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List of Acronyms and Abbreviations

Bulletin	The Bulletin of the Republic Commission
CA/CAs	Contracting authority/Contracting authorities
CCY	The Constitutional Court of Yugoslavia
FRY	The Federal Republic of Yugoslavia
NBS	The National Bank of Serbia
PoR	Protection of rights
PoR procedure	Procedure for the protection of rights
PoR request	Request for the protection of rights
PP	Public procurement
PP contract	Public procurement contract
PPO	Public Procurement Office
PP procedure	Public procurement procedure
PP subject	Subject of public procurement
PPL	The Public Procurement Law
PP Portal	The Public Procurement Portal
RCPRPPP/ the Republic Commission	The Republic Commission for the Protection of Rights in Public Procurement Procedures
RfC	Request for clarification

SaM	Serbia and Montenegro, The State Union of
SCE	The Serbian Chamber of Engineers
SFRY	The Socialist Federative Republic of Yugoslavia
TS	Technical specifications



Typical Cases of Ineffective Challenging of Contracting Authorities' Actions in Public Procurement Procedures, Presented as Examples from Case Law of the Republic Commission for the Protection of Rights in Public Procurement Procedures

This Bulletin of the Republic Commission for the Protection of Rights in Public Procurement Procedures (hereinafter: the Republic Commission) presents the legal views adopted by the Republic Commission in decisions made in such PoR procedures in which it has concluded that claimants, in their PoR requests, had unfoundedly indicated certain actions of CAs to be violations of provisions of the Public Procurement Law ("Official Gazette of the RS" Nos. 124/2012, 14/2015 and 68/2015; hereinafter: the PPL). This edition is the continuation of the Republic Commission's work that began with publishing Case Law Bulletin No. 6-7/2017, presenting most common irregularities in actions taken by CAs that had resulted in annulment of relevant PP procedures.

A lawful and also efficient and cost-effective managing of PP procedures cannot be understood without insight into PoR procedures related to disputed PP procedures. The previous Bulletin presented examples from select decisions of the Republic Commission, aimed at helping CAs avoid past mistakes that are

indicators of poor application of the PPL, and thus conduct PP procedures in a more efficient and cost-effective manner, all with a view to respond timely and pursuant to legal views in relevant decisions. To that same extent, this edition focuses on other participant in PP procedure, stakeholders and bidders, and aims at presenting to them those PoR procedures wherein, in similar situations, the assertions stated in requests were found to be groundless and as such, merely prolonged the procurement procedure but failed to attain the purpose for which the PPL set forth the PoR request was as a mechanism for legal protection.

A public procurement procedure is specific in that it requires from CAs a lawful and dedicated management, and from interested parties a proactive approach in their communication with CAs, pursuant to the PPL, which will enable them to prepare bids in line with requirements defined in tender documents, as specially prepared by CAs for each PP procedure individually. However, proactive approach and lawful communication in a PP procedure are a prerequisite for the concerned actors to protect their rights by using the valid initial act to initiate a PoR procedure for the protection of rights in line with PPL, in the way and for the purpose for which was established the right to file PoR request. This proceeding is not, nor should it be, the goal of its own — and this is an observation reiterated over many years, due to the practice-generated perception that certain PoR requests and/or appeals to CAs' conclusions had actually been filed solely to obstruct the challenged PP procedures.

As the reflection of CA's objective need that the subject of PP contract is expected to meet, technical specifications, which is a mandatory integral part of tender documents, is the essence of each public procurement and, consequently, target of most frequent suspicions in terms of violation of the principles of ensuring competition and of equality of bidders, as set forth under Articles 10 and 12 of the PPL. When it comes to CAs' alleged unlawful conduct while setting TS of the PP subject, even though in a significant number of procedures violations of the provisions of the PPL were established, in a no less significant number such PoR requests proved to be unfounded. The background is that, from the aspect of interested parties' business policies, the claimants' actions in the PoR procedures stem from what they hold to be their legitimate intention to adjust CA's requirements to their own products or to the most profitable ones from their respective assortments; however,

irrespective of legitimate business interests, suggestions made by bidders are not obligatory for the CA who has previously thoroughly considered, planned and explained its needs which need to be satisfied by the described PP subject's features and/or performances.

Effective and efficient use of public funds in line with the applicable legislation is a priority of the Republic of Serbia in the process of harmonising its normative practice with *Acquis Communautaire*, and also an area of operation of several institutions at both central and lower levels of governance. Among those are some independent regulators which, within the scopes of their competences, monitor how budget beneficiaries and other public funds users utilise and spend public funds.

Another obvious motive to file PoR request against decision on cancelling PP procedure pursuant to Article 109, Para 2 of the PPL, is a special interest that expert and general public pay for PP procedures and the review procedure efficiency; this was acknowledged and highlighted in the European Commission's reports, and followed by a positive evaluation of the Republic Commission's performance. Claimants resorting to this legal remedy, in such cases, should have in mind the grounds for cancelling a PP procedure, the unavoidable outcome of PP procedures where allocated funds are no longer available, and where the need for the PP subject ceased due to other reasons, as cited in CA's decision taken in accordance with Article 109, Para 2 of the PPL. Cancellation as outcome leaves unsatisfied those CA's needs that prompted the particular procurement; the assessment of the planning, the way of doing business, the appropriateness, and specific responsibilities of the CA's individual agents in the PP procedure, is not an exclusive remit of the Republic Commission. Taken together, all this affects the outcome of PoR procedure in concrete cases.

In all individual PoR procedures brought before this body, the actions of the Republic Commission, including duty to provide a detailed reasoning in each decision, are conditioned by its competences and powers as set forth by the provisions of the PPL. In line with its competences, the Republic Commission routinely monitors large number of proceedings it adjudicates, so to identify specific irregularities frequently found in numerous PP procedures conducted by different CAs, as well as unsuccessful challenges against CAs' actions in PP procedures, which are, in a certain way, indicators of poor practice in the application of the PPL.

Given the increased mandatory fees for filing PoR requests, one may reasonably assume that for the majority of stakeholders in the Republic of Serbia, mainly SMEs, rejection or dismissal of their requests also means a loss of substantial funds. This is why this Bulletin presents excerpts from actual reasonings found in decisions of the Republic Commission. The intent is to facilitate timely response through legal views adopted in these decisions, whereas the ultimate goal is to reduce rate of such PoR requests, thus helping the claimants avoid unnecessary expenses and increase efficiency of PP procedures.

In these decisions, the Republic Commission dealt with assertions in individual PoR requests alleging irregularities in terms of: communication in PP procedures, TS, additional eligibility requirements, deficiencies in bids that were of no relevance for determining their contents, and certain cases of cancelled PP procedures. Although these decisions, just like all taken by the Republic Commission, were posted on its web page and on the PP Portal, this edition presents them in a structured manner.

This Bulletin is also an output of a permanent and successful cooperation between the Republic Commission and SIGMA Initiative; the latter, through recommendations for the work of the Republic Commission together with its President and members, has recognized the need to establish an active rapport with stakeholders and bidders which is in line with the competences of this body.

Since the Republic Commission is an independent and autonomous body of the Republic of Serbia which ensures protection in PP procedures, the Bulletin's format is a part of activities designed to be a proper way to educate CAs, as the ones who conduct PP procedures and decide in the first-instance upon filed PoR requests, and also to educate stakeholders and bidders, whose rights to protection are exercised before the Republic Commission as the second-instance body in the procedure for the protection of rights.

This Bulletin is available in English, courtesy of the United Nations Development Programme (UNDP) under the "Accelerating Accountability Mechanisms in Public Finances" Project, whose beneficiary is the Republic Commission. Being aware that the Republic of Serbia is soon going to adopt a new PPL, the examples selected for this and the previous Bulletin are in line with new mechanisms that

the novel PPL is going to introduce or to develop in a more detailed manner than the existing laws do, in accordance with EU Directives on public procurement; to a certain extent and in a certain way, these mechanisms have already been acknowledged in the case law of the Republic Commission.

Belgrade, October 2018

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Communication in Public Procurement Procedure

Importance of communication in PP procedures is equally relevant in the stage of preparation of bids and in the stage of expert evaluation of bids. Article 20, Para 1, of the PPL provides that means of communication in PP procedures and in PP-related tasks is to be in writing, namely, by means of mail, e-mail or fax, and by CAs' notices posted on the PP Portal. Being a topic of relatively major significance, and given the different approaches to using these means of communication, communication via e-mail eventually prevailed as the response to certain problems appearing in practice, particularly in cases of missing CA's confirmation of receipt of certain documents.

In a number of PoR procedures, the Republic Commission examined the matters related to communication between interested parties and bidders and CAs. When deciding upon PoR requests mainly referring, directly or indirectly, to the manner or means of communication, certain similar mistakes in actions were observed. In part, these problems are caused by the bidders themselves, and also by misinterpretation and misimplementation of statutory provisions setting forth necessary mechanisms that enable interested parties to request additional clarification of provisions in tender documents, and to warn of potential irregularities therein, which are directly related to the exercise of the right for the protection in PP procedures pursuant to the PPL. Such errors and misinterpretations may result in rejection of PoR request for procedural reasons.

Implementation of Article 63 of the PPL enables interested parties to request additional clarification and ask questions concerning the contents of tender documents. It also foresees an option to alert the CA to potential deficiencies and irregularities identified in tender documents, and an option to have tender

documents amended. In a number of PoR requests concerning the application of this Article were detected claimants' erroneous conclusions that CAs were obliged to change the contents of their tender documents whenever indicated to certain irregularities and deficiencies. It was also noted that claimants perceived the CAs to have acted inconsistently when posting responses to questions beyond working hours, since tender documents usually provide that working hours are the time-slot for communication between interested parties and CAs.

In certain cases, erroneous implementation of Article 63 of the PPL is the outcome of misreading of provisions under Article 149, Paras 3 and 4 of the PPL. Namely, in most cases, timeliness of filed request challenging the contents of the public invitation and/or the tender documents, is examined pursuant to Article 149, Para 3 of the PPL. In some instances, claimants challenge the actions CAs did after the expiry of deadline set under Article 149, Para 3 of the PPL (actions CA undertakes between the seventh day or the third day in low value procedures, and the last day for the submission of bids), i.e., when within such period CA replies to questions and/or gives explanations of tender documents, however without making any changes to the latter. In the opinion of some claimants, the mere fact that CA replied to questions between the seventh (or the third day in low-value PP procedures) and the last day on which the deadline expires, gives them an opening to file PoR request pursuant to Article 149, Para 4 of the PPL. Due to such misinterpretation, a large number of PoR requests invoking application of Article 149, Para 4 of the PPL ended up rejected, since in such cases were not fulfilled requirements for its application.

Given that practice abounds with confusion concerning a proper application of provisions under Articles 63 and 149, Paras 3 and 4 of the PPL, the Republic Commission seeks to highlight claimants' most frequent errors in applying these provisions, by means of presenting selected decisions.

Communication between interested parties and CAs is equally important in preparation and in expert evaluation of bids, especially where necessary to additionally clarify submitted bids. Application of Article 93 of the PPL is very common in the stage of expert evaluation of bids, and critical for the establishment of facts. Both CAs and bidders make mistakes in application of this Article. The Republic Commission has dealt with application of this Article in numerous decisions. Typical mistakes of claimants who cite application of Article 93 of

the PPL refer to CAs' non-acting in line with clarifications of bids they sought. Likewise, in a number of cases, in their PoR requests claimants insisted on the mandatory application (as opposed to a mere option to apply) of Article 93 of the PPL, thus unfoundedly challenging CA's failure to act as they had expected.

**Excerpt from Reasoning of the Republic Commission's Decision
No. 4-00-234/2017 of 17 May 2017:**

"...Based on the contents of this PoR request, the Republic Commission established that it may be concluded that, while the direct cause for its filing was the fact that the CA, on 20 February 2017, posted on the PP Portal its response to questions asked by the claimant in the submission emailed on 17 February 2017, the supplied arguments actually challenge the contents of additional eligibility requirements for given PP procedure in terms of requested levels of business and staff capacities, and allege that said additional eligibility requirements were of a discriminatory character, i.e., set so to lead to the restriction of competition.

Taking into account the purpose and objective of this PoR which clearly stem from arguments presented by the claimant: that it was filed with a view to challenging the content of the additional eligibility requirements for this PP procedure in terms of requested level of professional and staff capacities; from the point of these being discriminatory, i.e., set so to lead to the restriction of competition; and that it was filed in the stage preceding the expiry of deadline for the submission of bids, the Republic Commission finds that relevant provision to examine its timeliness is Article 149, Para 3 of the PPL.

Namely, this Article explicitly prescribes that a PoR request challenging the type of procedure, the contents of the call for competition or of tender documents, will be considered timely: if received by CA at latest seven days before the expiry of deadline for the submission of bids, regardless of the manner of delivery, and if claimant has previously, pursuant to Article 63, Para 2, alerted the CA to potential deficiencies and irregularities but CA failed to remedy those (and also that, in low-value PP procedure and in qualification procedure, it has to be received by CA at latest three days before the expiry of deadline for the submission of bids).

In this regard, the Republic Commission finds that at the point of submission of this PoR request, according to the call for competition for the subject procurement, posted on the PP Portal on 24 January 2017, the deadline for submission expired on 24 February 2017 (pursuant to Article 55, Paras 1 and 2 of the PPL, date of expiry of the deadline for bid submission is an obligatory element of the call for competition).

It follows from the above that, in terms of Article 90, Para 2 of the PPL, the deadline for appealing should be counted starting from 24 February 2017, which was set by the CA as the date of expiry of deadline for the submission of bids in this open PP procedure, since it was valid at the moment of submission of given PoR request that challenges the content of tender documentation.

As such, said date is not to be calculated within the deadline, but instead the beginning of the deadline is the first preceding date, here, 23 February 2017.

From the above, the Republic Commission finds that seventh day prior to expiry of deadline for the submission of bids was 17 February 2017, and further infers that it was the final day for claimant to timely submit his PoR request to challenge legality of the CA's actions when developing tender documents for this open PP procedure, whereby, pursuant to Article 149, Para 3 of the PPL, a request filed on that day had to have been received by the CA, irrespective of the way of delivery.

The PoR request at hand was filed on 21 February 2017, which means after expiry of the final day of the deadline set under Article 149, Para 3 of the PPL applicable at the moment of its submission, within which, in terms of the subject PP procedure, the claimant has had a legal avenue to submit PoR request challenging the type of procedure, the content of the call for competition or tender documentation; thus, this PoR request is untimely.

In relation to this, the Republic Commission in particular finds that this case lacks the legal grounds to examine timeliness of given PoR request by means of applying Article 149, Para 4 of the PPL which reads that a PoR request challenging actions undertaken by CA before the expiry of deadline for the submission of bids, and after expiry of deadline under Para 3 of this Article is to be considered a timely one, if filed at latest before the expiry of deadline for the submission of bids.

The supporting reasoning is that the Republic Commission, after having reviewed data related to the subject PP procedure both posted on the PP Portal and contained in documents the CA submitted for this proceedings, has established that within the period spanning 17 February 2017 (the day of expiry of deadline under Article 149, Para 3 of the PPL) and 21 February 2017 (the final day for the claimant to submit given PoR request), no changes were made to the specific part of tender documents challenged by the claimant which would constitute legal grounds to examine timeliness of subject PoR pursuant to Article 149, Para 4 of the PPL.

Namely, the Republic Commission established that the content of the additional eligibility requirements for given PP procedure in terms of requested levels of professional and staff capacities, whom the claimant held not to be in line with the provisions of Articles 10 and 12 of the PPL — as inferred from the PoR request — constituted, in an unchanged form, an integral part of the tender documentation from the day the initial version of the latter had been posted on the PP Portal on 24 January 2017.

Neither was legal grounds to examine timeliness of subject PoR pursuant to Article 149, Para 4 of the PPL constituted by the fact that the CA, on 20 February 2017, posted two notices with answers given in terms of Article 63 of the PPL to interested parties' questions referring to the content of tender documents and indicating observed irregularities, with which content the claimant was not satisfied (these are the answer marked 1-40/16-R6 posted at 14:48, and the answer marked 1-40/16-R7 posted at 15:04, both being the answers the claimant attached to his PoR request).

