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MONITORING REPORT ON PROCUREMENT ACTIVITIES

**ROUNDABOUT IN LAKRISHTË
ROUNDABOUT IN ARBËRI**



This report was prepared by the Monitoring Group of Non-Governmental Organizations from Prishtina region.

Civil Society Organizations:
ÇOHU, INPO, FOL, Open Data Kosovo, Instituti Columbus

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ROUNDABOUT IN LAKRISHTË ROUNDABOUT IN ARBËRI

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INTRODUCTION

This report is prepared by the participants of non-governmental organizations in the Region of Prishtina, that gained knowledge and practical skills through the workshops for applying lessons on monitoring public procurement, organized by CiviKos Platform through USAID supported Project “Transparent, Effective and Accountable Municipalities - TEAM”.

METHODOLOGY

Monitoring Group has been using a combined methodology for monitoring of the procurement activity. Initially the Monitoring Group selected the tender for monitoring based on automatic selection indicators such as: “*the winning bid price higher than the estimated contract value*” and “*the importance of the project to the community*”. During the monitoring phase a quality analysis of the relevant documents containing primary official data on the procurement activity was conducted.

Participants of the series of workshops were:

NAME AND SURNAME	ORGANIZATION
Leonida Molliqaj	ÇOHU
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Shemsi Jashari	Demokracia fillon ketu
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Monitoring Group acquired all these documents through requests for access to public documents and the public procurement electronic platform.

The Monitoring Group met five times at the CIVIKOS Platform offices on the following dates:

Day I - 29.01.2019

Day II - 14.03.2019

Day III - 25.03.2019

Day IV - 10.04.2019

Day V - 11.04.2019

The goals of these workshops are:

- Engaging local NGOs in monitoring municipal level tenders;
- Training NGOs to analyse tender findings and identify the potential abuse of public procurement supported directly by the employed facilitators, and;
- Enable NGOs to prepare and publish reports on their findings during the monitoring of municipal level public procurement.

TENDER BACKGROUND

On May 11th, 2018 Prishtina Municipality opened the tender for the widening of the road connecting 'Lakrishtë' neighbourhood with 'Arbëria'. This project constitutes the connection road between the Roundabout in Lakrishtë that connects with the regional road Prishtinë - Mitrovicë and the Roundabout in Arbëria that connects "Tirana" and "Ahmet Krasniqi" roads. The "Roundabout Lakrishtë - Roundabout Arbëri"¹ tender was announced in a restricted procedure. The type of contract was work and envisaged only the execution of the work. The estimated contract value is 1,438,180 Euro.

Law on Public Procurement, Article 33, and paragraph 2 entitles the contracting authorities to use restricted procedures to conduct a procurement activity.

This procedure is divided in two stages:

In the first stage² only the administrative aspects and technical and professional criteria are evaluated, in the second stage only the price is evaluated. This procurement procedure is used very little by the Kosovo institutions. According to the data of the Public Procurement Regulatory Commission, in 2017 the value of contracts signed pursuant to the restricted procedure was only 3 million and 443 thousand Euro. In total 459 million Euro have been spent through tenders by the Kosovo Institutions.³

This procurement procedure enables the solution of all technical, financial and administrative issues in the first phase thus hindering the infinite delaying of the procurement process. A few days after the tender announcement, the Contracting Authority had modified the tender dossier criteria. The part stating that the economic operator shall prove the successful completion of road construction in the value of 1,000,000.00 Euro

¹The procurement number of this tender is 616-18-3326-5-1-2

² After receiving the request to participate, the contracting authority shall invite in writing, to present the tender or proposal, the candidates that meet the selection criteria set in the contract notice and the tender dossier in compliance with Article 51 of this law. The candidates that are not selected are thus eliminated from further participation.

³See: 2017 PPRC Report – <https://krpp.rks-gov.net/krpp/PageFiles/File/2018/06/sh-Raporti%20vjetor%202017%20Komplet.pdf>

during the last three years and that the lowest value of the project won should be 300,000.00 Euro, was amended and the 300,000.00 Euro condition was removed.

