publication of decisions vary from one to 67 days, as was the case with the publication of the decision: *Interadria, InterAdria v. Kosovo Police*, 331/16.

Delays in publication of decisions is an obstacle to contracting authorities as it delays the implementation of procurement projects, which could affect the ability of institutions to serve citizens. According to the Head of PRB, these delays occur as a result of the backlog in Administration, which drafts the decisions.¹²

However, this does not seem entirely reasonable as some decisions are published in the same day they were taken. From the perspective of risk, delays in the publication of decisions can be considered as a means to exert pressure over the company or institution. Although it was not stated as reason in this case, the PRB should nevertheless close all loopholes which may raise doubts or increase the risk of corruption.

Non-publication of expert reports

In the majority of cases, the expertise determines the fate of the appeal. A number of economic operators go a step beyond and withdraw their complaints if the expertise does not support their claims. However, despite its high significance, this document is not published on the PRB's website. Only the recommendation of the expert is published, if he/she recommends upholding or rejecting the request. The reasons which have led the expert to this recommendation are not made public, and the expert's analysis is not fully included in the panel's decision. This usually includes a short section summarizing the discussion by experts, published in the decision. Regarding the non-publication of the expert's report, PRB argues that "to economize the procedure, it may happen that not all findings of the expert's review are included in some PRB decisions, but you can see and verify many cases where all other findings of the expert's review were included in the decision."¹³

However, in cases where monitors need to assess the impartiality of the expert or the quality of the expertise, which in most cases affects the decision of the PRB, it is impossible with accessible documents provided. Therefore, the publication of expert reports would help to significantly increase the transparency of this institution.

In the reporting period, where 119 complaints were reviewed, only eight cases did not hire experts. This is because the complaints were rejected as inadmissible for failing to fulfill the legal requirements for review. Of 111 cases where complaints were reviewed by hired experts, in only 31 cases the panel's decision was contrary to the recommendation of the expert. This represents a high efficiency of the expertise, with over 70% influence in decisions. Thus, the expertise is largely the main justification of review panels when addressing complaints.

¹² Blerim Dina, personal interview (24.03.2017).

¹³ PRB comments dated April 20, 2017 in relation to the findings of the report.

Publication of hearing announcements

In principle, all PRB hearings held with the parties are open to the public for monitoring. Despite PRB's obligation to publish hearing announcements on its website, in the reporting period seven hearings have been identified to have been held without a hearing announcement published. PRB stated that this comes down to the information technology staff in the PRB. However, the responsibility for not publishing announcements for hearings lies within the institution, and it cannot be targeted to an individual.

The notifications on the conduct of PRB meetings are published on its webpage between one week and one day prior to the session. In most cases, sessions are notified two days before their conduct. During our monitoring, we noted cases where sessions were published only one day in advance. Such a short notice does not provide parties with sufficient time to prepare for their presentation in front of the panel and confrontation with the expert and opposing party. Also, the notification of the hearing is deficient, as it merely entails basic data, such as the names of parties and appeals number. Our monitoring revealed a number of cases where due to the large number of cases and appeals presented to PRB, some institutions were unable to understand the reason or object the appeal session published. This seriously restricts their ability to defend the allegations of institutions they represent. In relation to this matter, PRB stated that "other data does not have to be published. All parties, including the contracting authorities, appealing EO and those recommended for contract award, will have sufficient information to get ready for the session based on the name and case number." Moreover, PRB said in its comments to this report that it stands ready to increase the amount of information published in the session notifications, by adding the name of the procurement activity to them.

In certain cases the conduct of PRB hearing sessions failed. Various factors including failure to send party notifications, failure of the parties to appear for the hearing, and absence of experts or panel members, affected this. None of the sessions delayed indefinitely were notified in the webpage. However, such sessions were held even without webpage notifications, only through the invitation of relevant parties.

PRB management should ensure that hearing sessions are organized in a way that provides all parties sufficient time to prepare their defense and testimonies. In addition, the management should ensure that session notifications include sessions that are delayed or not conducted in the initially envisaged time.

PRB webpage

The first and most important means of public communication for the PRB is this institution's webpage. For this reason, a functional and well-structured webpage, containing information necessary for the parties and public is essential for the institution's transparency.

PRB has a functional webpage with a large amount of information for all interested parties. Despite its existence, there are problems with accessing information, mostly due to technical difficulties that hinder user access. A considerable number of cases were identified where PRB webpage was out of function, thus making access to information impossible. In order to test the system, we have compared PRB's webpage with other pages from the government server, and it was concluded that in all these cases problems were limited to the PRB webpage only. Other pages were accessible and functioned without problems. In relation to its webpage, PRB states that "PRB wishes to clarify that a new, redesigned and reorganized webpage is currently being procured by the CPA. The procedures were initiated in the second half of 2016 and are still ongoing. For this reason, currently there may be obstacles, [...], including inappropriate webpage organization. We are dealing with an old technology and design, but we expect this to be remedied soon."