The supporting reasoning is that, in given case, the CA fulfilled its obligations under Article 63, Para 3 of the PPL by posting the answers given in terms of Article 63 of the PPL on the PP Portal to the questions of interested parties regarding the content of tender documents.

Pursuant to Article 63, Para 3 of the PPL, CAs are not obliged to amend tender documents upon request of interested parties. Further, in terms of that same provision, the fact that the contents of CA's answers or actions indicate it would leave as is the content of tender documents developed for the subject PP procedure, does not amount to an unlawful action. That said, by choosing to stick to the content of tender documents the CA also assumes the risk of a complaint procedure, which is a legitimate prerogative of the interested parties.

On the other hand, the fact that the CA does not want to amend the content of tender document does establish a basis for the interested parties to file PoR request to challenge it.

However, in the case of an unchanged content of tender documents, a timely PoR request ought to be filed within the deadline set under Article 149, Para 3 of the PPL. This means that all interested parties, who deem there exist reasons to challenge the content of tender documents, are fully responsible to undertake all actions in terms of Article 63 of the PPL within such timeline which allows them to submit their PoR requests timely in terms of Article 149, Para 3 of the PPL; effectively, it means a PoR request in an open PP procedure to be received by the CA no later than seven days before the expiry of the deadline for the submission of bids regardless of the manner of delivery, and provided that the claimant, acting pursuant to Article 63, Para 2, has previously communicated potential deficiencies and irregularities to the CA that the CA failed to remedy.

From facts in this case follows that the claimant failed to take all necessary actions in terms of Article 63 of the PPL within a timeline which would allow him to submit PoR request timely in terms of Article 149, Para 3 of the PPL to challenge tender documents, having in mind that he took to send questions referring to the content of tender documents and indicating irregularities he thought the documents had contained on the final day of deadline for the submission of PoR requests (17 February 2017), while submitting the PoR request as late as on 21 February 2017.

Lastly, the Republic Commission affirms that, while adjudicating, it has established that the PoR request's assertion that the CA failed to respond to either question the claimant asked in his submission served on the basis of Article 63, Para 2 of the PPL (which, on its own, due to the foregoing, possesses no legal nature of a fact capable of constituting a legal basis to examine timeliness of given PoR request pursuant to Article 149, Para 4 of the PPL), does not correspond to the facts.

From the arguments supplied in given PoR request, the Republic Commission established that the above assertion referred to the manner the CA had answered to question No. 3 within the answer marked 1-40/16-P5 and posted on the PP Portal at 14:48.

Namely, the Republic Commission established that the content of answer marked 1-40/16-R5 and posted on the PP Portal at 14:48 indicates that question/comment No. 3, which reads as follows:

“Kindly replace the term ‘service provider’ in template contract with term ‘supplier’ pursuant to Article 63, Para 1, Point 7 of the Public Procurement Law. The legislator envisaged a single term for the bidder with whom will be concluded a framework agreement or a contract, which is ‘supplier’. Considering the will of the legislator, it is justified to amend tender documents in template agreement, too”,
— was answered by the CA as follows:

“The answer will be given through the changes to tender documents No. 2.”

It follows from the foregoing that the CA responded to request of an interested party to change the tender documents in a certain manner, with the answer indicating that the sought change would be made, and which was made, on 22 February 2017, by a notice posted on the PP Portal at 13:50.

Hence, on the basis of Article 139 in relation with Article 154, Paras 1 and 3 and Article 157, Para 5, Point 1 of the PPL, the Republic Commission decided as in the dispositive part of this decision, after having taken into account the following:

- the purpose and objective of given PoR request;
- that it was filed in the stage of PP procedure preceding the expiry of deadline for the submission of bids, thus making Article 149, Para 3 of the PPL apply to examining of its timeliness;
- the fact that, at the point of filing given PoR request, the deadline for submission of bids was to expire on 24 February 2017, thus making the seventh day prior to expiry of this deadline to be 17 February 2017;
- that given PoR request was filed on 21 February 2017 (in circumstances lacking legal grounds to examine timeliness of given PoR request by applying Article 149, Para 4 of the PPL);
- that thus the PoR request was filed after expiry of the last day of deadline set by Article 149, Para 3 of the PPL as in force at the point of its being filed, pursuant to which the claimant had been entitled, in given PP procedure, to submit PoR request challenging the content of tender documents, which makes it untimely.”

**Excerpt from Reasoning of the Republic Commission's Decision
No. 4-00-1261/2017 of 27 November 2017:**

“...Taking into account that, in this case, given PoR request was delivered to the CA undeniably on 8 September 2017, which means after the expiry of deadline set under Article 149, Para 3 of the PPL and thus untimely in terms of this statutory provision, the Republic Commission also scrutinised if there were any legal grounds to examine timeliness of given request by applying Article 149, Para 4 of the PPL; namely, the latter provision set forth an exception from the mentioned general rule, in that it prescribes that PoR request challenging CA's actions taken before the expiry of deadline for the submission of bids and after expiry of deadline under Para 3 of this Article, is to be considered a timely one, if filed at latest before the expiry of deadline for the submission of bids.

The supporting reasoning is that from the content of given PoR request it may be inferred that it was filed also because, before the point of its delivery, the CA failed to post on the PP Portal its response to the claimant's request sent on 5 September 2017 seeking additional information or clarification regarding the tender documents; while reviewing this request and on the basis of its contents, the Republic Commission found that it was a demand that the CA amends tender documents in the part related to Lot 1 in a certain manner suggested by the claimant (content of additional requirements, division of said lot into several lots, allowed type of financial security).

In this regard, after having reviewed the data of the subject PP procedure as posted on the PP Portal and those in documentation as supplied by the CA se, the Republic Commission finds that in this case there are no legal grounds to examine timeliness of the PoR request pursuant to Article 149, Para 4 of the PPL.

Namely, the fact that, prior to the delivery of given PoR request on 8 September 2017, no response was posted on the PP Portal to the claimant's questions effectively demanding amendments to tender documents (sent to the CA by the claimant on 5 September 2017), does not constitute any legal grounds to examine its timeliness in terms of Article 149, Para 4 of the PPL; the reasoning is that, by its nature, the foregoing has no feature of an action taken by the CA before the expiry of deadline for the submission of bids and after the expiry of deadline under Article 149, Para 3 of the PPL, whose existence would be a crucial legal precondition to this end.

Further, the Republic Commission recalls that, pursuant to Article 63, Para 3 of the PPL, CAs are not obliged to amend tender documents upon request of interested parties. Further, in terms of that same provision, the fact that the contents of CA's answers or actions indicate it would leave as is the content of tender documents developed for the subject PP procedure, does not amount to an unlawful action. That said, by choosing to stick to the content of tender documents the CA also assumes the risk of a complaint procedure, which is a legitimate prerogative of the interested parties.

On the other hand, the fact that the CA does not want to amend the content of tender document does establish a basis for the interested parties to file PoR request to challenge it.

However, in the case of an unchanged content of tender documents, the Republic Commission emphasises that a PoR request will only be timely if filed within the deadline set under Article 149, Para 3 of the PPL. This means that all interested parties, who deem there exist reasons to challenge the content of tender documents, are fully responsible to undertake all actions in terms of Article 63 of the PPL within such timeline which allows them to submit their PoR requests timely in terms of Article 149, Para 3 of the PPL; effectively, it means a PoR request in an open PP procedure to be received by the CA no later than seven days before the expiry of deadline for the submission of bids regardless of the manner of delivery, and provided that the claimant, acting pursuant to Article 63, Para 2, has previously communicated potential deficiencies and irregularities to the CA that the CA failed to remedy.

From facts in this case follows that the claimant failed to take all necessary actions in terms of Article 63 of the PPL within a timeline which would allow him to submit PoR request timely in terms of Article 149, Para 3 of the PPL to challenge tender documents, having in mind that he took to send to the CA the questions referring to the content of tender documents and indicating irregularities he thought the documents had contained on the final day of deadline for the submission of PoR requests (5 September 2017), while submitting the PoR request as late as on 8 September 2017.

Namely, the Republic Commission established that on 8 September 2017, that is, within deadline set under Article 63, Para 3 of the PPL i.e., three days from the day the CA received the request sent by the claimant on 5 September 2017, the

CA not only posted its response on the PP Portal, but also amended the tender documents.”

**Excerpt from Reasoning of the Republic Commission’s Decision
No. 4-00-1138/2017 of 06 September 2017:**

“...Taking into account the established circumstances in given PP procedure, the Republic Commission finds these circumstances provide no grounds to infer the merits of challenging the CA’s actions, since such merits imply CA’s failure to respond to the claimant’s RfC of tender documents.

Namely, the provision of Article 149, Para 7 of the PPL, in conjunction with Paras 3 and 4 of the same Article, prescribes that PoR request may not challenge CA’s actions in PP procedure if the claimant knew or could have known the reasons for its filing prior to the expiry of deadline to file, but failed to do so before the expiry of this deadline.

In this case, assertions in the claimant’s PoR request challenged the CA’s failure to act in line with obligation under Article 63, Para 3 of the PPL, pursuant to which the CA was obliged to post the response both on the PP Portal and its own web page, within three days from the day of receiving the request. According to the above, the CA’s action challenged by given PoR request constitutes an action challengeable within the deadline set for the stage of the procedure which precedes the making of the decision concluding a PP procedure, consequently, within the deadline referred to under 149, Para 3 or Para 4 of the PPL.

Under the circumstances of this case, and having in mind the point in time when the claimant filed his RfC of tender documents, according to which this is also the point in time when an opening arose for the claimant to challenge the CA’s purportedly improper actions by filing PoR request in line with requirements set forth in the PPL, this specific CA’s failure to respond to the RfC of tender documentation was challengeable within the deadline under Article 149, Para 3 of the PPL. Having in mind the statutory tying of calculation of the deadline at hand to the deadline set forth for the submission of bids, and given the type of procedure according to whose rules the procurement at hand was conducted, the above presupposes that the possibility to challenge relevant CA’s action had existed until at latest seven days before the date which — at the time the

challenged action was taken — was set as the final day of deadline for the submission of bids.

Having in mind the above and the fact that RfC of tender documents was filed on 9 June 2017 when also arose an opening for the claimant to challenge the CA's actions, therefore deadline for the submission of bids relevant for calculating seven days before the expiry of deadline for filing such PoR request was the one in force at the moment of asking clarification, and which, at the critical moment, was set to be 16 June 2017.

Given that the CA's relevant action, here: the failure to post response to the claimant's RfC of tender documents, could be challenged by filing PoR request within seven days before the expiry of such deadline which, at the moment of learning about the relevant action, was set as the deadline for the submission of bids, consequently in this case the relevant action could have been challenged no later than seven days before the expiry of deadline that was set to be on 16 June 2017.

The supporting reasoning is that at this particular point in time the claimant learnt of reasons to file given PoR request and gained an option to challenge the relevant action that occurred at the moment of filing the RfC of tender documents. The claimant, therefore, was not and could not be prevented from such a course of action either if a PoR request was filed by another claimant in the PP procedure at hand, or if the CA discontinued relevant action pursuant to Article 150, Para 11 of the PPL that happened as late as on 22 June 2017, also having in mind that he could have challenged the CA's action by filing PoR request pursuant to Article 149, Para 3 of the PPL, relative to the deadline for the submission of bids which was valid at the moment of filing RfC of tender documents.

Hence, taking into account that given PoR request challenged the CA's failure to respond to the claimant's RfC of tender documents filed on 9 June 2017, and given that the claimant was aware of this, this action/failure as such had to be, and could have been, challenged within seven days prior to the expiry of deadline for the submission which was valid at the moment of undertaking the subject action, i.e., at the latest seven days before the expiry of deadline on 16 June 2017.

The Republic Commission established that, in his PoR request, the claimant challenged solely the fact that he was not given any response to his question, and not the content of the subject tender document. In fact, neither at the

moment the opportunity first arose on 9 June 2017, nor under the PoR request which is adjudicated by this decision, did the claimant challenge the tender documents; rather, he challenged the fact he was not given response to the filed RfC. However, the review of the submitted documentation revealed that the CA did reply on the day of filing this request by confirming its receipt, albeit staying silent on the content of request; due to this, at that very moment the claimant acquired legal grounds to challenge the content of the subject tender documents.”

**Excerpt from Reasoning of the Republic Commission’s Decision
No. 4-00-882/2018 of 11 September 2018:**

“...From the established state of facts follows that the claimant filed PoR request which the CA received on 2 August 2018. Undisputedly, PoR request was filed for Lot 2 challenging the first amending of tender documents made on 25 July 2018, alleging that the CA restricted competition by adding one more surgical lamp, i.e., by requirements in terms of technical features, and challenging the CA’s actions in the second amending of tender documents made on 26 July 2018 under the explanation that, pursuant to Article 63, Para 5 of the PPL, the CA was obliged to extend deadline for the submission of bids, which was not done in the case at hand.

Having in mind that deadline for the submission of bids in given PP procedure was set to 30 days from the day of publication of call for competition, which was 3 August 2018, the Republic Commission underlines that in terms of Article 149, Para 3 of the PPL and taking into account the type of procedure, the final day of deadline for filing PoR request challenging the content of tender document, i.e., for the CA to receive the request, was 27 July 2018.

In light of the above, the Republic Commission underlines that if the claimant held that the CA had restricted the competition by amendment to tender documents of 25 July 2018 for Lot 2, or that the CA had failed to extend deadline for the submission of bids pursuant to Article 63, Para 5 of the PPL after the second amendment to tender documents of 26 July 2018, knowing that amendments were made on the eight day before the opening of bids, he has had opportunity to indicate the above by means of filing timely PoR request in accordance with

deadlines defined under Article 149, Para 3 of the PPL in conjunction with Article 63, Para 2 of the PPL, which means, no later than 27 July 2018.

The supporting reasoning is that here is established that PoR request challenged the CA's failure to act within the period before the expiry of deadline under Article 149, Para 3 of the PPL, with which the claimant was undoubtedly aware of, hence the Republic Commission affirms that, in this case, the claimant could have challenged such failure within deadline under Article 149, Para 3 of the PPL in conjunction with Article 63, Para 2 of the PPL.

In this regard the Republic Commission underlines that, should a CA opt to undertake unlawful actions upon the expiry of deadline for filing PoR request under Article 149, Para 3 of the PPL, the interested parties could challenge such CA's actions by filing PoR request even upon the expiry of said deadline, given that Article 149, Para 4 of the PPL provides that PoR request challenging actions taken by CA before the expiry of deadline for the submission of bids, and after the expiry of deadline under Para 3 of this Article, will be considered a timely one, if filed at latest before the expiry of deadline for the submission of bids.

Therefore, claimant will only be allowed to file PoR request under Article 149, Para 4 of the PPL if CA's actions are unlawful and undertaken after the expiry of deadline for filing PoR request in terms of Article 149, Para 3 of the PPL — which is not the case here, especially when having in mind that the filed request challenged the CA's actions before the expiry of deadline for the submission of PoR requests in terms of Article 149, Para 3 of the PPL.

From the foregoing, and with due respect to the fact that the CA received PoR request on 2 August 2018, it follows that the claimant's PoR request was untimely in terms of Article 149, Para 3 of the PPL."