Another amendment was related to the proof required from the economic operators for the same work completed successfully. Initially it was required only proof for completed projects in the value of 1 million Euro, without specifying if a reference or contract was required as proof. With the amendments, Prishtina Municipality asked the businesses to submit as evidence contracts in the field of new road construction in the minimal value of 1,000,000.00 Euro in the last 3 (three) years (starting from the contract notice publication date).

Out of the 12 applying economic operators only 6 had pre-qualified in the first phase. Out of the six pre-qualified operators, only 5 Economic Operators had submitted financial bids.

1. RSM- Company - total bid value	1,149,998.87 Euro
2. Rukolli - Company - total bid value	1,211,004.81 Euro
3. Gashi-ING&KAG Asphalt - bid	1,315,148.28 Euro
4. Fami-Co - total bid value	1,322,549.40 Euro
5. Drini-Company - total bid value	1,396,696.30 Euro

During the assessment phase of the financial bids, the Evaluation Commission had required explanations from three economic operators based on the rules for abnormally low prices. After receiving the explanations, the Commission had recommended for the contract RSM Company, whose bid was 1 million and 149 thousand and 998 Euro (1,149,998.87). The explanations provided by the RSM Company on the positions suspected on abnormally low prices had been convincing and sufficient to the Evaluation Commission⁴.

The head of Prishtina Municipality Procurement Department, Zekë Bardhaj, didn't approve the Assessment Commission report.

Bardhaj grounded his rejection, September 18th, 2018, of the Evaluation Commission report in his competencies deriving from Article 40.11 and 40.13 of the Rules and Operating Guidelines for Public Procurement.

In the decision rejecting the report, Bardhaj had found that the Evaluation Commission recommendation violated the legal provisions on Public Procurement, namely it didn't comply with Article 61.6 of the LPP.

The Evaluation Commission has examined the submitted tenders based on the Rules for Abnormally Low Tenders and demanded explanations pertaining to some positions resulting as such. Explanations were required from tenderers "RSM", "R & Rukolli", "Gashi-Ing & Kag Asphalt Company" and "Famis Co".

⁴The Evaluation commission was comprised of Afërdita Hasimi (chairperson), Qazim Bajrami (member) and Irfete Zejneli (member).

The Evaluation Commission demanded from the bidder explanations on nine positions.

Bardhaj found that the Commission's recommendation didn't contain any professional justification on the acceptability of the explanations of the tenderer recommended for contract award.

Initially, on September 10th, 2018, Bardhaj had asked the Commission for explanations on the positions suspected for abnormally low prices.

The head of the Prishtina Municipality Procurement Department in his comments on the "Evaluation Report" states that in previous cases the commission members had rejected tenders with abnormally low prices, by treating as unacceptable explanations of similar nature as in this specific case.

"According to the commission the price of 0.80 Euro for category III and IV digging is acceptable, for which position the referring price published by the PPRC for transportation up to 10 km is 2.87 Euro, which means that in this case it should be about 4.00 Euro, whereas the price given in the Bill of Quantity pre-calculation is 2.50 Euro", Bardhaj states in his document.

He explains that in the atmospheric sewerage it was accepted at 1.00 Euro. For the same position the price in the Bill of Quantity pre-calculation is 1.5 Euro and in the reference price list the price is 3.43 Euro for third category and 4.26 Euro for the fourth category. He stated further that the position of 1.3 at the faecal sewerage was accepted at 1.00 Euro, in the Bill of Quantity pre-calculation the price is 3.5 Euro, and the reference price is 3.83-4.36 Euros.

According to the justification of the head of Prishtina Municipality Procurement Department the tenderer has presented bids and fictional agreements for other positions as well and didn't provide any evidence that he has ever been supplied with the prices presented for the same. He stated that two more companies had offered abnormally low prices and they were asked for additional explanations. He states that "R & Rukolli" and "Gashi Ing & KAG Asphalt Company" didn't provide the necessary explanations for only one required position. According to him, positions that lack sufficient explanations from "R & Rukolli" are of minor value in relation to the total value and they also don't constitute any important quantity when it was decided to treat this tender as responsible.

PRBs CONTRADITORY DECISION

The contracting authority, through the Standard Letter to Eliminated Tenderer of 24.09.2018 notified the Economic Operator “RSM Company”⁵ on the elimination from the tendering procedure on the ground that the bid presented by this company was considered as abnormally low.