Another problem identified in the webpage is its lack of organization, labeling and posting of documents. For instance, it is common practice for appeals to be posted among decisions. Also, searching for documents older than the current year is impossible for a number of categories, including court decisions, conclusions and notifications. Notifications on the conduct of hearing sessions are deleted to make way for new ones. Archives of such notifications should remain accessible.

Nonetheless, the PRB webpage in general meets minimum transparency standards and provides a considerable amount of information to assist parties interested in its work.

14 PRB comments of 20 April 2017 in relation to the findings of the monitoring report.

15 PRB comments of 20 April 2017 in relation to the findings of the monitoring report.

Expertise

Review of each case that meets requirements to be reviewed by PRB includes at least one expertise that is supposed to assist the review panel in its decision-making. Despite the fact that the review panel reserves the right to decide contrary to the expert recommendation, in most cases such expertise comprises the backbone of the review panel's decision.

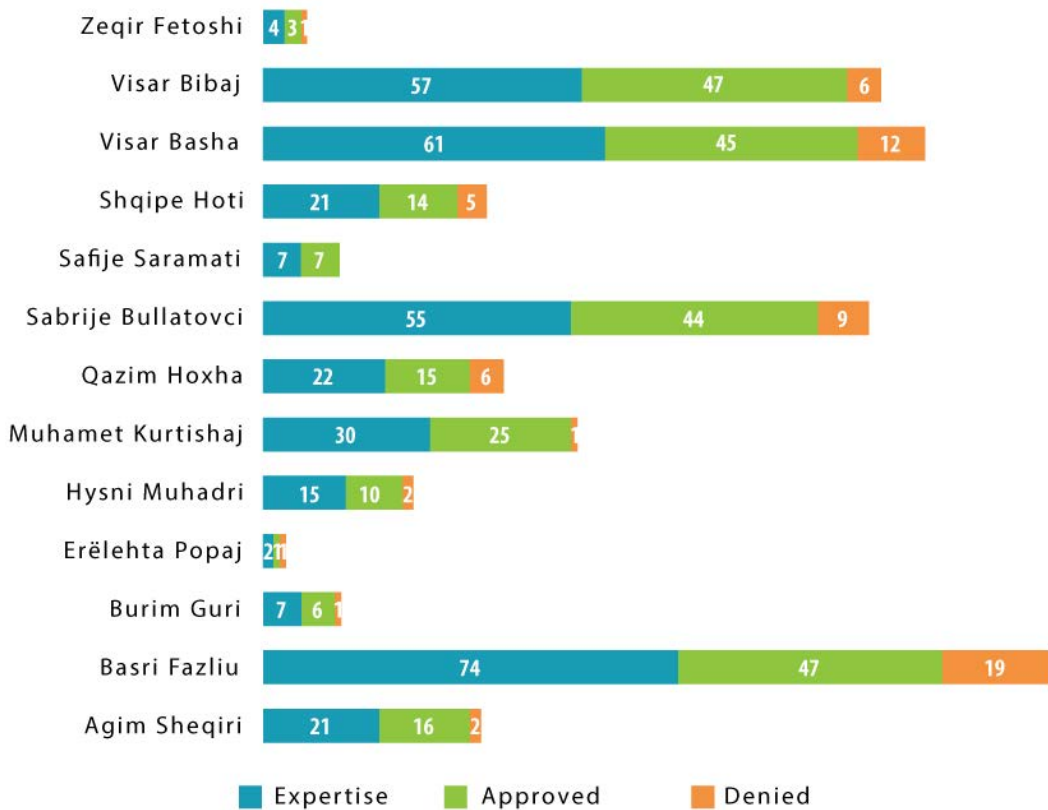
Review experts

For this purpose, PRB engages two types of experts, which assist in making well-informed decisions. The first type includes review experts, which are full-time PRB employees. Currently there are three such experts: Visar Basha, Visar Bibaj, and Basri Fazliu. Due to the small number of experts and large number of cases, other PRB officials are also used to assist the panels with expertise. In 2016, the following individuals were also engaged in the process: Erleta Popaj, Safije Bullatovci, Burim Guri and Zeqir Fetoshi.

The mandate to select the expert for a given case is reserved for the PRB secretariat chair. There are no written rules that define the form and order of case allocation, which would avoid linking a review expert with an economic operator or contracting authority. This threatens to result in the appointment of the same persons as an expert dealing with matters of a given institution, and the development of personal relations which may affect decision-making. In assessing PRB risks, this may well comprise one of the most sensitive matters. These discretionary competencies of the secretariat chair grant him/her extensive powers, and should be addressed by the PRB Board. The best way to allocate cases, in the given circumstances, would be on a rotational basis. This way, it would also be proportional, and parties would be defined on a random-basis, which would minimize the accommodation of experts with certain contracting authorities or economic operators. Review experts are general experts that are not renowned for specific knowledge of certain spheres. On the contrary, review experts are connoisseurs of procedural aspects and researchers invited to respond to businesses' appeals and allegations. Therefore, in appointing PRB review experts, there are no reasons not to utilize the rotational system.