**Excerpt from Reasoning of the Republic Commission's Decision
No. 4-00-488/2018 of 12 June 2018:**

"...The Republic Commission indicates that the fact upon which the claimant bases his arguments in the complaint, i.e., that given PoR request was filed electronically to the CA's e-mail on 30 April 2018, in this case is of no significance to examining timeliness of filed PoR request. The supporting reasoning is that Article 20, Para 6 of the PPL provides that where a document in PP procedure is

delivered by CA or bidder by e-mail or fax, the sender has to require the receiving party to confirm the receipt of such document in the same way and that other party is obliged to do so when needed as proof of delivery. In the case at hand was not undoubtedly established that PoR request was delivered to the CA via e-mail, because a print-screen of an e-mail requesting delivery receipt in itself does not constitute the proof of actual delivery of that e-mail to the recipient; in this case the claimant only supplied e-mail print-screen of such content without any evidence that the CA actually received relevant e-mail, since the CA did not confirm delivery of such e-mail and explicitly denied receipt of any e-mail related to this PoR request. Therefore, it cannot be concluded undeniably that PoR request was delivered electronically. Since it is not undeniably established that PoR request was delivered electronically, the claimant's assertion of electronically delivered PoR request has no impact on determining timeliness of the subject request and, on the other hand, since all available documentation contains evidence of PoR request sent via registered mail, the Republic Commission finds that only this other manner of delivery could be of relevance for assessing its timeliness.

In this regard, taking into account that PoR request sent on 30 April 2018 was delivered to the CA via registered mail, the Republic Commission finds that in this case only the day the CA received this mail may be deemed relevant for establishing timeliness of the request. Since the CA receipt-stamped this mail on 3 May 2018, it follows this date is to be considered the day the CA received the PoR request and, consequently, that it was received after expiry of deadline until which it should have been received by the CA as timely in terms of Article 149, Para 3 of the PPL.

Further, the Republic Commission affirms that the claimant's reasons cited in his complaint do not lend themselves to apply Article 149, Para 4 of the PPL in this case, since the CA has untimely, on 30 April 2018, responded to RFC of tender documents of 27 April 2018, thus preventing the interested parties unsatisfied with given answer to submit their PoR requests in a timely manner. Namely, the Republic Commission states that the purpose of questions and answers to the questions is to offer clarifications which, together with the remaining content of tender documents, make a totality, and as such make the basis for expert evaluation of bids; the same also applies to the content of amendments to tender documents that the CA may make in line with the provisions of the PPL.

Hence, taking into account said purposes of the RfC and of the supplied clarifications, which are aimed at creating adequate space and opportunities for bidders to prepare acceptable bids so to competitively take part in PP procedure, the Republic Commission underlines that the bidders are also responsible to take special care so to seek clarifications of known parts of tender documents within such timeline and in such ways so to avail themselves, in their capacity of interested parties, sufficient time to potentially challenge the relevant part of documents by filing PoR request within deadline under Article 149 of the PPL; in doing so, the bidders are to act in good faith, and in line with the purpose they are entitled to, and in line with the purpose of filing PoR requests. Given that the interested parties' option to file PoR request is not conditional on CA's clarifications, but rather such an option arises at the point of alerting the CA of aspects the claimant deems to be controversial, and given that the claimant is responsible to take special care so to seek clarifications of known parts of tender documents within such timeline and in such ways so to avail sufficient time to potentially challenge the relevant part of documents by filing PoR request within deadline under Article 149 of the PPL, it is inferred that claimant's assertion of being hindered to timely submit PoR request in this case due to the timing when the CA posted clarification, is without merit.

Taking into account the foregoing and the fact that after the CA's clarification posted on 30 April 2018 the tender documents were not amended, meaning that their contents remained available unchanged since posted on the PP Portal on 5 April 2018, when the type of public procurement was made public and never changed, it follows that such clarification by the CA could not have the significance of a fact which was not or could not have been known to the claimant for the duration of the deadline for filing PoR requests under Article 149, Para 3 of the PPL, i.e., which would serve as the grounds to apply Article 149, Para 4 of the PPL."

**Excerpt from Reasoning of the Republic Commission's Decision
No. 4-00-516/2018 of 06 July 2018:**

"...From the cited provisions of the PPL and the Law on Administrative Procedure (LAP), whose application *mutatis mutandis* is referenced under Article 148, Para 5 of the PPL for the PoR procedure-related issues not regulated by the PPL, it follows that PoR request must contain mandatory elements, among which are

the facts and evidence proving noncompliance, as well as the confirmation of paid fees referred to under Article 156 of the PPL and, lacking any of mandatory elements of the request's content, the CA should inform the claimant how and in what deadline to complete the request. Should the request be completed within set deadline, will be deemed regular from the beginning, whereas if not, meaning should the request not be completed within set deadline, the CA will reject such PoR request.

As follows from the facts of this case, filed PoR request was undeniably incomplete at the point of filing, since it did not contain all facts and evidence proving noncompliance, or confirmation of paid fee referred to under Article 156 of the PPL; this is corroborated by the wording of PoR request, wherein the claimant says that he will supply facts and proofs indicating violation of regulations related to the challenged decision upon the CA's request and pursuant to Article 148, Para 5 of the PPL, in observance of the legal provisions governing the administrative procedure, and that he will furnish the confirmation of paid fee at a later point in time, when completing and supplementing his PoR request.

Another undeniable fact is that the claimant failed to comply upon CA's request of 8 May 2018 to complete his PoR request with facts and proofs corroborating the alleged violations and to furnish the confirmation on paid fee referred to under Article 156 of this Law.

The above, beyond any doubt, derives both from the established facts of given PP procedure and also the claimant's allegations, wherein he himself professes he failed to act upon CA's request and goes on to support his failure to comply with the fact that the request to supplement was sent to him as the claimant instead of to his attorney whom he had authorized to file PoR request and undertake actions in the course of the PoR procedure in this PP case.

However, the fact he uses to argue his failure to complete PoR request, namely, that the CA's invitation to complete his PoR request was not sent to his attorney but to him as the claimant, in the view of the Republic Commission, is of no relevance to the consequence of the claimant's inaction, which implies that the request filed in this case was incomplete.

Namely, Article 49, Para 1 of the LAP provides that a party or his/her legal representative may authorise a proxy to represent the party in the procedure, except for statements that the party alone can give, whereby existence of a proxy does

not preclude the party to act on their own in the procedure. In this regard, the fact that the request to complete was directly sent to him, and not his attorney, does not imply that the claimant was precluded from completing the PoR request on his own, as requested by the CA, or to consult with his attorney concerning this matter if he deemed it necessary.

As for the claimant's argument describing this failure as a "benign error" resulting from the fact that the claimant and his employees were "laymen legal-wise", the Republic Commission recalls that the according application of the LAP provisions as referenced to in Article 148, Para 5 of the PPL, within the context of the protection of rights in the PP procedures, implies appreciation of differences between the participants in the administrative procedure and the participants in the PP procedure. The Republic Commission also recalls that all participants in the PP procedure are in equal position relative to the requirements pursuant to which and in line with the content of tender documents each individual PP procedure is being conducted, whereby the claimant, as a participant in a PP procedure, cannot be deemed an ignorant party. Nor does it follow from the way he depicts his failure to complete PoR request as the result of a benign error, emphasising that even without fees paid his request could have been decided upon, and that anyway there are other mechanisms for collection of unpaid fees and other costs of the proceedings before the authority obliged to decide upon a legal remedy, that the claimant in this case may be deemed an ignorant party who files a PoR request for the sake of protecting and exercising his rights in the PP procedure, and in whose interest would be to file a complete decidable request. Contrary to it, such arguments undoubtedly confirm that, notwithstanding the proxy, the claimant was not precluded to complete his PoR request on his own, as the CA requested, and that he had never had any intention to do so.

Further, the Republic Commission states that it was one J.M. who personally accessed and reviewed documents on the conducted PP procedure on behalf of the claimant, as confirmed by supplied documentation and who, according to the arguments stated in the request, was the sole person in that case authorised to supplement PoR request in terms of the established state of facts available for the review.

Taking into account that the claimant undeniably did not complete the filed PoR request, and that the CA, as undeniably established, instructed in a

letter the claimant to complete his PoR request and specified the way and deadline for its completing, and the fact that CA warned the claimant of the consequences of failing to complete this request, as and when specified, which would be the rejection of PoR request, the Republic Commission finds that the CA correctly evaluated this request as incomplete; it also finds that the CA's conclusion challenged by the complaint was taken pursuant to the provisions of the PPL and the provisions of Article 59, Paras 1 and 2 of the LAP as a piece of legislation accordingly applied in the PoR procedure in public procurement, whose contents under the described circumstances lead to the same outcome, which is the rejection of this submission. The foregoing is justified, both in view of Article 164 of the PPL, which prohibits to file PoR request for purposes other than those for which that right has been granted, and in view of the according application of Article 9 of the LAP in conjunction with Article 9 of the PPL, taking into account that the CA in this case acted as the first instance body."

**Excerpt from Reasoning of the Republic Commission's Decision
No. 4-00-84/2018 of 10 May 2018:**

"...The Republic Commission takes into account that the claimant in his PoR request stressed that the CA failed to reply to the following questions of the claimant:

- for Lot 6, Point 2, the CA did not explain the term "taper — point plus" and did not state "equivalent";
- did not reply to the question on permissibility of variations on given values of tension profiles in Lot 7, Points 1-4, thus preventing claimant from submitting an acceptable bid;
- the CA failed to reply to the claimant's question regarding Lot 7 on permissibility of deviations from the determined tension profile after 3 weeks, and also failed to define interim profile for item 5, which was indicated in the claimant's question of 5 January 2018;
- for Lot 8, the CA did not explain the terms "visi-black", "Wolfram-Rhenium" and „cutting microtip“, and did not state "equivalent".

Further, the Republic Commission affirms that, in terms of the claimant's indications and requests for clarification, the CA posted on 11 January 2018 on the PP Portal its replies, and under Item 4 thereof responded to questions 6 through 21.

Therefore, in view of the Republic Commission, the claimant's previous indications in terms of contents do not amount to allegations inherent to a PoR request challenging an action the CA did while developing tender documents in terms of justification and the CA's capability to foresee them, but rather constitute solely a repetition of claimant's indications already sent to the CA; the claimant was dissatisfied about the latter, since the same commission of the CA chose to respond in an integrated manner.

Namely, had the claimant not been satisfied with CA's response in terms of said indications and questions, and had he deemed that these contained possible deficiencies or irregularities in developed tender document, he could have challenged those by filing the PoR request."

Excerpt from Reasoning of the Republic Commission's Decision No. 4-00-927/2017 of 17 October 2017:

"...In this case, the claimant's allegations indicate he deems the CA published the subject amendment to tender documents beyond working hours, holding that the CA's working hours' time-slot envisaged for communication with interested parties was unambiguously and clearly defined in tender document as 08:00 to 15:00, Monday to Friday. The claimant holds this CA's action is an indication of the CA's inconsistent conduct, due to which the claimant required the CA to amend tender documents and align the actions it undertakes with the time-slot explicitly set for the communication in the subject PP procedure.

In light of the above, the Republic Commission finds that the CA, by posting the notice on continuation of PP procedure on 23 June 2017 at 18:18, upon Decision of the Republic Commission No. 4-00-161/2017 of 27 April 2017, did not act contrary to the PPL or the subject tender documents; the supporting reasoning especially takes into account that from the segment of the content of tender documents indicated by the claimant unambiguously follows that the relevant part sets how and when interested parties may seek additional information or clarifications from the CA regarding the preparation of their bids, pursuant to Article 63,

Para 2 of the PPL, and not, as the claimant maintains, the CA's working hours. The claimant therefore unfoundedly maintains the CA should not take any action related to the conducting of given PP procedure beyond the time-slot set in tender document for the interested parties to address the CA.

By further review of the content of data published on the PP Portal, the Republic Commission establishes that the CA posted, on 29 June 2017 at 16:43, its response the requests for additional clarification of the tender document sent by potential bidders.

Based on the supplied documents is established that the claimant, pursuant to Article 63, Para 2 of the PPL, has also addressed the CA on 26 and 27 June 2017 in writing, requesting additional information for the preparation of his bid in order to participate in PP procedure.

Here, Article 63, Para 3 of the PPL provides that where CA receives an interested party's written request for additional information or clarifications for the preparation of bid, which may be submitted no later than five days before the expiry of deadline for the submission of bids, CA is obliged to post its response both on the PP Portal and on its website within three days from the day of receiving request. Therefore, the Republic Commission finds that, in this case, the CA acted within the statutory deadline by posting on 29 June 2017 its response to the claimant's RFC of tender documentation received on 26 June 2017. The same applies to the RFC of tender documents filed by the claimant and received by the CA on 27 June 2018.

The Republic Commission finds the claimant unfoundedly alleges that the CA posted its response in an untimely fashion thus acting contrary to the provisions of both the PPL and the LAP, because the response was posted on the PP Portal at 16:43, whereas the tender documents provide that interested parties may seek, in writing, additional information or clarifications concerning the preparation of bids and alert CA to potential deficiencies and irregularities observed in tender documents, only within the working week Monday through Friday within time-slot from 08:00 to 15:00.

Namely, as stated above, it unambiguously follows from the content of tender documents that the relevant part sets how and when interested parties may seek additional information or clarifications from the CA concerning the preparation of bids; this point, however, was not challenged by the claimant, and

could not have had any impact on the rights of interested parties prescribed under the PPL. On the other hand, CA's duties when undertaking actions in PP procedure are subject to relevant legal deadlines specified in days, not hours, as deemed by the claimant. Hence, by posting its response to RfC of tender documents on the PP Portal on 27 June 2017 at 16:43, the CA acted in full compliance with provisions of the PPL.

Further, the Republic Commission confirms that the CA posted notice of PoR request on the PP Portal on 3 July 2017, at 10:22. The content of the notice reads that the CA stated it would stay further activities in the PP procedure.

Documentation supplied to the Republic Commission shows that the CA received the claimant's PoR request on 29 June 2017. Since Article 149, Para 10 of the PPL provides that CA has to post notice of a received PoR request on the PP Portal and on its website, no later than two days from the day of receiving such request containing data under Annex 3LJ, it follows that the CA did post a timely (3 July 2017) notice on the PP Portal, one working day after receiving this PoR request.

As per the claimant's assertion that the CA violated provisions of the PPL by posting this notice of a PoR request on the PP Portal on 3 July 2017 at 10:22, allegedly after the expiry of deadline for the submission of bids, which was set for 3 July 2017 at 10:00, whereby acting contrary to Article 11 of the PPL because by then it has already had insight into the names of bidders who submitted their bids timely, the Republic Commission finds that, pursuant to Article 149, Para 9 in conjunction with Article 150, Para 1 of the PPL, a PoR request does not stay further activities of CA in the PP procedure until the decision on awarding contract is made. Therefore, the CA's manner of executing the subject action and posting said notice on 3 July 2017 at 10:22 did not violate provisions of the PPL, and did not violate the principle of transparency in PP procedure under Article 11 of the PPL."

**Excerpt from Reasoning of the Republic Commission's Decision
No. 4-00-491/2018 of 06 July 2018:**

"...Article 63, Para 2 of the PPL provides that interested person may request from CA, in writing, additional information or clarifications concerning the preparation of bid and, in doing so, may also alert the CA to potential deficiencies and

irregularities identified in tender documentation, at latest five days before the expiry of deadline for the submission of bids.

Article 61, Para 1 of the PPL provides that CA should develop tender document so that bidders can prepare acceptable bids pursuant to it.

Article 76, Para 2 of the PPL provides that, whenever necessary in terms of the PP subject, CA in the tender documents determines additional eligibility requirements concerning financial, operational, technical and personnel capacities.

Article 76, Para 6 of the PPL provides that CA sets eligibility requirements in such way so that these do not discriminate bidders and are logically related to the PP subject.

From the established facts follows that, on 25 April 2018, the CA was alerted that the Law on the Protection of Population from Infectious Diseases does not recognize terms of systematic and non-systematic pest controls, and that, on 30 April 2018 (i.e., the same day the claimant filed his PoR request), the CA posted response on the PP Portal that it “will accept the evidence on execution of contracts concluded with any of reference CAs if related to conducting of a systematic pest control, due to the reasons stated in the Republic Commission’s position.”