Prishtina Municipality wrote that after the request for explanations on the positions of the presented bid “RSM Company” provided only statements and no details. The CA, always based on the Standard Letter for Eliminated Tenderer, provided the EO the opportunity to file an appeal with the CA.

On 24.09.2018⁶ the EO, “RSM Company” used its legal right to file a complaint with the Contracting Authority requesting the reassessment of the decision of the CA⁷.

On 29.09.2018 the municipality rejected as unsustainable the “RSM Company” claims and rejected the reassessment request.

The specified company, pursuant to its legal rights filed a complaint with the Procurement Review Body against the decision of Prishtina Municipality. The complaint was filed on 05.10.2018.

In its complaint “RSM Company” claimed that Prishtina Municipality didn’t treat it equally with the other operators and aims to award the contract to a more expensive operator, namely “R & Rukolli”. This company claimed that it met all the criteria of the Tender Dossier.

The Company claims that the Responsible Procurement Officer should ask additional explanations and validate the agreements between “RSM Company” and L.L.C. Mineral and Bau Market and not qualify them as “Fictional Agreements”.

The EO also claims that also in the past it had implemented contracts with Prishtina Municipality, by providing much lower prices on some positions than those offered in the bid for this tender.

Based on this complaint, the EO proposes to the PRB to return the case for reevaluation. However, the reviewing expert, in his report, had recommended to the Review Panel to leave in power the decision of Prishtina Municipality to recommend company “R & Rukolli” for contract award.

“Based on the foregoing explanations, the review expert proposes to the review panel to approve as partially grounded the complaint of the Economic Operator and the de-

⁵RSM Company SH.P.K. Business number is: 70658046. The owner of the company is Agim Kola with a founding capital of 250 thousand Euro. The access link to this company through the KBRA is: <https://arbk.rks-gov.net/page.aspx?id=1,38,1|6282>

⁶In the decision of the CA, of 28.09.2018, the paragraph on the rejection of the request for reassessment of “RSM Company” contains the date of 27.09.2018 which doesn’t match the date specified in the justification when the appeal of “RSM Company” is mentioned.

⁷The appeal of EO “RSM Company” with the CA has not been published in the E-procurement.

cision for contract award to remain in power”.

However, the PRBs Review Panel comprised of Blerim Dina-President, Mr. Nuhi Paçrizi-Referent and Mr. Goran Milenkovic-Member, had decided differently from the expert’s recommendation.

In its decision (PSH.no.544/18, 08.11.2018, Prishtinë) the Review Panel had decided to partially approve the complaint of Economic Operator “RSM Company” and to annul the the contract award notice of the CA “Prishtina Municipality”.The PRB had demanded the case to be returned for reevaluation.

In the justification of the decision the review panel found that Prishtina Municipality had not implemented Article 3 of the Rules for Abnormally Low Prices pursuant to the table provided in this Regulation.

“The Review Panel explains that Prishtina Municipality did not implement Article 3 of the Rules for Abnormally Low Prices pursuant to the table provided in this Regulation, therefore during the reassessment the contracting authority is obliged to observe the procedures as provided by the regulation for abnormally low tender and if the three conditions of this table are not met the CA shall continue with the procedures of Article 4 of the Regulation for Abnormally Low Prices”⁸.

So, the PRB in its decision states that abnormally low prices may be considered only if the three conditions in the table are met, while ignoring the following paragraph of the same Article.

In addition, the reassessment panel explains that the EO in the main hearing session managed to prove that the bids were not fictions as they were deemed by Prishtina Municipality, because the same has provided evidence, namely original offers with the respective companies (Mineral LLC and Bau Market).

The PRB Panel in its justification concludes that the CA upon reassessing should take into consideration the evidences specified above and the handling, assessment, comparison and examination of bids should be done in compliance with Articles 7 and 59 of the LPP.

In relation to the plaintiff’s claim that the CA has rendered a different decision on a similar matter, the Panel finds that “The contracting authority cannot implement double standards on similar review objects or in similar cases by discriminating or favouring a certain economic operator in violation to Article 7 of the LPP”⁹.