In relation to this remark, the following response was received: "According to Article 19, Paragraph 7 of the PRB Rules of Procedure No. 02/2015, if it is ascertained that the complaint belongs to the jurisdiction of PRB it is the competency of the PRB Chair to appoint a review expert. In addition, the matter of appointing a case expert is conducted in line with Article 19, Paragraph 11 of said Regulation. The entire procedure is performed in line with the PRB Rules of Procedure, although the volume of work that individuals face is vast given the small number of internal PRB review experts available."

REVIEW EXPERTS



External (technical) experts

In reviewing appeals from economic operators and contracting authorities, especially pertaining to criteria used by the latter in terms of technical requirements, professional expertise is required. For this purpose, PRB has established a group of technical experts from various spheres to assist review panels in professional issues related to technical specifications. For this purpose, PRB has established a group of technical experts from various spheres to assist review panels in professional issues related to technical specifications.

The PRB list contains 47 experts hired through an open competition published on 26 September 2016. The engagement of each technical expert is asserted by the PRB Chair and not by the head of the PRB Secretariat, as is the case with review experts.

PRB technical experts come from the following fields of expertise:

- Economics – 3 Experts
- Construction and Architecture – 13 Experts
- Engineering – 8 Experts
- Machinery – 3 Experts
- Healthcare/Pharmaceuticals - 4 Experts
- Computer Science – 2 Experts
- Mathematics/Chemistry – 5 Experts
- Geodesy – 1 Expert
- Veterinary/Agriculture – 2 Experts
- Mining/Metallurgy – 1 Expert
- Other

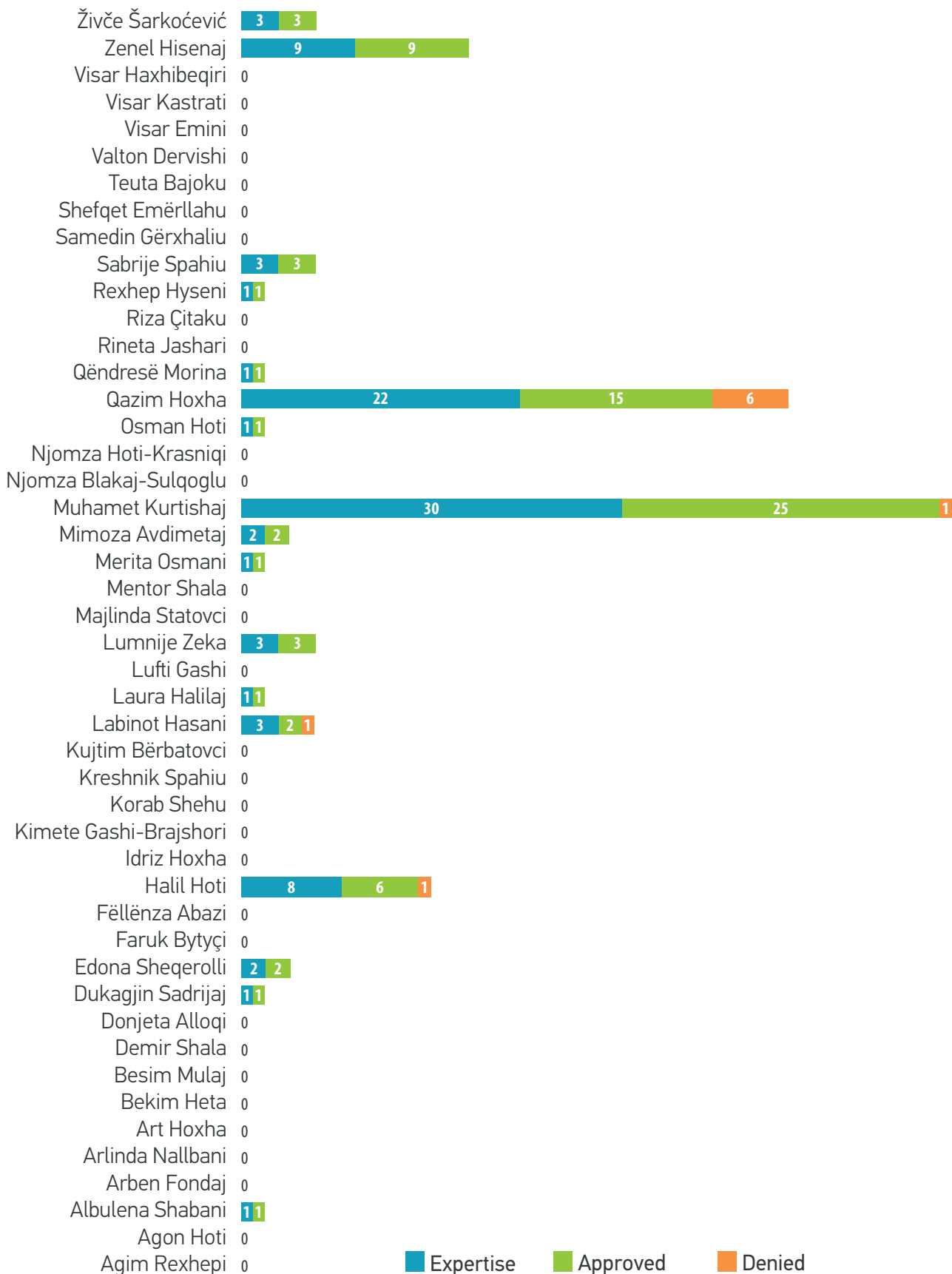
In this sense, a problem faced currently is finding experts for professional fields for which PRB does not have any hired experts. This list, in this form, may be updated once per year and does not provide a comprehensive list that meets all PRB needs. In fact, a large number of experts hired by PRB were never engaged. The rest had a limited number of engagements.