Since from the CA’s response it undoubtedly follows that ‘CA will accept the evidence on execution of contracts concluded with any of reference CAs due to the reasons stated in the Republic Commission’s position’, the Republic Commission finds that the terminology of the additional requirement containing the term “systematic” pest controls is not vital for the CA because it accepts the reasoning from the Republic Commission’s decision including the reference to the Law on the Protection of Population from Infectious Diseases (“Official Gazette of the RS”, No. 15/2016) does not recognize terms of systematic and non-systematic pest controls but rather prescribes who, how, and where is obliged to execute this control.

Likewise, as from the CA’s response follows that the term ‘systematic pest control’ refers to the intention to execute pest control in a certain territory in an organised and planned manner, in the Republic Commission’s view it unquestionably follows that the wording used by the CA — ‘systematic pest control’ — is irrelevant from the point of compliance with additional requirement regarding

“business capacity”; for bidders, this effectively means that if they in their bids submit certificate of any of the reference CAs confirming they had executed pest control in an organised and planned manner in a certain location, it will prove they fulfil additional condition within the “business capacity” requirement.”

Due to the above, the matter of whether certificates of reference CAs contain wording such as systematic or non-systematic pest control is irrelevant in terms of evaluation of acceptability of a bid, given that in the case at hand the only relevant point for the CA will be to evaluate whether bidders did execute a pest control in a certain location in an organized and planned fashion. Further to the foregoing, in the Republic Commission’s view, by so designed tender documents the CA did enable participation to all participants capable of proving they had provided pest control services in a planned and organized fashion in the value of RSD 30,000,00.00 excluding VAT, regardless of whether the services rendered were systematic or non-systematic, since such concepts are clearly not used in the Law on the Protection of Population from Infectious Diseases (“Official Gazette of the RS”, No. 15/2016). On the basis of the above, the Republic Commission finds that the tender documents in this part were not developed in contravention of with Article 61, Para 1 of the PPL in conjunction with Article 76, Paras 2 and 6 of the PPL, nor did it restrict the competition among bidders in terms of Article 10, Para 1 of the PPL.”

Excerpt from Reasoning of the Republic Commission’s Decision No. 4-00-917/2017 of 21 July 2017:

“...Article 3, Para 1, Point 33) of the PPL provides that an acceptable bid is a bid which is timely, one that CA did not reject due to substantial deficiencies, which is adequate, one that does not restrict or condition either the rights of CAs or the obligations of bidders, and which does not exceed the amount of estimated value of concrete public procurement.

Article 61, Para 1 of the PPL provides that CA should develop tender documents so that bidders can prepare acceptable bids pursuant to tender documents.

Article 70, Para 1 of the PPL provides that TS and design documents, in terms of this Law, are technical requirements which are mandatory and integral part of tender documents containing described features of goods, services or works.

These must ensure that the goods, services or works to be procured, are described objectively and in the way that meets the needs of CA.

Article 107, Para 1 of the PPL provides that CA rejects all unacceptable bids after inspecting and evaluating all bids in PP procedure.

According to cited provisions, the Republic Commission firstly affirms the CAs have to prepare explicit tender documents with description of PP subject and required TS, and to list the evidence proving the fulfilment thereof, and to state the method for evaluating bids to participate in the subject procedure, thus enabling the potential bidders to prepare bids in line with these requirements so that the bids are evaluated as adequate and acceptable.

Namely, CA defines its technical demands in terms of goods which are the subject of the procurement in its TS, and those have to be developed so to allow the bidders to explicitly determine the features that the offered goods must possess in order to make the bids evaluated as adequate; CA also has to state the evidence which prove the compliance with relevant requirements. When conducting expert evaluation of bids, the CA has to evaluate whether a bid is adequate solely on the grounds of requirements contained in tender documents developed in line with the above.

In the subject PP procedure, for the subject item (field base) the CA envisaged certain technical features that the offered goods has to fulfil, i.e., that the field base, inter alia, must contain “expansion bars” of the predetermined dimensions.

The claimant offered the base of manufacturer “Gerfloor” — Powergame supplying for it an excerpt from the catalogue which did not contain any data on the existence of the expansion bars. In order to determine the undetermined matter, and acting pursuant to Article 93, Para 1 of the PPL, the CA requested the claimant to provide the evidence which proves that the offered field base indeed possess expansion bars.

On 22 June 2017, the CA received the claimant’s letter, wherein the latter failed to supply the evidence on the existence of the disputable technical features, but instead elaborated on the “defects” of the field bases containing expansion bars (i.e., slabs jut out in the sun), indicating that only the base of the manufacturer “Bergo multisport” had expansion bars, whereas all other producers had managed to “overcome the problem of slabs jutting out in the sun, so that there

is no need to insert expansion bars”. In this way, he indirectly confirmed that the field base he had offered did not contain expansion bars.

Therefore, taking into account that the CA specified in tender documents that offered field base had to contain “expansion bars”, and that the claimant in his offer (excerpt from the catalogue) and also later on in his clarifications of the bid, failed to prove that the offered field base had the required technical feature (expansion bar), the Republic Commission finds that the CA was right to evaluate claimant’s bid as unacceptable pursuant to Article 3, Para 1, Point 33) of the PPL in conjunction with Article 107, Para 1 of the PPL. The reasoning is that the above is pursuant to Article 61, Para 1 of the PPL which prescribes CA’s duty to develop tender documents so to enable bidders to use it as the basis to prepare bids which must be in line with the requirements of tender documents. Therefore, in this case, it is irrelevant if the features of the field base offered by the claimant are “better” i.e., “more advanced”, for so long as the given procedure is conducted pursuant to tender documents explicitly requiring the field base to contain expansion bars; in addition, the claimant has not challenged this particular technical provision timely, i.e., pursuant to Article 149, Para 3 of the PPL, by filing PoR request.”

Excerpt from Reasoning of the Republic Commission’s Decision No. 4-00-798/2018 of 16 August 2018:

“...In this case, as it follows from the established facts, the CA stipulated in the call for competition and in tender documents that the contract for subject procurement would be awarded by applying the criterion of the economically most advantageous bid. In line with the PPL, the CA also stated elements of the criterion it intended to apply, and methodology to weight each foreseen element. Further was established that the CA foresaw in total five elements of the criterion of economically most advantageous bid, where the fifth element was “monetary value of offered mobile devices” which could get maximum 20 weights. As revealed from the methodology for awarding weights for this particular element of the criterion, the CA took the value of the offered mobile devices with VAT as the relevant value to calculate weights, whereby noting that this value could not be lower than RSD 1,300,000.00, and that the price to be considered was one in the bid form — specifically, in the price structure form.

Hence, on the basis of the foregoing, after having taken into account the following:

- the fact that the CA stipulated in this procurement that the allocation of weights for the fifth element of the criterion of economically most advantageous bid “monetary value of the offered mobile devices” would be made by applying the methodology which for calculating considers the price with VAT stated in the bid;
- that this fact, in its turn, was the matter of question and clarification pursuant to Article 63, Para 2 of the PPL, in that the total value for the fifth element of the criterion “monetary value of the offered mobile devices” was set as the minimum for the offered devices of RSD 1,300,000.00 with VAT;
- that, however, the final content of the relevant part of tender documents was not challenged in the stage before the expiry of deadline for the submission of bids by any interested party;

the Republic Commission finds that in the case at hand the CA did not violate Article 93, Para 3 of the PPL, as alleged by the claimant, by having invited the selected bidder to correct what the CA called a ‘technical error’ in terms of the price entered excluding VAT for the monetary value of the offered mobile devices.

The supporting reasoning, as already said, is that the monetary value of the offered mobile devices with VAT is required as such by tender documents as the element to be used in weighting formula. Therefore, since in this case the price with VAT was relevant for calculation of weight for the fifth element of the criterion, there are no merits in the claimant’s allegations that the CA changed the elements of bid to make an otherwise unacceptable bid to be acceptable, by means of inviting the selected bidder to correct his calculating error, which the CA considered a technical error in light of the price offered with VAT and amount of VAT being entered as 3,333,33.33.

Consequently, taking into account the following:

- that in this PP case the CA did not request correction of an error in terms of the price with VAT which, in line with provisions of tender documents, is the only element to be considered and applied as relevant in the weighting formula;

- that accordingly the amount of VAT in the selected bidder's bid arithmetically corresponds to the stated monetary value with VAT,
- that, on the other hand, the monetary amount excluding VAT was not in any way an element of the determined methodology for weight allocation;

the CA's request that the selected bidder consents to the correction of an obvious technical error to the effect that, instead of number 3,333,33.33 excluding VAT as originally entered by him, it should be deemed that the latter had actually entered 3,333,333.33 excluding VAT, as the CA concluded when inspecting the content of the subject form, does not constitute a violation of Article 93, Para 3 of the PPL as alleged by the claimant, nor does it constitute a change of price as a vital element. The supporting reasoning is that the CA in its invitation for consent took notice of the way the value with VAT was entered and, thereby, considering the amount with VAT and VAT as harmonized, the CA has properly acted when asking for a correction as a correction of a technical error."

2

Unfounded Challenging of CAs' Actions Concerning Technical Specifications

Article 70, Para 1 of the PPL provides that TS is a mandatory and integral part of tender documents, which determines the described features of goods, services or works that must enable objective description of goods, services or works to be procured in the way which meets the CA needs. This legal provision reflects the importance that legislator awarded to description of the PP subject in the provisions on TS, in that each tender documentation developed for PP procedure must have its TS that corresponds to the nature and type of given PP procedure.

Challenging the TS by the interested parties, in the stage of PP procedure prior to the expiry of deadline for the submission of bids, is mostly based on allegations that challenge the existence of CA's objective need for the specific technical characteristics, and on tying the tender documents' challenged provisions on TS with provision of Article 10 of the PPL, which prescribes the principle of ensuring competition.

While some claimants challenge the way TS was defined, maintaining the CA had no need to purchase goods featured with requirements specified by TS that imply acquisition of high-quality goods, works or services, a number of potential bidders maintain that TS should be changed so to lower or completely omit certain technical requirements in order to widen the circle of parties capable of bidding in given PP procedure.

In a significant number of these PoR procedures, the Republic Commission found such PoR to be unfounded, on the basis of the following:

- there were in place clear and unambiguous explanations of the objective needs of CAs;
- explanations with arguments were given in responses to RfCs of tender documents and/or in responses to the PoR requests;
- explanations substantiated why CAs did require the goods, works or services of exactly prescribed technical features, having in mind the specific needs of the subject PP procedures;
- within the circumstances of subject PP procedures challenged by PoR requests, the Republic Commission could not establish that any restriction of competition had been introduced by the design the TSs, and instead it established the lack of business interests of specific interested persons to bid.

Likewise, a group of interested parties unfoundedly challenged TSs, alleging those to be insufficiently specific or precise, however without having clearly alerting, before the expiry of deadline for the submission of bids, to such purported deficiencies of tender documents in terms of Article 63, Para 2 of the PPL and in the procedure set forth for challenging TSs in PoR requests; instead, in those cases that had any communication in the stage before deadline for the submission of bids, the claims were of an all-purpose nature.

The challenging of TSs after the expiry of deadline for the submission of bids, from the aspect of their fulfilment in the bids submitted in PP procedures challenged by PoR requests, in a number of situations resulted in the need to additionally examine such disputed matters by applying Article 93, Para 1 of the PPL; where tender documents required several proofs of the compliance with TSs, the fact that some of the required proofs were not supplied was irrelevant for expert evaluation of submitted bids for as long as the compliance with TSs could be established on the basis of other proofs supplied with the bids, and thereby such allegations in PoR requests were found to be without merits. It has been observed in this stage of the PP procedure that bidders unfoundedly attempt to challenge bids due to failure to supply vital evidence to prove technical possibility to render certain service, which were not explicitly stated by the provisions of tender documents as a duty the bidders must perform, and which did not entail a duty to supply, together with the bid, the proofs which relate to the required services.

**Excerpt from Reasoning of the Republic Commission's Decision
No. 4-00-101/2018 of 13 March 2018:**

“...On the basis of the content of PoR request, the CA's response to this request, and the content of tender documents, the Republic Commission finds it conclusive that tender documents in said part, in the tabular view listing TSs for the goods to be procured by this PP procedure, the column titled “Dimension tolerance/Geometric tolerance” stated that the dimension tolerance for a number of positions had to be of the class 6 or better.

The Republic Commission infers from the arguments presented in PoR request that the claimant primarily holds this technical requirement does not represent a real need of the CA, because it is not defined as a minimal technical requirement in the documentation of equipment for whose maintenance the goods are being procured, thus making a class of normal tolerances be sufficient in this regard, and also because the aims to be achieved by installation thereof, in claimant's opinion, do not constitute a reason that justifies the existence of an objective need to acquire goods whose dimension tolerance is of class 6 or better.

In that respect, the Republic Commission recalls that Article 70, Para 1 of the PPL, inter alia, provides that TS must ensure that goods, services or works to be procured are described objectively and in the way that meets the needs of CA.

However, in terms of Article 70, Para 1 of the PPL in conjunction with Article 52, Para 1 of the PPL, the needs assessment, as an action preceding the conducting of a PP procedure, is a CA's competence which is subject to oversight by other authorities tasked with supervising the CA's operations.

Pursuant to Article 139 in conjunction with Article 149, Para 2 of the PPL, once PoR procedure is initiated, in the manner prescribed by law, the Republic Commission's competence is limited to the matter whether the CA's actions, undertaken after the initiation of the PP procedure challenged by PoR request for the purpose of conducting such PP procedure, were in line with the provisions of the PPL.

The Republic Commission notes that, in this regard, the only issue that may be a matter of deliberation in this case is whether the filed request had merits to point out that the CA violated Article 10 of the PPL by stipulating in the TSs, for a number of positions, that dimension tolerance had to be of class 6 or better.

In this regard, the Republic Commission notes that from the arguments presented in PoR request follows that the claimant's assertion of Article 10 of the PPL being violated by the way used to define this part of TS for given PP procedure, is based on the thesis that only the SKF manufacturer has in its standard production portfolio the goods with dimension tolerance of class 6 or better, whereas all other manufacturers of disputed bearings, even when with advanced technical specifications, are producing those in the class of normal dimension tolerance within their standard production portfolio and declare them as such in their catalogues (by markings PN or PO, with no additional markings), while bearings of class 6 (or better) are exclusively manufactured in the line of production marked with special additional markings (R6, R5) which, in claimant's opinion, means that these bearings are "special production".

Given the claimant's arguments, the Republic Commission notes that, on the basis of analysis of the content of Chapter 3 – "Technical Specification" (whose final content is established through amendments to tender documents published on 4 January 2018 on the PP Portal) it has established that in defining the requirement that dimension tolerance for certain number of goods had to be of class 6 or better, the CA never stipulated that such goods had also to fall under the standard production portfolio.

Likewise, the Republic Commission has established that neither the proving that the offered goods which meet said technical requirement was defined so to mean that data on dimension tolerance had to be declared exclusively within the production catalogue.

Namely, in Part 3 – "Technical Specification", under point 3.3, titled "Technical documentation to be supplied as an integral part of the bid, proving that the offered goods meet required technical features", the CA stipulated it mandatory to attach to the bid manufacturer's catalogue or excerpt from the catalogue of the offered bearings, in either Serbian or English, for all subject bearings (in hard copy or electronically), also noting that catalogues had to cover all offered bearings.

However, at the same time the CA stipulated that, for positions which due to their specificities (grand dimensions, small production batches, custom-order production, and the like) remain beyond standard manufacturers' catalogues, as a proof of technical compliance may be supplied a manufacturer-verified

technical drawing that contains all relevant information as catalogue does, which would be deemed as an excerpt from manufacturer's catalogue, noting that CA reserves the right to verify the authenticity of received catalogue excerpts with the manufacturer.

Likewise, in the same part of tender documents the CA stipulated that where the original catalogue did not contain features or standard of the offered bearing, the compliance would be proven by verified and signed statement of responsible manager in charge of quality control from the factory producing the offered goods, or by verified and signed statement of the responsible person in charge of quality, irrespective of where the goods were produced — in which manufacturer's location, noting that it reserves the right to verify the authenticity of received statement with the manufacturer.