The Evaluation Panel finds that the Contracting Authority in this activity did not implement Articles 1, 6, 7, 59 and 60 of the LPP and Article 3 of the Rules for Abnormally Low Tenders, thus obliging the CA to implement the foregoing provisions and perform the examination, assessment and comparison of the bids based on the requirements stipulated in the tender dossier and the contract notice.

⁸ Reassessment panel, Decision PSH.no.544/18, on 08.11.2018, page 6.

⁹ Ibid, page 7.

ABNORMALLY LOW PRICE

Law on Public Procurement, namely Article 61 describes abnormally low tenders. This Article provides that the Contracting Authority may demand explanations for tenders that are or seem abnormally low.

Pursuant to the Law on Procurement it is in the discretion of the Contracting Authority to approve as acceptable the explanations of an EO that has submitted a Tender that is or seems “abnormally low”.

Item 4 of Article 61 stipulates: “After taking into consideration the information and explanations provided by the tenderer pursuant to paragraph 1 of this Article, if the contracting authority concludes that the tender is abnormally low, the contracting authority shall reject the tender.”

Based on this Article of the law, the PPRC has prepared a regulation for the detailed regulation of defining an abnormally low price.

The regulation states that for the abnormally low tenders to exist, based on the **Regulations for Abnormally Low Tenders approved by the PPRC**, three conditions shall be met:

1. The offered price is over **30% lower than the average price of responsible tenders**;
2. The offered price is over **10% lower than the price or costs of the second lowest tender**;
3. At least **3 (three) tenders** have been submitted.

The Monitoring Group has calculated the operators’ bids to see if these three conditions are met for the bid of operator RSM to be considered “an abnormally low price tender”.

The first two conditions are not met. The price offered by ‘RSM Company’ is not 30% lower than the average price of tenders¹⁰. In addition, the difference between the bids of ‘RSM Company’ and EO ‘R&Rukolli’ is not over 10%. Only the third condition has been met, because more than 3 bids have been submitted.

However, Prishtina Municipality has done the same calculation for unit prices. For all unit prices that have met the conditions, Prishtina Municipality has asked for explanations by all Economic Operators that have submitted their bids.

It should be noted that Prishtina Municipality, based on the Regulation is entitled to ask for additional explanations even if the three conditions for calculating abnormally low prices are not met.

¹⁰ The average price of tenders is 1,279,079

Article 3, item 2 of this Regulation stipulates: “When tenders seem abnormally low for other reasons to those stipulated under paragraph 3.1 of these rules, the contracting authorities may assess the credibility of such tenders and consequently demand explanations pursuant to the following paragraphs and Article 61 of the LPP”.

Article 4 of the PPRC rule makes it clear that abnormally low prices may also be considered those related to only some positions of the bid and not the total bid as stipulated under Article 3 item 1.

Paragraph 2 of Article 4 is of essential importance and it literally states: “In case a tender **(or a tender position)** seems to be abnormally low, the Contracting Authority shall demand in writing from the economic operator, submitting the tender seeming abnormally low, a written statement that includes a detailed specification of the relevant parts of the tender and which includes an explanation for the low price by using the standard form adopted by the PPRC “*Standard form for abnormally low tenders*”.

This point was not taken into consideration by the PRB, which in its suggestions for Prishtina Municipality for the reassessment phase stated that the three conditions provided by this regulation should be met.

For every tender that is suspicious of abnormally low price, namely for the suspicious positions, the contracting authority shall demand from the economic operator to make them more credible, namely to prove the opposite in relation to the suspicions for the abnormally low price.

The PRBs decision ignores the fact that certain positions of the bid had abnormally low prices pursuant to the assessment of the Procurement Responsible Officer.

The PRB has recommended to Prishtina Municipality to test the bid of “RSM Company” only based on the three conditions provided under Article 3, item 1 while ignoring paragraph 2 of Article 4

Upon assessing whether a tender is abnormally low or not the Contracting Authority shall take into consideration the following issues:

1. The economy of the production process, provided services and/or construction methods;
2. Whatever technical solutions that have been provided or selected;
3. Whatever especially favourable conditions that are available to the tenderer for supplying products, ensuring services, executing projects and works and/or exercising construction activities that are being procured, and/or
4. Originality of supplies, services, work or proposed works.