In 2016, 30 of 47 hired experts were not engaged by PRB at all. Eight external experts were hired once, while experts hired most are: Muhamet Kurtishaj (30 cases), Qazim Hoxha (22 cases) and Zenel Hisenaj (9 cases).

The distribution of cases reveals that PRB has not used any mechanism to assess performance or allocate cases to each expert, which would have the chance to prove their skills. Viewed from the corruption prevention perspective, relations between experts and panel members may be considered one of the dimensions of growing risks. The PRB Board should ensure that such experts are subject to performance evaluation, that expertise is required based on their respective knowledge levels and that the distribution of work among external experts is more just.

Data review reveals that a number of technical experts were mandated to act as review experts by PRB. These two expert roles differ substantially and such amalgamation of roles is prohibited by PRB regulations in force at the time when the expertise was performed.

TECHNICAL EXPERTS



■ Expertise
 ■ Approved
 ■ Denied

Economic operators

In 2016, many economic operators have utilized their right to an appeal against contracting authority decisions more than once. For the purposes of this report, data from five companies with the largest number of appeals are presented, along with an assessment of the efficiency of such appeals and their treatment by PRB.

Decisions in favor of the EO	Decisions against EO	Total appeals
6	4	10

PBC SHPK

No.	CA	Expert	Expertise in favor of EO	Decision in favor of EO
1	Municipality of Gjakova	Basri Fazliu	No	No
2	Municipality of Prizren	Safije Saramati dhe Mimoza Avdimetaj	No	No
3	Municipality of Prishtina	Visar Bibaj dhe Zenel Hisenaj	Yes	Yes
4	Municipality of Gjakova	Basri Fazliu dhe Zenel Hisenaj	No	No
5	Student's Center	Shqipe Hoti dhe Zenel Hisenaj	No	No
6	Bus Station – Prishtina	Basri Fazliu dhe Zenel Hisenaj	Yes	Yes
7	Ministry of Infrastructure	Visar Bibaj dhe Driton Thaçi	Yes	Yes
8	Municipality of Prishtina	Visar Bibaj dhe Sami Shatri	Yes	Yes
9	University of Prishtina "Hasan Prishtina"	Visar Bibaj	Yes	Yes
10	Municipality of Ferizaj	Basri Fazliu dhe Labinot Hasanaj	Yes	Yes

Decisions in favor of the EO	Decisions against EO	Total appeals
1	3	4

Ndërtimi SHPK

Nr.	CA	Expert	Expertise in favor of EO	Decision in favor of EO
1	Ministry of Infrastructure	Visar Bibaj	Yes	No
2	Municipality of Obiliq	Sabrije Bullatovci	Yes	No
3	Municipality of Peja	Visar Bibaj	Yes	Yes
4	Ministry of Infrastructure	Visar Bibaj	Yes	No

Decisions in favor of the EO	Decisions against EO	Total appeals
2	1	3

Security Code

Nr.	CA	Expert	Expertise in favor of EO	Decision in favor of EO
1	Kosovo Clinical and University Center	Qazim Hoxha	Yes	Yes
2	Kosovo Privatization Agency	Qazim Hoxha	Yes	Yes
3	Kosovo Clinical and University Center	Qazim Hoxha	Yes	No

Decisions in favor of the EO	Decisions against EO	Total appeals
2	1	3

Laguna SHPK

Nr.	CA	Expert	Expertise in favor of EO	Decision in favor of EO
1	Energy Regulatory Office	Sabrije Bullatovci	Yes	Yes
2	Central Public Procurement Agency	Muhamet Kurtishaj	Yes	Yes
3	Kosovo Hospital and Clinical/University Service	Qazim Hoxha	No	No