Further to the above, the Republic Commission notes that, on the basis of examining excerpts from manufacturers' catalogues the claimant attached to the bid, it has established:

- from the contents thereof it follows that, in addition to the goods within the class of normal dimensional tolerances, the parts of respective production portfolios — not only of SKF but also of other manufacturers: Schaeffler, ZKL, NSK, TIMKEN, RKB, ZVL, URB, MPZ and SNR — also contain goods of dimensional tolerance of class 6 or better;
- that it was clearly stipulated that these, as such, may be the subject of delivery;
- in terms of the contents of arguments presented in the PoR, there are no grounds to infer that competition in this case was restricted because the subject PP procedure was not formulated in lots, since no increased class of accuracy was required for 167 positions (112 positions for bearings and 55 positions for casings and sleeves),
- also, there are no grounds to infer that due to the above the opportunity to participate in subject PP procedure was limited only to bidders who for one part of items mandatorily have possibility to offer bearings of SKF manufacturer.

Considering the established facts, the Republic Commission finds that, from the point of arguments presented in PoR request, it was not established that the

CA violated Article 10 of the PPL, i.e., restricted the competition, by having stipulated in TS for a number of positions that dimensional tolerance had to be of class 6 or better.

**Excerpt from Reasoning of the Republic Commission's Decision
No. 4-00-150/2018 of 30 March 2018:**

"...Article 10, Para 1 of the PPL provides that CA is obliged to facilitate as much competition as possible in a PP procedure, whereas Para 2 of this Article provides that CA may not restrict competition, and in particular it may not prevent any bidder from participating in public procurement by unjustified use of negotiated procedure or by using discriminatory requirements, technical specifications, or criteria.

Article 70, Para 1 of the PPL provides that TS and design documents, in terms of this Law, are technical requirements which are mandatory and integral part of tender documents containing described features of goods, services or works. These must ensure that the goods, services or works to be procured, are described objectively and in the way that meets the needs of CA.

It follows from the cited provisions that CA is obliged to set the technical specifications of goods, which are obligatory and integral part of tender documents, so to allow that goods to be procured are described in an objective fashion and in line with the needs of CA, however provided that such features do not prevent any bidder from participating in the PP procedure. Further, CA is not obliged to define them in such a way to make all interested bidders able to comply, but rather should determine those specifications in line with its objective needs.

In this PP case, for the required goods — bulldozer with ripper, the CA foresaw technical specifications it had to have, among other things a clearance, reducing it from previously required minimum 615mm to minimum of 580mm, after having been alerted by bidders, with a view of widening the competition among bidders.

By filed PoR request, the claimant challenged the prescribed value of the subject technical specifications of clearance, and moved to amend tender documents in a way that the required value of clearance of minimum 580 mm gets added tolerance of 10 mm, claiming that this would not affect the machine's mobility and that the required technical features only corresponded to a specific bidder.

Having in mind the established facts, the Republic Commission recalls that, by arguments justifying its needs for the challenged technical specifications, the CA explained that, in given case, it had determined such technical features in a way that is both objective and meets its need pursuant to Article 70, Para 1 of the PPL. Namely, by justifying reasons due to which it had foreseen values of clearance of minimum 580 mm, the CA invoked the extremely difficult working conditions on the open-pit mining, where the possibility to use the machine and the efficiency of its work directly depend on the value of the clearing.

In this regard, the Republic Commission accepts as grounded the CA's arguments whereby it explained the reasons due to which any further reduction of clearance would adversely affect the functioning of machine and possibility of its use in this case and, given that the subject good would be used for operations in the other coal layer and its roofing, where the terrain was water-saturated and thereby its bearing capacity was significantly reduced; in this terrain a machine equipped with the ripper would mean greater mass than a standard machine, and therefore a machine with small clearance would often get stuck. In addition to this, the CA also made note of its experience in exploitation of using bulldozers with clearance less than 580mm, which entailed a lot of problems in terms of getting stuck in the mud, difficult transport from one location to another, reduced effectiveness in its operation, and increased fuel consumption.

Having in mind the following:

- the fact that the CA, upon request of the claimant as an interested party, reduced the initial clearance of 615mm to 580mm, under explanation that the difference of 35 mm did not significantly affect the mobility of machine;
- arguments presented by the CA explaining its needs when using and exploiting the subject good, due to which it could not accept additional reduction of clearance;
- the fact that the required clearance of 580mm, challenged by the claimant's statement that the amended technical specification (as suggested by claimant — additional tolerance of 10mm) would not affect the mobility of the machine;
- claims that the CA was giving "completely different and inconsistent responses" to the same questions and requests — which did not correspond to the facts;

the Republic Commission finds that the claimant unfoundedly challenged the CA's action in the part defining the subject technical feature, in terms of Article 70, Para 1 of the PPL.

On the basis of the foregoing, the Republic Commission finds that the CA justified the reasons due to which it had required the challenged value of the subject technical feature of clearance, meaning that the clearance was determined pursuant to Article 70, Para 1 of the PPL and, subsequently, the Commission finds the examined allegation of the claimant to be unfounded."

**Excerpt from Reasoning of the Republic Commission's Decision
No. 4-00-160/2018 of 04 April 2018:**

"...On 16 March 2018, the Republic Commission sent a letter to the CA, requesting the CA to declare the reasons for requiring the digger's "traction force" to be at minimum be 220 kN, i.e., to explain why the minimum value of 189kN was not acceptable, bearing in mind allegations in PoR request.

On 28 March 2018, the CA submitted its explanation to the Republic Commission on the required value of "traction force of minimum of 220 kN", indicating that the traction force had to be the greatest possible, because the machine would work both in cultivated and non-cultivated parks and green areas. This implies the exceedingly difficult working conditions due to uneven terrain, often muddy and grassy, and this involves very slippery surfaces where the digger has to perform necessary works. The CA explains that such type of terrain requires greater traction force to prevent the slipping of the machine, and to harness the force it has at the top of its bucket. Further, the subject machine is required to extract all types of stumps, an extremely difficult job, which could never be done without huge traction force. The CA notes that technical features of the subject goods were defined as a reflection of its need to ensure smooth and quality course of operation of its business, and that the purpose of the required features is to ease the work of its competent service so to perform the works of vital importance for the CA's operations.

Article 10, Para 1 of the PPL provides that CA is obliged to facilitate as much competition as possible in a PP procedure, whereas Para 2 of this Article provides that CA may not restrict competition, and in particular it may not prevent any

bidder from participating in public procurement by unjustified use of negotiated procedure or by using discriminatory requirements, technical specifications, or criteria.

Article 70, Para 1 of the PPL provides that TS and design documents, in terms of this Law, are technical requirements which are mandatory and integral part of tender documents containing described characteristics of goods, services or works. These must ensure that the goods, services or works to be procured, are described objectively and in the way that meets the needs of CA.

It follows from the cited provisions that CA is obliged to set the technical specifications of goods, which are obligatory and integral part of tender documents, so to allow that goods to be procured are described in an objective manner and in line with the needs of CA, however provided that such characteristics do not prevent any bidder from participating in the PP procedure. Further, CA is not obliged to define them in such a way to make all interested bidders able to comply, but rather should determine those characteristics in line with its objective needs.

In the subject PP procedure, the CA was to procure a working machine — digger, stipulating, inter alia, it should possess “maximum traction force of at least 220 kN” and that “total length of the digger is maximum 9,400 mm”.

By filed PoR request, the claimant challenged the prescribed values concerning technical characteristics on “traction force” and “length of digger”, and moved to amend tender documents in a way that traction force be at least 198 kN instead of stipulated 220 kN, and that the length of the digger be maximum 9,530 mm instead of stipulated 9,400 mm, declaring that the amended technical characteristics would not affect the quality and exploitation of the digger, and pointing that only the “SANWORD” machine manufacturer could meet the required technical characteristics, which violated the principle of ensuring competition among bidders.

Having in mind the established facts, the Republic Commission finds that, under given arguments justifying its needs for two challenged technical characteristics, the CA has explained that in this case it had foreseen the challenged technical characteristics in a way that is both objective and corresponds to its needs, pursuant to Article 70, Para 1 of the PPL. Namely, in its delivered response, the CA justified the reasons for stipulating maximum digger length of 9400 mm by

possessing a trailer which would be used to transport the digger to different city locations as necessary to perform subject works and which is of dimensions corresponding to the prescribed digger's length. In this light, the CA correctly reasons that if it acquired a digger of a length other than the one set in tender documents, it would not be able to use it due to the dimension of the loading trailer it already has (of the same dimensions as the digger to be procured), and that in such case it would not have any possibility to transport such a digger wherever needed to perform subject works, which would result in inability to use the digger due to its inability to transport it.

When justifying the requirement for "traction force" of at least 220 kN, the CA stressed that such requirement was set having in mind the planned working locations for digger, including the working in parks and green areas with either cultivated or non-cultivated terrains, which requires the greatest possible traction force due to the difficult working conditions on uneven terrain, often muddy, grassy and extremely slippery, which makes the operation of the digger much harder. Due to the enumerated difficulties the machine might be exposed to while operating in that kind of terrain, it is necessary to require traction force of at least 220 kN, so as to prevent the slipping of the digger, and to harness the force the digger has at the top of its bucket. The CA further clarified that the digger would be used to extract stumps of all types, an extremely difficult job, which could never be done without huge traction force.

Having in mind the arguments the CA used to explain its needs while using and exploiting the subject digger that had articulated the challenged technical requirements for a set length of the digger and traction force, and the fact that those characteristics were challenged by the claimant's assertion that amended (per his suggestion) technical characteristics would not affect the "quality" and "functional use" of the working machine, the Republic Commission finds that allegations challenging the CA's actions regarding two challenged technical characteristics, in terms of Article 70, Para 1 of the PPL, are unfounded.

On the basis of the foregoing, the Republic Commission finds that the CA justified its reasons to require the challenged values of relevant technical characteristics, meaning that those were set pursuant to Article 70, Para 1 of the PPL, which leaves the claimant's allegation without merits."

**Excerpt from Reasoning of the Republic Commission's Decision
No. 4-00-301/2018 of 14 May 2018:**

"...Further reviewing of data posted on the PP Portal establishes that to this interested party's question "Can a water conditioning mixture be organic-based or inorganic-based?" the CA's response was that the liquid water conditioning mixture may be both organic and inorganic-based, provided that it does not contain such inorganic matters which facility brings in the Seveso situation (reply No. E.05.01.-136179/1-18 of 16 March 2018).

When responding to an interested party's question on which evidence ought to be supplied so that the CA verifies the offered equipment complies with all TS, the CA replied, inter alia, it is necessary to attach with the bid the gear plates catalogue material or any other material for bunded tanks cladding that they can offer and that are in line with the tender documents requirements (reply No. E.05.01.-136185/1-18 of 16 March 2018).

Article 10, Para 1 of the PPL provides that CA is obliged to facilitate as much competition as possible in a PP procedure, whereas Para 2 of this Article provides that CA may not restrict competition, and in particular it may not prevent any bidder from participating in public procurement by unjustified use of negotiated procedure or by using discriminatory requirements, technical specifications, or criteria.

Article 70, Para 1 of the PPL provides that TS and design documents, in terms of this Law, are technical requirements which are mandatory and integral part of tender documents containing described characteristics of goods, services or works. These must ensure that the goods, services or works to be procured, are described objectively and in the way that meets the needs of CA.

Article 71, Para 1, Point 2 of the PPL provides that CA also defines TS in the form of characteristics or functional requirements, which may include environmental characteristics and requirements concerning energy efficiency, and must be sufficiently specified and clear so that the bidders can prepare adequate bids and the CAs can procure goods, services or works adequate to their objective needs.

Taking into account the established facts and cited provisions of the Law, the Republic Commission finds that all claimant's allegations challenging the way

the CA stipulated TS for goods which were the subject of PP procedure in tender documents, both in terms of technical requirements regarding the protection of bunded tank and the type of basis for mixtures for the conditioning of softened water, and in terms of the claimant's alerting that the technical specifications had been designed so as to favour the product offered by manufacturer "Oveks Inžinjeri" d.o.o. from Belgrade (Hidro X Boiler Compound) are without merits.

Namely, it is established in this case that in the final, sixth amendment to tender documents, posted on the PP Portal on 16 March 2018, the CA in its TS described goods to be procured pursuant to Article 10 of the PPL. In fact, by stipulating that besides the required bunded tanks being cladded with polyethylene gear plates, it could also be cladded with any other cladding material (acid-resistant anti-skid plates, or bi-component chemically resistant solvent-free epoxy resin, or other equivalent cladding), the CA effectively allowed for as broad competition as possible in the subject PP procedure and, thus, acted in line with mentioned principle of the PPL.

Therefore, the claimant unfoundedly holds that the only tender documents designed in line with the provisions of the PPL would be such tender documents which stipulate that the sole possible protection of bunded tank is the one implying gear plates, and no other possible alternative."

**Excerpt from Reasoning of the Republic Commission's Decision
No. 4-00-610/2018 of 06 June 2018:**

"...In this case, in the subject request the claimant maintains that bidders were obliged to prove they can independently perform standardising (*étalon*), being qualified pursuant to ISO 17025 standard. Since the selected bidder, as the claimant observed, does not own a laboratory accredited under ISO 17025 standard, the former should have submitted bid by commissioning an accredited laboratory or a person possessing one, in the only way provided by the PPL — in a joint bid, or through a subcontractor, pursuant to Articles 80 and 81 of the PPL. Since the bid does not have any evidence proving the selected bidder can do it on his own or through another person — whom he would have to name in his bid as the subcontractor or as the second participant in a joint bid, and since the bid does not have any evidence proving the laboratory was qualified to

perform standardising pursuant to requirements of ISO 17025 standard, hence the claimant alleges that the selected bidder is not capable of performing contractual obligation to standardise instruments, as provided under Article 1, Para 6, Sub-Para 5 of template PP contract.

However, from the established facts follows that the CA did not stipulate, in any part of tender documents, in a clear, precise, and unambiguous manner, those bidders had to own a metrology laboratory qualified to perform standardising pursuant to ISO 17025 standard. The tender documents do not stipulate that bidders had to personally perform standardising pursuant to ISO 17025 standard, and do not stipulate supplying of any evidence of laboratory having been accredited pursuant to ISO 17025 standard. Bidders were not instructed to attach to their bids the proof of metrology laboratory having been accredited pursuant to ISO 17025 standard, or that a bidder who does not own one should name in the bid which laboratory would perform standardising and what format of cooperation, association or commissioning should be in place between them so to prove the standardising would be performed in a specific laboratory. There was no instruction for bidders who do not own a metrology laboratory or an organisation accredited to standardise pursuant to the required standard, that they had to include a laboratory in their bids either as a subcontractor or as the second participant in the joint bid, and to submit the proof of such laboratory having been accredited per this standard.

Namely, from the contents of tender documents follows that the subject of procurement is *Real time PCR* device; from the template PP contract follows that in addition to the goods which is the subject of purchase and sale agreement, the price also covers:

- installing, connecting and commissioning the device, to be performed by the supplier's engineers authorized by the manufacturer of the servicing, maintenance and installation equipment;
- training of the laboratory staff to work on this device, delivered by the CA's staff authorized by the equipment manufacturer, with issuing certificates on names of staff;
- upon installation and at the end of the first warranty year of the instrument, to "ensure standardising of instrument by the metrology laboratory accredited pursuant to ISO 17025 standard at the bidder's expense";

- standardising kit, which will be used only for internal control of bidder's device to deliver to the CA and to install the subject of procurement;

whereby the delivery would only be deemed finalized on the day of the handing over, installing and putting into commission the contracted goods in the CA's premises.

The circumstances that led to evaluating the subject allegations as unfounded are as follows:

- the disputed duty of standardising was defined so that bidders "should ensure" it at their expense but not perform it themselves;
- mentioned duty was not accompanied with bidders' obligation to submit the proof thereon in their bids;
- the chapter of tender documents containing mentioned duty: "3.9 Other CA's requirements" and Article 1, Para 6 of Template PP contract governing the price structure and what it covers, were more indicative of an additional duty in the course of execution of the contract to be funded by bidders.