Pursuant to Article 4, paragraph 6, after receiving the written explanation from the Economic Operator pertaining to abnormally low prices the Contracting Authority may approve them and continue with the other procedures or may reject him.

“If the explanation is insufficient, reject the tender and in compliance with Article 61 of the LPP notify the PPRC by using the standard form approved by the PPRC within two days from the day the decision is signed”¹¹.

The report “(IN)JUSTICE in procurement” published in 2017 by “Democracy Plus” it is stated that abnormally low prices have been the main assessment point of the PRB. However, according to D+, the PRB or the Law on Public Procurement have still now provided an answer or formula to clearly calculate what is considered an abnormally low price.

“There is no doubt that most of the blame for tolerating the **abnormally low prices** phenomenon falls with the Contracting Authorities themselves as they don’t demand the complete implementation of contracts. In cases when the operators would reject this, then the contract could be terminated. However, in the absence of the liability of the Contracting Authorities, or some of them, the PRB should develop its methodology, on how it shall handle abnormally low prices and how much discretion should be given to the authorities to decide this”.¹²

According to this report in lack of a concrete methodology on this matter the PRB has rendered decisions by assessing the facts of each case individually and by deciding on the merits of each case, while not aiming to create a unique and standard and consistency in decision making.

PPRC’s INCONSEQUENTIAL PRICE LIST

The Public Procurement Regulation Commission web page contains a manual with the reference prices per unit. The Chief Procurement Officer in the decision rejecting the recommendation of the Assessment Commission quoted this PPRC manual several times with the aim of proving the abnormally low price.

However, PPRC states that these manuals are not mandatory, meaning that Contracting Authorities are not obliged to refer to these prices, but they rather serve as an assisting tool for the Contracting Authorities. In the PPRC response it is stated that the analysis for the rational use of public money cannot be completed by using only one element be it the referring price list and/or the allocated budget.

According to a response of the PPRC the published manuals with the referring prices are manuals on which procurement officers may lean on during the assessment of tenders; other officers of Contracting Authorities may lean on upon calculating the envisaged values; and Economic Operators may lean on upon preparing bids.

¹¹ Rules for abnormally low prices, Article 4, paragraph 6, sub-paragraph 2.

¹² <http://www.dplus-ks.org/wp-content/themes/dplus/assets/img/OSHP-Final-Democracy-Plus-Final.pdf>

REASSESSMENT OF BIDS

After the decision of the PRB Prishtina Municipality annulled the contract award notice and created a new commission for reassessing the bids. The new commission comprised of: Merita Mehovci, Besim Qelaj, Kaltrina Dalipi, has recommended 'RSM Company' for contract award, in the value of 1,149,998.87 Euro.

This Commission admitted that in some positions abnormally low prices were offered, for which all the necessary explanations were received from all the competing businesses. However, they stated that the abnormally low price is connected to the total bid price and not positions.

“PPRC - Has drafted the list of unit prices for construction work but we don't have a comparison procedure as we have abnormally low price tenders in relation to the total price of the bid. For positions with bids that are considered to have abnormally low prices, the preliminary commission demanded explanations from companies “RSM Company”, ‘Rukolli-Company’, ‘Gashi-Ing’, ‘Famis-Co’ and they have provided those explanations.”

The commission has given an additional explanation based on the conducted examinations but also the stances of the PRB.

“Considering the recommendations of the PRB in decision number 544/18 of 08.11.2018 we have concluded that based on the LPP the regulation for abnormally low tenders none of the offers cannot be considered as abnormally low because none of the conditions provided under Article 3, item 3.1 of the regulation for abnormally low tenders is met.”

However, the Responsible Procurement Officer has written that the following conclusions are unacceptable:

The PRBs conclusion and the conclusion of Commission that the Contracting Authority cannot demand explanations for abnormally low prices for positions but only for the total price is illegal, because the explanations were demanded in full compliance with Article 4.2 of the regulations for abnormally low tenders;

The PRBs conclusions that the tenderer “RSM” has provided sufficient explanations for abnormally low prices is partially acceptable, because it doesn't include the explanations for all the required positions.