Decisions in favor of the EO	Decisions against EO	Decisions against EO
2	1	3

Botek SHPK

Nr.	CA	Expert	Expertise in favor of EO	Decision in favor of EO
1	Ministry of Infrastructure	Visar Bibaj	Yes	Yes
2	University of Prishtina "Hasan Prishtina"	-	-	No
3	Ministry of Infrastructure	Visar Bibaj	Yes	Yes

Contracting authorities

The number of appeals by contracting authority is one of the indicators of the manner in which their procurement activities are managed. Despite the fact that the large number of appeals cannot be considered the only mean of performance measurement, it does remain a good indicator on the way in which a given institution has conducted its procurement activities. In this sense, there are a number of institutions that are characteristic for the large number of appeals. Five contracting authorities with the largest number of appeals in 2016 are:

1. Kosovo Energy Corporation (44)
2. Ministry of Infrastructure (25)
3. Municipality of Prishtina (22)
4. Municipality of Peja (18)
5. Kosovo Police (18)

On the other hand, if procurement activities are compared to the number of appeals and percentage of disputed tenders, five contracting authorities with the highest percentage of appeals are:

Institution	No. of Tenders	No. of appeals	Tender/Appeal percentage
Central Procurement Agency	11	9	81%
Memorial Complex Management Agency	11	4	36%
Kosovo Public Safety Academy	16	5	31%
Ministry of Infrastructure	81	25	30%
Energy Regulatory Office	4	1	25%

Violations noted among contracting authorities

Due to PRB's mandate, all appeals submitted to this institution pertain to tender criteria, bid assessment or black-listing requests for operators that have committed severe violations of the law. However, a number of violations are more common and have drawn our attention during this reporting period.

- 1. Abnormally low prices** In most appeals reviewed by PRB, among other, abnormally low prices with which operators apply for a number of units required in the tender dossier are noted as grounds for appeal. However, PRB and the Public Procurement Law are yet to give a clear response or formula for calculating what would be considered an abnormally low price. There are no doubts that for the most part, contracting authorities themselves are to blame for tolerating the phenomenon of abnormally low prices, and not demanding complete implementation of contracts. In cases when operators refuse such implementation, contracts are terminated. However, in the absence of contracting authority responsibility, at least by some of them, PRB should develop its own methodology for the treatment of abnormally low prices, and define the extent of discretion left to authorities to decide on the matter. To date, such abnormally low prices were noted among facility cleaning contracts, hotelier services and facility and vehicle insurance contracts. In absence of a concrete methodology on the matter, PRB has taken a number of decisions, by reviewing facts of the matter individually and deciding based on the merits of each case, with no tendency to establish a unique standard or consistency in decision-making.
- 2. Retraction of authorizations or subcontractors** In some cases, it was noted that reasons that lead to the elimination from bidding procedures included the phase when contracting authorities have checked whether operators in reality enjoy authorizations for bidding. This served companies that issued authorizations, which saw their interest, and if the next operator in line to be awarded the contract was subject to their authorization – they retracted the authorization. This occurred in at least three occasions during the reporting period. Such were the cases *Reforma v. Kosovo Police*, 429/16. PBC v. Ministry of Public Administration dhe *El-Bau v. Municipality of Vitia*, 26/17.
- 3. Request for additional information** Based on the Public Procurement Law, prior to deciding on the merits of a bid contracting authorities are entitled to request additional clarifications from the operator

Such requests do not imply the alteration of bidding conditions or amendments of the bid contents. However, clarifications may be required on the fulfillment of a given condition, in the event that the bid assessment committee is uncertain or requires additional information before recommending the contract award. This issue was left to the discretion of the contracting authorities, in order for them to decide whether to request additional information or just eliminate certain bids.

4. Annulment of procurement activities due to lack of funds.

A number of contracting authorities have annulled procurement procedures, even after the procurement procedures were announced, or were in different phases, including after the conclusion of the bid assessment process, reasoning that they do not have sufficient available funds. In many cases this implies that contracting authorities do this to avoid awarding the company that bid the best conditions and was likely to be awarded the contract. PRB failed to establish a strict rule to address such matters and make it impossible for contracting authorities to use this remedy as means to eliminate companies they do not prefer to award contracts to. In some cases, this practice was not allowed and authorities were required to cancel annulations decisions and proceed to contract award, such as the case of *MedicalGroup, EuroLab v. Kosovo Hospital and Clinical/University Service*, 450-51/16. In other cases this was tolerated, *Ekoinvest v. Kosovo Energu Corporation*, 481/16. *Blendi v. Municipality of Prishtina*, 447/16. In cases where tenders were cancelled after bids were open and fund availability statements made, PRB failed to provide consistency in decision-making. This could be due to the structure of facts that render these cases completely different natures. However, PRB should establish such rules to provide contracting authorities with the reasons for which procurement activities may be cancelled.