The bidders' duty was to fill in and sign template PP contract and thus declare whether they agree or accept to ensure the standardising of instrument, at their own expense, upon the completion of installation and at the end of the instrument's first warranty year. Bidders were not able to state these costs within the price structure form, since this form had a blank space for entering the price of the offered device, with and excluding VAT, but not the costs of training, standardising or of other elements making the structure of the offered price. Bid with a signed template PP contract means the bidder's acceptance to ensure standardising at own expense.

The selected bidder undoubtedly prepared his bid starting from the way the tender documents had been prepared. He committed to ensure standardising of the device by a metrology laboratory pursuant to ISO 17205 standard, at his expense.

The tender documents did not specify that bidders had to own a metrology laboratory, or how to include laboratory in the bid where a bidder did not own one, nor did it define that bids had to contain proof of accreditation of laboratory pursuant to ISO 17205 standard. Where a claimant held the CA should have mandatorily incorporated proof of accreditation of the laboratory into the body of

evidence, pursuant to Article 63 of the PPL he had had a possibility to alert the CA thereon, should he considered it to be an irregularity.

Namely, he learned the content of tender documents within deadlines under Article 149, Paras 3 and 4 of the PPL during which he could have timely alerted the CA he had held it to be an irregularity, and thereafter challenge the content of tender documents had the CA assessed there were no reasons to change anything or to supplement the content of tender documents in that regard. In terms of Article 149, Paras 3 and 4 of the PPL, the claimant could have timely acted, particularly if he had deemed that the proof of accreditation of laboratory pursuant to ISO 17205 standards, by its nature, belonged to the body of evidence proving the mandatory eligibility requirement for PP procedure under Article 75, Para 1, Point 5 of the PPL. The claimant was aware of the content of all mandatory and additional eligibility requirements for PP procedure, and thereby of the proofs to be supplied with the bid. He was also aware that the CA had posted additional information and clarification regarding the preparation of bids, when responding to an interested party's request to clarify the requirement for standardising Real Time PCR device, which was not included for Real Time PCR devices, and question whether that requirement implied verification with standardising. The CA responded that said requirement implied verification with standardising.

Therefore, in the view of the Republic Commission, under expert evaluation of bids the CA could not act otherwise to how it had evaluated proofs supplied in the selected bidder's bid. Namely, the CA is obliged to evaluate bids starting from the content of tender documents and the way it had defined eligibility requirements, through key requirements defining the acceptability of bids, ending with technical specifications. In the case at hand, from the content of tender documents and provisions of Article 1 of template PP contract it follows that the only obligation the CA clearly defined is to include the price of standardising into the price, i.e., that a bidder has to assume duty — in order to make his bid acceptable — to ensure standardising by a metrology laboratory pursuant to ISO 17205 standard, at his own expense, in the stage of the execution of contract. Assuming such contractual obligation, which bidder does by signing the template PP contract, constitutes the sufficient grounds to evaluate the bid as acceptable. The content of tender documents did not clearly or unambiguously produce any other obligation of bidders in this matter — how exactly to ensure,

through which laboratory, whether to name such laboratory in the bid, how to prove that the laboratory consents to standardise the device which is the subject of this public procurement, how to prove whether the laboratory is accredited pursuant to requirements of ISO 17205 standard. In the view of the Republic Commission, it can therefore be concluded that the duty of bidders unambiguously stemming from tender documents is to accept to ensure standardising of the instrument by a metrology laboratory accredited pursuant to ISO 17205 standard, at own expense, which is exactly what the CA said in its response to PoR request.

The Republic Commission notes that in each individual PP procedure tender documents constitute the basis for each bid, and thus the basis for their evaluation, given that the content of the bid is directly conditioned by the content of tender documents, and consequently the evaluation of acceptability of such bid should be assessed according to the parameters and requirements it was prepared upon. Having in mind the foregoing and the content of tender documents, the Republic Commission finds that the CA acted properly by not rejecting the selected bidder's bid as unacceptable in terms of Article 3, Para 1, Point 33 of the PPL, due to which the Republic Commission finds the claimant's allegation to be without merits."

Excerpt from Reasoning of the Republic Commission's Decision No. 4-00-340/2017 of 24 April 2017:

"...The reviewing the questions and responses at hand establishes that the interested party posed a question to the CA and alerted that TS for services was not precisely defined. The claimant phrased the mentioned imprecision as follows: "Under 1) Freight vehicles – garbage truck – Mercedes, position 14) reads: cylinder block replacement, and 15) reads: piston replacement. This procurement is imprecisely defined, as it leaves unknown which Mercedes make is in question, and which sort of engine. The same applies to all other positions from 15 through 39, as well as for garbage truck scavengers Volvo, Iveco, Bonetti, Kia, Fap, Tam, Fiat, for working machines it reads only "tractors" without indicating any make at all, not even their type and chassis number, for bulldozers Cat it only reads: telehandler, with no further detail." The claimant required the modifying of tender documents into lots and supplementing it with accurate indi-

cations of make and type of each machine.” In response to this question, the CA said it would make changes to tender documents by indicating makes and models of vehicles.

Also stated in this claimant’s questions is that the specifications of services did not contain catalogue numbers describing spare parts, nor did it contain a rough description of parts, since different names are ambiguous. The claimant proposed that maybe the CA defined these names deliberately so as to afterwards manipulate the delivery of spare parts, or maybe intended to enable as little competition as possible through this imprecise definition of descriptions of spare parts without any catalogue numbers. The claimant required changes to tender documents in the part of descriptions of spare parts, i.e., overhauling of components by adding catalogue numbers which accurately determine and describe each component/spare part to be overhauled or installed. The CA responded to this question that it did not possess catalogue numbers of spare parts, and informed the potential bidder that it had stipulated in tender documents a mandatory tour of the vehicle fleet to facilitate potential bidders’ inspecting the vehicles.

Article 149, Para 3 of the PPL provides that PoR request challenging the type of procedure, the contents of the call for competition or of tender documents, will be considered timely if received by CA at latest seven days before the expiry of deadline for the submission of bids, whereas in low-value PP procedure and in qualification procedure, if received by CA at latest three days before the expiry of deadline for the submission of bids, regardless of the manner of delivery and provided that claimant has previously alerted the CA to potential deficiencies and irregularities in compliance with Article 63, Para 2, but CA failed to remedy those.

In line with the above and having in mind the purpose of cited Article, the precondition for filing PoR request is that claimant alerts the CA to potential deficiencies and irregularities observed in tender documents before the expiry of deadline for its filing. Having in mind the established facts, and in light of Article 149, Para 3 of the PPL whereby previous alerting to deficiencies and irregularities is a legal preconditions for filing PoR request before the expiry of deadline for the submission of bids, the Commission finds that this precondition was not fulfilled for the request to be taken up in the procedure i.e., for the Commission to deliberate on merits of allegations by which the claimant

alerts to imprecisions in defining technical features of required services, because the claimant failed to duly alert the CA through his previous alerting episodes in terms of Article 63, Para 2 of the PPL, and which he has alleged only later on, in given PoR request which includes the subject allegations.

Namely, from the established facts undoubtedly follows that the claimant sent RfC of tender documents, thereby alerting to deficiencies of tender documents concerning technical features of required services, which the CA posted on the PP Portal on 9 March 2017. In this preliminary alert, the claimant maintained the TS of spare parts was imprecise since it does not allow to undisputedly identify specific spare parts, or the makes of vehicles, or number of engine or chassis, as in his opinion these data (accurate reference to the make and type of machine) enable precise identification of spare parts to be replaced, and by his preliminary request he in fact requested according amendments to tender documents. Acting upon filed RfC of tender documents, the CA accepted claimant's suggestion and made changes to tender documents in the part regarding stipulated TS of services, by specifically stating for each motor vehicle its make, type of machine, and number of chassis of relevant motor vehicle.

Therefore, the CA made changes to the relevant part of tender documents by accordingly specifying required technical features of spare parts to be replaced when providing the subject services, thus acting in line with the claimant's preliminary alert.

However, in the remaining part of allegations contained in PoR request challenging imprecision in determining technical features of spare parts to be replaced, the Republic Commission finds that the claimant has not previously made according alert by his request for additional clarification of tender documents and by question to the CA in the stage before the expiry of deadline for the submission of bids. Hence, it was only in the PoR request that the claimant for the first time raises the matter and underlines discrepancies in tender documents in the part regarding the individually determined goods the CA requires in TS for specified motor vehicles, by listing components claimant deems the CA was obliged to define in a more specific and precise fashion (replacement of cooler — whether water or air condition; repair of cylinder — without indicating which cylinder; replacement of valves — without indicating which valve; replacement of side window — windshield, front left, front right etc.). In the view of the Republic Commission, had he deemed it necessary to

have a more precise TS of the PP subject, he should have previously alerted the CA thereon within the deadline under Article 63, Para 2 of the PPL. Likewise, since the claimant alerted to the deficiencies and irregularities observed in tender documents per above-stated reasons, but as late as in PoR request, the Republic Commission finds that he thus acted contrary to Article 149, Para 3 of the PPL, and that the precondition to consider the subject allegations has not been fulfilled.

In this part, the Republic Commission considered the claimant's allegation asserting it would be correct that the CA has entered catalogue numbers of spare parts required for the provision of auto mechanic services, taking into account that conditions were met to deliberate upon it in terms of Article 143, Para 3 of the PPL in conjunction with Article 63, Para 2 of the PPL.

By inspecting tender documents, Part III "Technical features of the PP subject" is established that the CA in a tabular view for each of four types of motor vehicles (freight vehicles, working machines, upgrading garbage truck, passenger vehicles) listed: equipment manufacturer, make of vehicle, number of chassis of motor vehicles, and specification of services required for each specific motor vehicle, with reference to indicative annual quantities of services to be procured. There was a note in tender documents stipulating that bidders wishing to participate in the PP procedure are obliged to inspect the CA's vehicle fleet i.e., all vehicles that will be the subject of auto mechanical services, within the deadline for the submission of bids, and to submit the proof of this tour with their bids.

Namely, the Republic Commission affirms that Article 70, Para 1 of the PPL provides that TS and design documents, in terms of this Law, are technical requirements which are mandatory and integral part of tender documents that contain described features of goods, services or works. Those must enable the goods, services or works to be procured are described in an objective manner and in line with the needs of CA, while Article 71, Para 1, Point 2 of the PPL provides that CA may define TS in the form of features or functional requirements, which may include environmental features and requirements concerning energy efficiency and which must be sufficiently specified and clear so that the bidders can prepare adequate bids and so the CAs can procure goods, services or works adequate to their objective needs.

Taking into account the established facts and cited provisions, the Republic Commission is of the opinion that the CA in this case specified, in a clear and unambiguous fashion, the technical features of spare parts to be replaced or repaired within providing relevant auto mechanical services, by means of listing specific data on make of vehicle, type of machine and number of chassis of motor vehicle for each motor vehicle, due to which all bidders were able to recognize the CA's needs and thereby offer their goods that correspond to the requirements of TS. In addition, the fact that the CA in its tender document stipulated a mandatory tour of vehicle fleet for bidders participating in the subject PP procedure, in the view of the Republic Commission, allows the bidders to inspect motor vehicles for which auto mechanical services are to be procured, and thereby evidently learn the CA's needs, in on top of information on spare parts of motor vehicle the CA has listed under TS. Further, the Republic Commission affirms that the use of trade mark, i.e., special production (here, the use of catalogue number as the claimant suggests in his request) is contrary to Article 72, Para 2 of the PPL, and CAs may only opt to use it where the subject of procurement cannot be described in a way to make specifications sufficiently understandable to bidders, in line with the provision of Para 3 of the same Article. Due to this, the Republic Commission finds that the defining of technical features by entering catalogue numbers was not a statutory obligation of the CA, and that such defining was not necessary for a precise identification of features of the motor vehicles' spare parts, when having in mind the data available in tender documents and the duty of bidders to inspect the CA's vehicle fleet prior to preparing their bids.

On the grounds of the foregoing, here considered claimant's allegation is found to be without merits."

**Excerpt from Reasoning of the Republic Commission's Decision
No. 4-00-1259/2017 of 17 October 2017:**

"...The Republic Commission notes that from the request stems that the claimant did not at all challenge the state of facts determined by the CA after having received additional clarification from the latter about disputed TS for offered goods (length and width of Teflon rod for all seven positions covered by Lot 1), based on insight into information available on the web page of manufacturer

“Guarniflon” S.p.A. from Italy, i.e., the fact that, according to these data, the largest diameter in this manufacturer’s product portfolio for Teflon rods is diameter Ø 140, meaning that there are no information that this manufacturer has in its product portfolio Teflon rods of Ø 160 diameter and 1 m length (position 7 in the form V – “Technical specifications”).

Further, the Republic Commission notes that the claimant in his PoR request did not supply any evidence leading to a conclusion that the facts determined by the CA while evaluating Lot 1, insight into information available on the web page of manufacturer “Guarniflon” S.p.A from Italy, do not correspond to the actual state of facts.

Hence, acting upon this PoR request, the Republic Commission finds that the CA, by expert evaluation of bids the claimant was given the opportunity, pursuant to Article 93, Para 2 of the PPL, to submit additional clarification of his bid in terms of disputed TS for offered goods (length and width of Teflon rods for all seven positions covered by Lot 1) based on insight into information available on the web page of manufacturer “Guarniflon” S.p.A. from Italy, has established the facts which show that the claimant for Lot 1 did not offer the goods which fully meet all technical features as defined in tender documents, whereby the claimant in his request did not dispute this as not to correspond to the established facts, and did not attach any additional proofs conducive of questioning the accuracy of the conclusion inferred by the CA when evaluating his bid.

It derives from the above that the CA had the legal grounds to determine the claimant’s bid had no status of an adequate bid, that is, an acceptable bid in terms defined under Article 3, Para 1, Points 32 and 33 of the PPL in conjunction with Article 107, Para 1 of the PPL, which further means, that the CA was *ex lege* obliged to reject it.

Specifically, Article 107, Para 1 of the PPL provides that CA has to reject all unacceptable bids after inspecting and evaluating all bids in PP procedure.

In this regard, the Republic Commission affirms that the notion of adequate bid is defined under Article 3, Para 1, Point 32 of the PPL, which provides that such a status has a bid which is timely and determined to fully comply with all TSs that are a mandatory element of each tender documents pursuant to Article 61, Para 4, Point 5 in conjunction with Articles 70 and 71 of the PPL.

When having in mind that, pursuant to Article 3, Para 1, Point 33 of the PPL, an acceptable bid is one which is timely, one that CA did not reject due to essential deficiencies, which is adequate, one that does not restrict or condition either the rights of CA or the obligations of bidder, and one which does not exceed the amount of estimated value of given public procurement, this means that the fact that a bid is adequate in terms of Point 32 of the same Article of the Law, is but one of several cumulative conditions which have to be fulfilled in order to make a bid an acceptable one.

Having in mind the statutory duty under Article 107, Para 1 of the PPL to reject all unacceptable bids in PP procedure after inspecting and evaluating all bids, and bearing in mind the content of the PoR request, the Republic Commission finds that in this case it is not established that the CA incorrectly evaluated the claimant's bid in terms of the provisions of the PPL."

**Excerpt from Reasoning of the Republic Commission's Decision
No. 4-00-1287/2017 of 20 December 2017:**

"...Having reviewed data on the PP Portal, it is established that, upon suggestion of an interested party to amend tender documents in Lots 2 and 3, by inserting catalogue number to each listed spare part, the CA replied in the document titled "Responses to questions" No. 11-19/17-1 of 18 September 2017, saying that tender documents were prepared pursuant to Article 72, Para 2 of the PPL, which provides that CA may not indicate in tender documents any particular trade mark, patent, or type, or a specific origin or production, thereby enabling participation in the subject PP procedure to all interested parties. On these grounds, the CA said it would keep the content of tender documents unchanged.