Although the Head of Procurement Department did not agree with the decisions of the PRB and the assessment commission, he has approved the commission's recommendation to award the contract to “RSM” company.

Despite the preliminary remarks the Head of the Procurement Department, based on the fact that the PRB has found as acceptable the majority of the explanations for abnormally low prices and that the tender has the lowest price which is in compliance with the principle of the economization, the recommendation is approved”.¹³

¹³ Conclusion of the Responsible Procurement Officer in the Tender Assessment Report prepared on 15.11.2018.

“R&RUKOLLI” COMPLAINT

On 03.12.2018 economic operator ‘R&Rukolli’ filed a request for reassessment pertaining to the procurement activity “Roundabout Lakrishtë - Roundabout Arbëri”, with the claims for the violation of Article 59 of the Law on Public Procurement in relation to the examination and assessment of tenders for abnormally low prices.

However, in the decision of the Contracting Authority, namely Head of the Procurement Department of Prishtina Municipality, it is stated that this claim is found as not grounded since during the tender assessment the requirements of the Tender Dossier Sheet (TDS) have been observed and all tenders have been treated equally.

Also, the claim pertaining to the abnormally low price pursuant to the Contracting Authority is partially grounded and this was noticed in time by the contracting authority and the head of procurement and pursuant to Article 61 of the LPP and the Rules for Abnormally low tenders they sought explanations. In the justification of Prishtina Municipality it is stated that the PRB it has decided to accept the explanations of the EO, despite that the Municipality continues to insist that a part of the prices for unit are abnormally low.

For this the Head of Procurement Department has stated that he acted in compliance with the legal provisions and when he demanded explanations and didn't accept as sufficient the explanations provided by the Economic Operator “RSM”.

CONTRACT SIGNATURE

Prishtina Municipality has signed the contract with “RSM Company” on 17 December 2018. The final deadline for starting the work is 90 working days. On 27 December 2018 Prishtina Municipality had decided to appoint Jeton Zherka as the contract manager, whereas Imer Mavriqi, Amire Krasniqi, Krenar Xhaferi and Hazir Krasniqi were appointed as supervisors for the realization of the contract. Pursuant to this decision, the contract manager is obliged to draft a contract management plan by using the Standard Form adopted by the PPRC, which must be signed by both parties prior to the initiation of implementing the contract. The contract manager, pursuant to the aforementioned decision manages the contract until the complete receiving of the required articles or services namely until the conclusion of the contract.

CONCLUSIONS AND RECOMMENDATIONS

- The Procurement Review Body is not taking into consideration the abnormally low prices on tender positions, but is only reviewing the total bids. Such a misinterpretation of the Rules for Abnormally Low Prices, hinders the Contracting Authorities to prevent cheating bids.
- In this specific case, the Monitoring Group found that that Procurement Review Body (PRB) did not give the right to Prishtina Municipality, namely the head of the procurement to reject a tender that had abnormally low prices in several positions.
- The PRB obliged Prishtina Municipality to reassess the RSM Company bid by instructing it to take under consideration only one part of Article 3 of the Regulation on Abnormally Low Prices and to ignore the following Article 4 the provides for abnormally low prices for positions and not in the total bid.
- This instruction of the PRB hinders Prishtina Municipality to reject the bid from RSM operator because two of the three conditions for abnormally low prices are not met. However, Zekë Bardhaj had concluded that an abnormally low price had been received in several positions of the bid.
- The PRB decision to not take into consideration at all the abnormally low prices in bid positions make the Regulation of the Procurement Regulation Commission worthless. One such decision requires that the same rule, since it has been interpreted that way by the PRB, should be amended for the purpose of its clarification: If the Contracting Authority is entitled to reject a bid that has abnormally low prices in several of its positions.

The monitoring group recommends that:

- PPRC amends the 'Rules for Abnormally Low Prices', since its amending has become mandatory after the decision of the PRB.
- The new rule should specify exactly whether the abnormally low price may be considered for positions and not only the total price.
- Upon the amendment of the rule, not all prices of positions should serve as the ground to annul a bid, because it is necessary to set a limit based on the weight of the position/unit in the total price. So, a tender worth a million cannot be annulled due to a position that has an abnormally low price but the latter is only 0.5% of the total bid (5,000 Euro).