Most problematic institutions

Institutions differed to a great extent in terms of the number of appeals on procurement activities, caused by differences in budgets and procurement activities. During the quarter of PRB monitoring, the largest number of appeals and cases was noted in the following institutions:

1. Kosovo Energy Corporation.

During the three month period, this institution had 20 cases under review. Of these, 14 cases were decided in its favor, while in six other cases decisions went in favor of the appealing economic operators. Review Panels for KEK engaged Blerim Dina in 11 cases, Goran Milenkovic in 6, Ekrem Salihu in 8, Nuhi Paçarizi in 15, Tefik Sylejmani in 14. On the other hand, experts hired in these cases were Muhamet Kurtishaj in two cases, Visar Bibaj in two, Burim Guri in two, Sabrije Bullatovci in two, Albulena Shabani in two, Halil Hoti in two, Zivce Sarkocecic in one, Halil Hoti in one and Basri Fazliu in one case. Economic Operators' appeals against KEK were complex, and ranged from criteria adoption, partial treatment of bids and hindrance of access to official documents to the illegal annulment of procurement activities. In two cases, PRB raised suspicions of corruption and company favoring. In the case of "Supply with hydrated lime", *Diari v. Kosovo Energy Corporation*, 404/16. , PRB requested an investigation of the case, since despite PRB's request to verify the Operator's ISO Certificate, KEK didn't perform this. Another case that led to accusations for the institution was *FörderanlagenMagdeburg, Ekoinvest v. Korsovo Energy Corporation*, 29/17, in which the review expert claimed that KEK berated him, thus withdrawing from the expertise recommendation. In assessing all cases reviewed by PRB, it is visible that KEK is the institution with the largest number of appeals and consequently offences. Due to the specific nature of KEK tenders, this institution often manages to hide behind specific requirements of the industry. However, it is certain that KEK tenders, due to their specific nature and values, should be treated specifically and based on professional technical expertise. This because knowledge of the Public Procurement Law alone, without sufficient knowledge of the reasons and needs of specific tenders, can't lead to proper merit-based decisions. On the other hand, operator dissatisfaction with the institution remains high.

2. Kosovo Clinical and University Center

During this quarter, appeals of six economic operators against decisions of this institution were reviewed. All KCUC sessions were open. Of six operator appeals, KCUC won three and lost the other three.

A significant difference is noted between expertise and panel decisions, because experts had recommended the upholding of all six appeals, while the review panel decided against their recommendations in three occasions. Appeals rejected against expert recommendations are “Cleaning of KCUC facilities” *Krasniqi, Beni, Shfenberg v. Krasniqi, Beni, Shfenberg v. Kosovo Clinical University Center*, 436/16. The expertise of Qazim Hoxha was ignored by the panel and the decision went in favor of the Contracting Authority. Another case in which recommendations of experts Safije Saramati and Fëllënza Abazi were not supported pertained to the tender on “Supply with reaction agents for closed system Cobas E 411 analyzer”. Although formally presented as open, this session was not presented in advance in the webpage *Koslabor v. Koslabor v. Kosovo Clinical University Center*, 08/17. The other case in which the panel decided against the expertise finding was *LediMed v. Koslabor v. Kosovo Clinical University Center*, 430/16. The expertise for appeals against KCUC were provided by Visar Bibaj (in 4 cases), Safije Saramati (1 case), Qazim Hoxha (1 case), Fëllënza Abazi (1 case), Osman Hoti (2 cases), and Shefqet Emërllahu (1 case). The panels which adjudicated the cases included the following members: Blerim Dina 6 cases, Goran Milenkovic 5, Nuhi Paçarizi 6, Tefik Sylejmani 5, and Ekrem Salihu 4.

3. **Kosovo Police.** During the reporting period, in total 7 appeals and 3 blacklisting requests were presented against Kosovo Police procurement activities. Of these cases, five were reviewed in open sessions, while the other five were deliberated behind closed doors, including two requests for economic operator blacklisting. Five decisions were in favor of the economic operators, including two blacklisting requests, while the other five cases were deliberated in favor of the Kosovo Police, including one blacklisting request against “*5 Vëllezërit Mulaku on black list*”. Experts hired to work on Kosovo Police cases included: Visar Basha, Basri Fazliu in 3 cases, Visar Bibaj, Muhamet Kurtishaj, Shqipe Hoti and Qazim Hoxha. Panel members that adjudicated Kosovo Police cases are: Blerim Dina 4 cases, Nuhi Paçarizi 5, Goran Milenkovic 4, Tefik Sylejmani 5, and Ekrem Salihu 4.
4. **Municipality of Prishtina.** This institution was subject to seven appeals, of which five were addressed in open sessions, while another two were reviewed behind closed doors. Six cases were decided in favor of the Municipality of Prishtina, and only one was won by economic operator PBC. The panel rejected expert recommendations in two cases and decided in favor of the economic operators. The first case was *Sendertimi v. Municipality Of Prishtina*, 363/16. in which the expert, Sabrije Bullatovci, recommended to uphold the economic operator’s request, but this was not taken into account.