Article 10, Para 1 of the PPL provides that CA is obliged to facilitate as much competition as possible in a PP procedure, whereas Para 2 of this Article provides that CA may not restrict competition, and in particular it may not prevent any bidder from participating in public procurement by unjustified use of negotiated procedure or by using discriminatory requirements, technical specifications, or criteria.

Article 61, Para 1 of the PPL provides that CA should develop tender documents so that bidders can prepare acceptable bids pursuant to tender documents.

Article 72, Para 2 of the PPL provides that CA may not include in tender documents any particular trademark, patent, or type, or a specific origin or production.

Article 72, Para 4 of the PPL provides that indication of elements such as trademarks, patents, type or manufacturer must be accompanied by the words “or equivalent”.

From the above it follows that in Lots 2 and 3 of tender documents the CA stipulated that the right to participate in the tender had bidders who had available spare parts necessary for the servicing, and proved this by the statement that they had available spare parts necessary for the servicing. The CA stipulated in tender documents the list of spare parts bidders should have, and specified which spare parts would be replaced as necessary upon the CA's written consent and upon previously submitted report of the selected business on the need to replace spare parts. In this case, the CA did not require original spare parts, but instead took to supply the list of spare parts which the bidders should have available and which would be replaced as necessary and upon the CA's written consent. It also envisaged as bidder's duty to replace spare parts at own expense.

In his PoR request, the claimant invoked the CA's duty under Article 72, Para 4 of the PPL, to mark in the tender documents the spare parts to be procured with manufacturer's catalogue numbers and the words “or equivalent”. From the above the claimant inferred that CA's omitting to mark spare parts with catalogue numbers disabled bidders to submit acceptable, unambiguous and competitive bids, thus not knowing which spare parts to offer.

In consideration of the above and of the claimant's allegations, the Republic Commission finds that the precision in terms of developing tender documents, in this case, is reflected in the CA's clear and unambiguous statement that the subject of maintenance service are X-ray machines in Lot 2 — medical ventilators, and in Lot 3 — aspirators of the manufacturer Dräger. Hence, in the view of the Republic Commission, by inserting specific data such as the name of manufacturer, in the part on the anaesthesia machine, the CA has clearly determined its needs and thereby enabled the bidders to recognize those and offer goods, here: spare parts, which comply with tender documents and required technical features of medical ventilator Savina of the manufacturer Dräger (produced in 2004 and 2011) and aspirators of the manufacturer Dräger. The

Republic Commission further notes that the use of trademark or special production (which would in this case be the use of catalogue number as insisted by the claimant in his request) is in contravention of Article 72, Para 2 of the PPL, because CAs may only choose so where the subject of procurement cannot be described so to make specifications understandable to bidders, pursuant to the provision of Para 3 of the same Article.

Taking into account that the claimant did not challenge the precision, i.e., the way the CA had defined the PP subject, but instead insisted that the spare parts for X-ray machines which the CA owns and which are the subject of maintenance services, be marked with catalogue numbers, the Republic Commission finds that claimant's allegation that spare parts should be marked with catalogue numbers is groundless. The supporting reasoning, in the view of the Republic Commission, is that the defining of technical features by entering catalogue numbers of spare parts was not a statutory obligation for the CA, but rather an exception in cases the CA cannot describe the PP subject so to make TS sufficiently understandable to bidders; further, because it was not necessary to precisely determine the features of spare parts of the X-ray machine, since the tender documents contained data on devices owned by the CA which would be the subject of maintenance services, and these data were not challenged by the claimant.

From the aspects of the above and of the limitations in defining TS provided under Article 72 of the PPL, whose obvious purpose is to facilitate competition in PP procedure, the CA acted properly by not marking spare parts with catalogue numbers. In addition, in the view of the Republic Commission, by not marking spare parts with catalogue numbers the CA enabled a larger number of bidders to bid in this PP procedure, and thus facilitated greater competition among bidders, which is the purpose and aim of each PP procedure. Hence, the CA has thus enabled bids in this PP procedure to be submitted by bidders/repairers who had spare parts other than products of the manufacturer Dräger. The fact that spare parts are not the products of the manufacturer Dräger or their equivalent does not reduce the responsibility of bidder, i.e., service provider, to ensure the functionality of the X-ray machine to be serviced in line with obligation stipulated in tender documents, given that pursuant to Article 3 of template PP contract they are obliged to remedy any deficiencies of the performed maintenance services at own expense, within 2 days from the upon receipt of a complaint. Another prescribed obligation of service provider is to offer a warranty period for each

servicing and maintenance of medical equipment (of at least 12 months) from the day of rendered repair or maintenance service, and for the replaced spare parts (of at least 6 months) or until the expiry of given spare part's warranty period according to the manufacturer's terms. Therefore, the CA ensured security in terms of the functioning and smooth operation of X-ray machine by means of the warranty for the rendered services and replacement of spare parts.

On the basis of the above, the Republic Commission holds that the CA did not violate the provisions of the PPL by not requiring spare parts with catalogue number "or adequate".

**Excerpt from Reasoning of the Republic Commission's Decision
No. 4-00-1424/2017 of 27 October 2017:**

"...In response to PoR request the CA, inter alia, stated that based on TS of subject Lots 11, 12, 13, 15, 16, 17, 18, and 19, it had enabled bidder to offer equipment complying with the required technical features, made by at least two manufacturers. The CA further stated that it had defined TS according to its objective needs, rather than to business and economic interests of bidders. On the basis of its market research, the CA held that manufacturers producing the subject goods had a sufficient number of partners, thus making a sufficient number of bidders and enabling the competition. The CA went on to explain it would not backtrack on the required CPU speed since the multi core CPUs of required speed are capable of sharing resources during the peak workload, in particular when user executes multiple processes at the same time. Since all CAs had several employees sharing a single device, there is the need for devices as efficient and modern as possible, capable of meeting the challenges of modern business operations.

Article 10, Para 1 of the PPL provides that CA is obliged to facilitate as much competition as possible in a PP procedure, whereas Para 2 of this Article provides that CA may not restrict competition, and in particular it may not prevent any bidder from participating in public procurement by unjustified use of negotiated procedure or by using discriminatory requirements, technical specifications, or criteria.

Article 12, Para 1 of the PPL, provides that CA has to ensure equality of all bidders in all phases of PP procedure, whereas Para 2 provides that CA may not impose

conditions that would constitute national, territorial, subject-matter or personal discrimination among bidders, or discrimination arising from the classification of the business activity performed by the bidder.

Article 70, Para 1 of the PPL provides that TS and design documents, in terms of this Law, are technical requirements which are mandatory and integral part of tender documents containing described features of goods, services or works. These must ensure that the goods, services or works to be procured are described objectively and in the way that meets the needs of CA, whereas Para 2 provides that, in procurement of goods and services, TSs determine features of goods or services such as dimensions, level of quality including methods for quality assurance, safety, level of environmental impact, energy consumption, consumption of other vital resources while using the product, accessibility for all users (including accessibility for disabled persons) and compliance assessment, use of product, as well as other features concerning the product such as the name under which the product is sold, terminology, designation, testing and methods of testing, package, marking and labelling, production process and the procedure of compliance assessment.

Article 72, Para 1 of the PPL provides that CA may not use, or refer to, technical specifications or standards which specify goods, services or works of a specific make, source, or of a particular construction, whereas Para 2 provides that CA may not indicate in tender documents any particular trade mark, patent, or type, or a specific origin or production.

Pursuant to the cited provisions, the CA sets TS by describing the subject of its procurement in an objective way and in line with its needs. Likewise, the CA is obliged to determine features of the subject services in a way which does not discriminate bidders, and which cannot be used nor can it refer to technical specification or standards denoting the goods of a certain manufacturer. Namely, although CA is legally obliged to facilitate as much competition in procurement as feasible pursuant to Article 10 of the PPL, on the other hand it does conduct each particular PP procedure primarily in order to satisfy its objective needs on the basis of tender documents which define specific requirements that correspond to these needs. Further, the Law does not oblige CA to list the names of manufacturers which in their products portfolio have goods corresponding to the requirements of technical documents.

Taking into account all facts it has established, the way the claimant has challenged the CA's actions in developing TS for the subject public procurement, the CA's arguments in its response to PoR request, and the nature of the subject of this public procurement, the Republic Commission finds that the claimant's arguments do not constitute the grounds to infer that the CA violated Articles 10 and 12 of the PPL in conjunction with Article 70 of the PPL, when setting requirements for TS in this PP procedure.

Namely, having in mind that the CA developed TS by listing a large number of required features (e.g., RAM memory, format — printing type, CPU, scanning speed, etc.), the Republic Commission finds that the claimant has only generally challenged requirements of TS by his PoR request, without specifying which technical features, listed under the subject tender documents for the subject lots, in his opinion were the ones limiting competition among bidders, i.e., which of technical features were not in line with the CA's objective needs, and the reasons thereto. The Republic Commission expressly notes that, in his PoR request, the claimant did not supply any evidence corroborating his allegations, and did not clearly and conclusively demonstrate the actual essence of unjust limitation of competition brought about by the CA when stipulating the subject TS, or state the specific reason which made the claimant deem that this TS fulfilled only goods of certain manufacturers and which these manufacturers were, or why he deemed the TS were not in line with CA's objective needs. Instead, he in general alleged that thus formulated tender documents limited competition as he described, and limited possibility for him, as an interested party, to bid in the subject PP procedure.

After considering the claimant's assertions alleging that the CA "did not allow for deviation from the CPU speed", and bearing in mind that he has challenged several lots covering different types of printing machines, the Republic Commission notes that this particular allegation did not specify relevant goods and the reasons why the stipulated CPU speed limited the competition among bidders. Further, after considering the way the CA formulated tender documents in the part of the required TS, and especially considering the CA's needs as explained in its response to PoR request whereby the CA said it would not backtrack on the required CPU speed since the multi-core CPUs of required speed are capable of sharing resources during the peak workload, which is vital due to due to a large number of staff who use the subject goods, the Republic Commission finds that

allegations contained in PoR request do not constitute the grounds to conclude that the CA unjustly limited competition in terms of Article 72, Para 1 of the PPL.”

**Excerpt from Reasoning of the Republic Commission’s Decision
No. 4-00-1603/2017 of 21 December 2017:**

“...Upon further review of tender documents it is established that under item 8.19, titled “Submission of Sample”, the CA stipulated duty of all bidders to submit samples with their bids for the testing purposes including, inter alia — one roll of 250,000 control stamps for the purpose of material qualification in the ZIN (Institute for Manufacturing Banknotes and Coins). The same part stipulated that the sample roll had to be in line with TS, contain generic design of OVD element (to present possibility of hologram origination) and narrative content (to present possibilities and quality of fixed printing) within textbox. It also stipulated that sample testing implied verification of the quality of applied hologram.

An integral part of tender documents in this part, in terms of duty to submit a sample, is a tabular view, whom the CA foresees as an integral part of the report on testing, consisting of four columns: tested characteristics, parameters and testing results, requirement met (yes/no), note.

Upon review of decision on awarding contract G. No. 10024 of 23 November 2017, it is established that the CA therein stated that, in compliance with item 8.19 of tender documents, it had tested the sample supplied by the claimant in line with the requirements of tender documents, and that the report was made on performed testing of control stamps for labelling the outer packaging of a medicinal drug, with this report being an integral part of the decision on awarding contract. As further stated, in the testing was established that the supplied samples did not meet requirements from the TS in tender documents in the part regarding quality of applicative hologram, which was duly noted in the testing report.

Upon review of the report on performed testing of control stamps for labelling the outer packaging of a medicinal drug JN 180/2017 of 20 November 2017, reference number 418/36/17, it is established that in terms of the tested claimant’s sample, the tabular view of the testing report, in the part regarding the tested characteristic — quality of applicative hologram, in the column “Requirement

met” was entered “NO”, which at the same time meant that the sample did not satisfy the requirement in terms of verification of applicative hologram quality (the hologram is applied in its entirety without indented edges and damage), as a tested parameter, with the description thereto being given in the column “Parameters and results of testing”. Namely, as entered in the column “Note”, the applied generic hologram contains periodic interruptions in a continuous design in about each 20 control stamps. In addition to the attached images, it was concluded that such deficiency was unacceptable, and that it appeared due to inadequate mounting of the plate to print the hologram’s diffractive structure.

Article 3, Para 1, Point 32 of the PPL provides that adequate bid is a bid which is timely and determined to fully comply with all technical specifications;

Article 3, Para 1, Point 33) of the PPL provides that an acceptable bid is a bid which is timely, one that CA did not reject due to substantial deficiencies, which is adequate, one that does not restrict or condition either the rights of CAs or the obligations of bidders, and which does not exceed the amount of estimated value of concrete public procurement.

Article 70, Para 1 of the PPL provides that TS and design documents, in terms of this Law, are technical requirements which are mandatory and integral part of tender documents containing described characteristics of goods, services or works. These must ensure that the goods, services or works to be procured, are described objectively and in the way that meets the needs of CA.

From the established facts follows that in this PP procedure’s tender documents the CA stipulated specific technical features of the goods to be procured, including the testing as a way to verify whether these technical characteristics required under tender documents are met. In this regard, the CA in tender documents stipulated bidders’ duty to supply a sample in the bid — one roll of 250,000 control stamps for the purpose of material qualification which ought to comply with TS and contain generic design of OVD element (to present possibility of hologram origination) and narrative content (to present possibilities and quality of fixed printing) in textbox. In the same part of tender documents, the CA informed bidders of the content of the report to be compiled on the performed testing, i.e., which characteristics would be tested and which parameters and testing results would be used to determine wheth-

er the offered good satisfies or does not satisfy the requirement in terms of the tested features.

In case at hand, basing on the cited testing method, the claimant's bid was evaluated as unacceptable because, as stated under the testing report which is an integral part of the decision on awarding contract, the supplied sample did not satisfy the requirement in terms of tested characteristic of applicative hologram quality, since the applied generic hologram contained periodic interruptions in a continuous design in about each 20 control stamps.

However, the claimant challenged this expert evaluation of bid, alleging that the described shim lines on the foil were neither damage or error, but rather a natural effect of hologram foil production, and that in this regard there were no requirements in tender document in the part of TS in terms of whether to submit a sample with or without shim lines effects, and that the purpose-made hologram would be generated for the actual reproduction. He went on to say that the foil with actual purpose-made hologram was to be generated using technology for minimizing shim line, but that such a solution was a matter of the actual production, which in this case had not been required by tender documents.

Starting from the above, notably, the fact that the claimant's allegations in the request do not deny that he did not use technology for minimising shim line effect on the supplied sample, but rather that said solution would be applied in the actual production of hologram, the Republic Commission finds that the CA acted properly by evaluating claimant's bid as unacceptable since the supplied sample did contain periodic interruptions in a continuous design, i.e., shim lines effects, thereby not satisfying the parameters of applicative hologram as a tested feature of the supplied sample, as stated under the report on testing of control stamps, which is an integral part of the decision on awarding contract.

Namely, in this case of public procurement, bidders were informed that expert evaluation of bids would be based on the testing of supplied samples as the way to verify the compliance with required technical characteristics of the offered goods; therefore, they knew which parameters and testing results were expected to satisfy the requirement in terms of each tested characteristic. Thus, in terms of the quality of the applied hologram as a characteristic to be tested in relation to the supplied sample, in the column "parameters and test results" was noted that the quality of the applied hologram would be tested, that the

required parameter was that the hologram be applied in its entirety without jugged edges and damages, and that depending on the testing results of the sample in terms of the required parameter, the quality requirement of the applied hologram would be either satisfied or not.


Having in mind the above, and that the bidders prove their productions possibilities by supplying samples of offered goods, that is, prove whether the offered good is in line with all technical characteristics required in tender documents which, ultimately, is the purpose of planning such a way of verifying the fulfilment of technical characteristics required in terms of each particular goods, the Republic Commission finds as groundless the claimant's referring to the fact that tender documents, in the part of TS, did not contain any requirement in terms of whether to supply a sample with or without shim lines effect, and claimant's concluding that for this reason his bid could not have been evaluated as unacceptable just because he did not supply a sample without shim lines effect, since for the actual reproduction he intended to produce a purpose-made hologram, in which case the foil with the actual hologram would be produced by using technology for minimizing shim line.