Another case was the appeal of the economic operator, and the expert recommendation by Burim Guri to approve it, *Sigkos v. Municipality of Prishtinë*, 470/16. In the cases of Municipality of Prishtina expertise was provided by Sabrije Bullatovci 2, Visar Bibaj 1, Zenel Hisenaj 1, Basri Fazliu 1, Burim Guri 1, Visar Basha 1 and Muhamet Kurtishaj 1.

- 5. Central Procurement Agency** During the reporting period, PRB received appeals against CPA decisions from four economic operators. Of these, one pertains to “Supply with fuel”, in which the economic operator (HIB Petrol) addressed PRB and was invited to an open hearing session conducted on 16/02/2017. Although the expertise of Sabrije Bullatovci was in favor of CPA, the review panel decided in favor of the economic operator. The three other appeals were related to “Cleaning services – Framework Contract” divided in lots 1, 5, 7, 8, 9 and 10. Similarly to the previous case, expertise was in favor of the Contracting Authority, however the decision was taken in favor of the economic operators, in this case: Oni Impex, Uni Project and MSS Mobile Sanitary Service. In general, all sessions conducted to review appeals against CPA were open. In the first case the issue was reviewed by three members of the review panel: Blerim Dina, Nuhi Paqarizi and Goran Milenkovic, while in the second case all five members of the panel were present.
- 6. Ministry of Public Administration** Four different economic operators appealed against decisions taken by this authority on various procurement activities. In relation to “Services – telephony, mobile, internet, internet GPRS, optic cable, cable TV services”, IPKO approached PRB and presented its allegations against the decision to award a tender without procedure to Kosovo Telecom. Although the expert assigned to the case, Qazim Hoxha, recommended the approval of the appeal, the review panel decided against it. Similarly, economic operator “Uni Project” expressed its dissatisfaction with MPA’s decision related to “Technical maintenance of governmental buildings”. The appeal of this economic operator was upheld by the review panel, contrary to findings of the expertise provided by Visar Basha, which was in favor of the Contracting Authority. In two other sessions held in absence of the parties, one on “Supply of furniture” (“Graniti” Company appeal), and another on “Review of elevators in governmental buildings and in the Palace of Justice” (“Stewart Inspect Kosova” appeal), decisions were in favor of the economic operators, as recommended by the review experts.

Black List

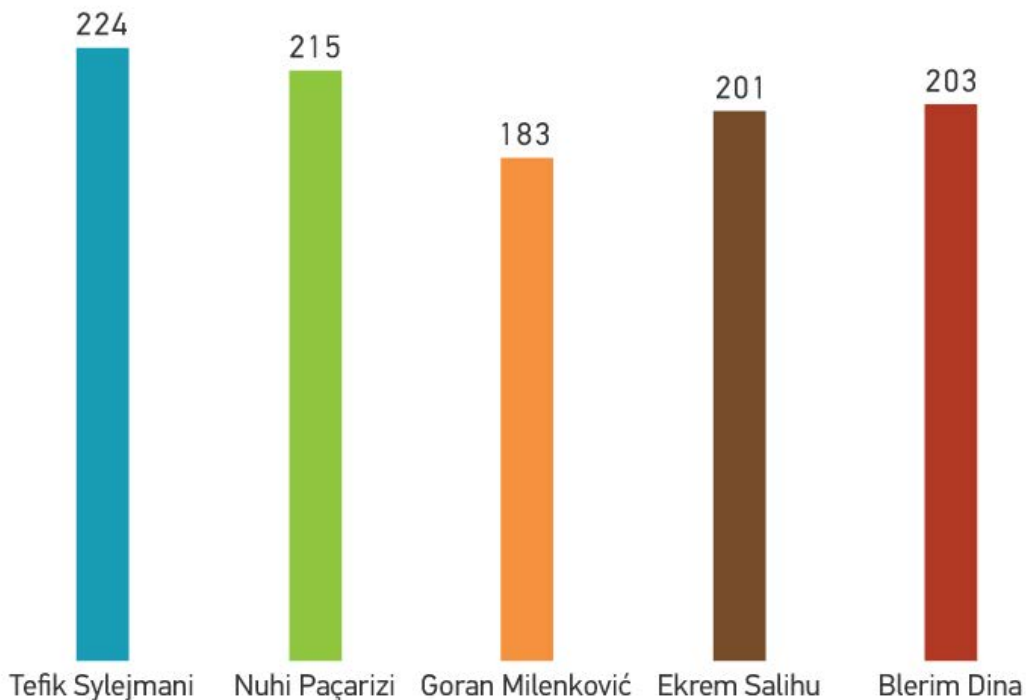
During this reporting period, there were four requests for blacklisting various companies. Of these, three were made by the Kosovo Police, and one by KEK. Only one such request, presented by the Kosovo Police, was upheld – to blacklist the company 5 Vëllezërit Mulaku. The other requests were not approved in absence of convincing reasons and evidence on their merit. Of these, the most disturbing was the request of Kosovo Police, which accused “Kapital X” company of providing false documents, but failed to present any evidence on falsification of documents, claiming merely that the figures provided do not match those of the Kosovo Tax Administration. This allegation was not upheld by KTA, which stated that there was a mistake in their system that led to the mismatch.

CONTRACTING AUTHORITY	ECONOMIC OPERATOR	PANEL	DECISION
KOSOVO POLICE	Kapital X	Ekrem Salihu, Blerim Dina, Tefik Sylejmani	Rejected
	5 Vllezërit Mulaku	Ekrem Salihu, Nuhi Paçarizi, Goran Milenković	Approved
	Euro Construction	Ekrem Salihu, Nuhi Paçarizi, Goran Milenković	Rejected
KEK	Solid Company	Blerim Dina, Nuhi Paçarizi, Ekrem Salihu	Rejected

PRB members' level of engagement

As an independent institution, PRB comprises five members elected by the Assembly of Kosovo, which serve as 'arbiters' on appeals made by economic operators. However, no manner of just division of cases between these members is provided in the Law or Rules of Procedure. Therefore, the establishment of relations between members of this institution and operators or authorities is inevitable. Also, division of labor among members is not appropriate, with Tefik Sylejmani being allocated the biggest number of cases, and Goran Milenkovic the least throughout 2016.

PRB MEMBER ENGAGEMENT



Recommendations:

1. PRB Board should hold open public hearings in which appeals of economic operators are reviewed, regardless whether they are held in the presence or absence of parties. This will increase transparency and public trust in the institution's decisions.
2. PRB should draft instructions or regulations on rules of party representation in PRB sessions. Such a regulation would define rules that ensure equality in treatment of parties during hearing sessions. This document, among others, should define the time available for parties to present their allegations, applicable restrictions, as well as occasions in which parties may be removed from the room or sanctioned for breaking established rules.
3. PRB should appoint review experts through a software or in line with a rule that would ensure impartiality and equal division of cases. Also, a system for measuring performance and consistency of expert recommendations is required. This would assist PRB in taking measures in accordance with the success shown by experts, and take necessary measures in case of poor performance.
4. Decisions taken by the panel, in line with legal requirements, should be published no later than five days after they are executed. Any delay in their publication raises doubts and questions on why some decisions are published without delay, while others take tens of days or even months to be published.
5. PRB should ensure a more equal engagement of external technical experts from the expert list, to ensure that such engagement is not conducted under terms that would raise suspicions of favoring certain individuals. Also, performance of such experts should be measured, in order to justify their presence in the expert list. Moreover, the expert list should be open throughout the year for all persons that meet PRB's terms, conditions and needs. It would be appropriate for PRB to allow itself to identify and hire external experts that are not part of its list but have valuable experience and expertise for the institution.
6. A decision consistency measurement should be set in order to ensure that PRB decides in an impartial and merit-based manner for all parties and in all cases. This would provide the PRB Board with an opportunity to decide based on certain appeals treatment standards, increase the trustworthiness of the institution and make decisions on similar appeals more expectable.

7. PRB should publish all expertise, including those of technical nature, alongside the reasoning of experts on recommendations offered. This would enable the public to better understand the appeals and decisions taken by PRB.
8. PRB should undertake measures against operators that submit claims that are not based on Public Procurement Law, and rather aim at delaying procedures.
9. PRB should establish a testing system to analyze reoccurring disagreements in a unified manner. For instance, in cases of abnormally low or high prices, PRB should establish a standard test to review to which extent abnormally high or abnormally low prices would be tolerated. This would also assist the contracting authorities in their bid assessment processes.
10. PRB should invite witnesses to testify on cases under review whenever necessary, especially when contradicting allegations or statements are made for a given person. It would also be desirable for witnesses to face questions by the panel and parties in dispute.
11. PRB should publish votes of panel members related to decisions on all cases. Similar to the Constitutional Court Resolutions, members that do not agree with the majority decision should be provided the opportunity to offer their opinion on the grounds for their disapproval of the majority decision.
12. PRB should publish complete notifications on sessions, at least five calendar days in advance. In addition, it should publish complete appeals on its webpage and reorganize the webpage to facilitate case searches based on various filters, based on best practices of Kosovo institutions (e.g. Constitutional Court).

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Democracy Plus

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