The supporting reasoning is that, as the claimant himself declared, the foil with actual purpose-made hologram is produced by using technology for minimizing shim line, which implies compliance with best practice used in the industry of highly secure printing. Hence, since the claimant does not deny that the foil with actual purpose-made hologram is produced by using technology for minimizing shim line, which implies compliance with best practice used in the industry of highly secure printing, the claimant was therefore obliged in this case to supply a sample without shim line effect, i.e., a sample with fully applied hologram, without any jugged edges or damages; at the same time, this is the requirement set in tender documents in terms of quality of applied hologram, for which the claimant stated in his PoR request that he intended to generate for the actual production.

Pursuant to the foregoing plus the fact that a role of 250,000 control stamps, which the claimant supplied as a sample required under tender documents, did not satisfy the requirement in terms of the set parameter on whose basis was assessed the quality of the applied hologram as the tested characteristic, since this hologram contained periodic interruptions in a continuous design in about each 20 control stamps, as stated in the report on performed testing of con-

trols stamp which the claimant did not dispute, and after having deliberated upon the claimant's request challenging the evaluated unacceptability of his bid due to the mentioned reasons, the Republic Commission finds his allegations to groundless. Further to this, the Republic Commission notes, the same way the CA stated in its response to PoR request, that it cannot be deduced on the basis of the claimant's sample whether or not he possesses the technology for minimising shim lines effect, for which effect he does not deny to be an implied compliance with best practice used in the industry of highly secure printing.

An additional supporting argument for the above is the claimant's explanation for challenging the unacceptability of his bid which stressed that there was no explicit requirement for the foil to be generated by the technology for minimising shim lines effect, while for the claimant, too, is undisputed that the requirement under TS in the actual reproduction may only be fully met by using foils produced by such technologies. Likewise, in its response to PoR request the CA states that the foil production technology which minimises shim lines effect is widely known among the professionals and due to the expired patents affordable to a larger number of manufacturers. This statement is supported by the fact that in relation to this part of tender document no RfC was filed from among the potential bidders who, as revealed by the explanation of PoR request, already knew possible ways to produce specific goods which are subject of this procurement, but for which the claimant incorrectly inferred from tender documents of this PP procedure that should have been applied only in the actual reproduction. Therefore, the way the claimant challenged the performed testing of the sample he had undeniably supplied with an identified defect, cannot constitute any grounds to find the CA's process of expert evaluation of bids to be in contravention of the provisions of the PPL."



3

Additional Eligibility Requirements in Public Procurement

Article 76 of the PPL provides a legal option for CA to set in tender documents additional eligibility requirements in PP procedure, where CA finds it necessary considering the subject of public procurement.

Article 76, Para 2 of the PPL provides that CA sets in tender documents additional eligibility requirements in PP procedure in terms of financial, operational, technical and personnel capacities whenever it is necessary having in mind the subject of public procurement, whereas Para 6 of the same Article provides that CA sets eligibility requirements in the procedure so that such requirements do not discriminate bidders and are logically related to the subject of public procurement.

The purpose of setting additional requirements is to verify bidders' eligibility, given the specificities of each individual PP subject, to take part in, i.e., to prove that they are capable of executing the specific PP contract if awarded.

To this end, CA sets the levels of financial, operational, personnel and technical capacities the bidders have to possess to be eligible to participate in PP procedure, and to be capable of executing the contract for whose awarding the specific PP procedure is being conducted.

When defining additional requirements, CA is obliged to set those in line with its objective needs, mindful that they are logically related and proportionate to PP subject, that the way of their setting does not unjustly restrict the competition, and that they are really requisite for the execution of specific PP contract. The

above does not mean that CA is obliged to define additional requirements so that the required capacities are suitable for each individual bidder. The difference between bidders exists exactly due to their unequal financial, operational, personnel and technical capacities, and hence the purpose of stipulating additional requirements is to make selection among those bidders who, given their capacities, are capable of successfully and in a quality fashion executing the awarded contract.

Failure to fulfil additional eligibility requirements in PP procedure results in exclusion of pertinent bidder from further procedure, as such a bid is unacceptable pursuant to Article 3, Para 1, Point 33) of the PPL, and therefore the CA is obliged to refuse it due to significant deficiencies pursuant to Article 106, Para 1, Point 2) of the PPL.

Given their importance in PP procedure, those requirements are often challenged in PoR requests, both in the stage of bid preparation, and the stage following expert evaluation and adoption of decision completing the procedure.

Challenging additional eligibility requirements in PP procedure in the stage before the expiry of deadline for the submission of bids, in a number of cases, is based on the interested parties' alert that those are not logically related to PP subject or that they restrict participation of bidders in given PP procedure. However, such claimants' allegations are often based on general assertions that CA stipulated additional requirements contrary to Articles 10 and 12 of the PPL, and that those are not logically related to the subject of public procurement for which the CA conducts the specific procedure. The key feature of this kind of allegations is insufficient argumentation or even total absence of arguments supplied by claimant, which could help identify the exact form of an undue restriction of competition, or help establish that the defined additional requirements are not logically related with the PP subject in given PP procedure. In addition, a number of PoR requests disagreed with the need to define a certain requirement, or claimed that some of those were defined at an unnecessary high level of capacity for given procedure and contract to be awarded, but without offering any clear or detailed explanation to corroborate such allegations. The consequence of generalised and unsupported claims of violation of competition and of lack of relation between the requirements defined under tender documents and PP subjects, was the rejection of PoR requests.

In the stage after decision finalising expert evaluation of submitted bids, the challenging often targets the compliance with all or with some additional requirements, i.e., required capacities. When challenging compliance with additional requirements, certain number of unsuccessful PoR requests is based on misinterpretation of the content of tender documents in the mentioned part. It was observed, in several cases where PoR requests were rejected, that claimants groundlessly alleged that they had fulfilled the requirement clearly defined under tender documents by having supplied the evidence contained in their bids (for instance, types of services which were the subject of previous contracts as the business capacity-related requirement stipulated in tender documents).

Besides the above-described challenging of expert evaluation, in this stage of the procedure are sometimes challenged the contents of additional requirements stipulated in tender documents and their way of proof, even though Article 149, Para 7 of the PPL provides that PoR request may not be filed to challenge CA's actions undertaken in PP procedure, where claimant knew or could have known the reasons for its filing before the expiry of deadline for the submission under Paras 3 and 4 of this Article but failed to file it before the expiry of this deadline. Challenging the contents of tender documents after the expiry of deadline for the submission of bids constitutes a reason to reject such PoR request and allegations targeting the contents.

**Excerpt from Reasoning of the Republic Commission's Decision
No. 4-00-456/2018 of 06 July 2018:**

“Upon review of decision on awarding contract No. 404-29/2018 of 9 May 2018 is established that up expiry of deadline for timely submission of bids the CA received three bids, evaluated the selected bidder's bid as adequate and acceptable, and chose it as most advantageous one, whilst evaluating bids of bidder “Steelsecurity DM” and of the claimant as unacceptable. Citing the reason for rejecting claimant's bid, the CA noted that the claimant, as evidence of fulfilling the requirement on business capacity, had filed photocopies of four contracts on subjects different than the procurement subject required by tender documents. These four contracts dealt with physical security and protection of facilities, instead of the required protection of crops and new

seedlings on agricultural land against crop damages; protection of field paths and ditches; prevention of burning of post-harvesting organic residues on agricultural land; prevention of livestock grazing on arable agricultural land. Having in mind the above, the CA finds that the claimant did not meet the additional requirement in terms of “business capacity” requiring the bidders “to have signed at least two contracts for services that are the subject of PP procedure in 2017, and that the value of at least one of those is of value no less than RSD 2,500,000.00 excluding VAT”.

Article 3, Para 1, Point 33) of the PPL provides that acceptable bid is a bid which is timely, one that CA did not reject due to substantial deficiencies, which is adequate, one that does not restrict or condition either the rights of CA or the obligations of bidder, and which does not exceed the amount of estimated value of concrete public procurement.

Article 76, Para 2 of the PPL provides that CA sets in tender documents additional eligibility requirements in PP procedure in terms of financial, operational, technical and personnel capacities whenever it is necessary having in mind the subject of public procurement.

Article 77, Para 2, Point 2, Sub-Point 2) of the PPL provides that bidder may prove compliance with requirements under Article 77, Para 2 of the Law by submitting a prove thereto with the bid, such as professional references accompanied by the list of major works performed, goods delivered, or services provided.

Article 106, Para 1, Point 2 provides that the CA is obliged to refuse a bid where bidder fails to prove compliance with additional requirements.

From the foregoing follows that, under additional requirement of “business capacity” in tender documents, the CA required the bidders “to have signed at least two contracts for services that are the subject of PP procedure in 2017, and that the value of at least one of those is of value no less than RSD 2,500,000.00 excluding VAT”. As the way to prove said requirement, the CA required the bidders to submit completed reference list with photocopies of contracts with their bids. The tender documents defined the subject of this PP procedure as the service of organising the farm land guarding within territory of the Municipality of Opovo, whereby a more detailed description the PP subject is given under title “Types, technical description, quality, quantity, way of conducting control, place of rendering service and deadline for its execution”.

From said part of tender document which clearly and in detail specifies tasks which comprise the PP subject, it follows that the organising of farm land guarding implies: regular, extraordinary and mobile engagement of field guards, whereby the regular guarding means the protection of crops and new seedlings on agricultural land against crop damages; protection of field paths and ditches; prevention of burning of post-harvesting organic residues on agricultural land; prevention of livestock grazing on arable agricultural land except on one's own land and pastures. Other tasks comprising this PP subject are additionally listed within extraordinary and mobile guarding services and engagement of field guards within territory of the Municipality of Opovo; these are relevant because the bidders were obliged to specifically state the monthly prices for regular, mobile and extraordinary engagement of field guards for these tasks/services and the total monthly price of all previously declared services in Form No. XIII – titled as “Price Structure Form” contained in tender documents.

Therefore, the fact that CA required that bidders had signed at least two contracts in 2017 for services that are the subject of this PP procedure, in the case at hand, in the view of the Republic Commission, means that the bidders, in order to prove compliance with the “business capacity” requirement, were obliged to attach evidence with bids, i.e., contracts corroborating they had signed contracts that dealt with organising and providing of farm land guarding service in 2017. Accordingly, the only relevant matter for the CA in this PP procedure was that bidders prove by supplied contracts that they had experience in rendering services which make the subject of this public procurement, here unquestionably defined as field guard services.

On the grounds of the foregoing and the fact that the claimant, intending to prove compliance with additional “business capacity” requirement, to his bid attached contracts undoubtedly referring to his having provided the facility security services, but not the farm land guarding service, and that this discrepancy the claimant did not negate, the Republic Commission finds that the CA acted properly by rejecting the claimant's bid as unacceptable pursuant to Article 3, Para 1 of the PPL in conjunction with Article 76, Para 2 of the PPL.”

Further, the Republic Commission has taken into consideration arguments the claimant's presented in his PoR request on application and interpretation of the provisions of the Law on Private Security, but found it not to be relevant

in this case. The supporting reasoning is that, even though said Law does not distinguish the physical protection activities according to different types of property to protect (agricultural fields, roads, homes), this cannot be accepted as a justified argument that prevents the CA from making such distinction in terms of property in a certain PP procedure. Namely, in the view of the Republic Commission, quite contrary to the claimant's arguments, the CA had the right in each specific PP procedure to define the PP and, according to those, to require specific type of experience of bidders for its materialisation. Therefore, in terms of Article 76, Para 2 of the PPL it was justified that the CA, for given PP subject which is farm land guarding services, requires that bidders prove they have relevant experience. However, if the claimant or maybe other potential bidder deemed that either the defined business capacity requirement in tender documents or the way to prove compliance with it were unjustified, the Republic Commission notes that they had possibility to accordingly alert the CA of the reasons for which they deemed a certain requirement and the way to prove it were not justified, during the stage of preparing their tender documents. In this case, having verified the data on the PP Portal, it is established that the CA did not receive a single RfC of tender documents, or a single PoR request in the stage of preparing tender documents which would hypothetically challenge the way the tender documents were developed in terms of additional requirements, which leads to a conclusion that bidders accepted to submit bids in given PP procedure in line with requirements the CA had stipulated in tender documents. Therefore, any bidder's action contrary to this, and submission of bid not in line with the terms and requirements in tender documents, could only result in rejection of such a bid as unacceptable in terms of Article 3, Para 1, Point 33 of the PPL having in mind the above and the fact that the claimant attached contracts to his bids which undoubtedly referred to his having provided the facility security services, but not farm land guarding service as required by tender documents, the Republic Commission finds that the claimant failed to provide evidence proving that he complied with the additional "business capacity" requirement, and this made his bid unacceptable in terms of Article 3, Para 1, Point 33 of the PPL. On the grounds of the foregoing, the Republic Commission finds the reviewed request of the claimant to be groundless".

**Excerpt from Reasoning of the Republic Commission's Decision
No. 4-00-477/2018 of 31 May 2018:**

"...Article 9, Para 1 of the PPL provides that CA is obliged to ensure that goods, services or works procured in public procurement are of appropriate quality relevant to the purpose, intended use, and value of public procurement. Para 2 of the same Article of the Law provides that CA is obliged to ensure that PP procedure is conducted and awarding of contracts are made within deadlines and as prescribed by this Law, with as little costs as possible spent in conducting and executing public procurement.

Article 10, Para 1 of the PPL provides that CA is obliged to facilitate as much competition as possible in PP procedure, whereas Para 2 of this Article provides that CA may not restrict competition, and in particular it may not prevent any bidder from participating in PP procedure by unjustified use of negotiated procedure or by using discriminatory requirements, technical specifications, or criteria.

Article 12, Para 1 of the PPL, provides that CA is obliged to ensure equality of all bidders in all phases of PP procedure, whereas Para 2 prescribes that CA may not impose conditions that would constitute national, territorial, subject-matter or personal discrimination among bidders, or discrimination arising from the classification of the business activity performed by the bidder.

Article 76, Para 1 of the PPL provides that the CA in tender documents also sets additional eligibility requirements in PP procedure.

Article 76, Para 2 of the PPL provides that CA sets in tender documents additional eligibility requirements in PP procedure in terms of financial, operational, technical and personnel capacities whenever it is necessary having in mind the subject of public procurement

Article 76, Para 6 of the PPL provides that CA sets eligibility requirements in such way so that these do not discriminate bidders and are logically related to the PP subject.

The Republic Commission notes that, pursuant to Article 76, Para 2 of the PPL, CA sets additional requirements wherever it needs to taking into account the PP subject, whereas Para 6 of the same Article provides that the way those are set must be such so not to discriminate bidders and to logically relate to

the PP subject. The purpose of said norm is to enable CA to define requirements whose fulfilment implies that, when selecting bids, it does select the bid of bidders who, according to their capacities, are capable of implementing successfully the contract to be awarded. However, the Law limits the options for defining them down to the way which implies that this is allowed if it is necessary in view of PP subject, and which effectively implies that CA in each individual PP case must justify the presence of stipulated additional requirements. Hence, when setting additional eligibility requirements in given PP procedure, the CA above all starts from its own objective needs and their relation with the PP subject.

Therefore, taking into account that the purpose of setting additional requirement is to prove bidders' capabilities to participate given the features of each specific PP subject, i.e., that they are capable of implementing the specific public procurement contracts, if awarded. That also implies that CA, as an entity which is conducting PP procedure and preparing tender documents for given PP procedure, must be aware of the purpose of setting requirements to be fulfilled by all bidders in order to participate in an individual PP procedure. Hence, when setting all requirements in the subject tender documents, and here also the additional requirement in terms of business capacity, the CA is obliged to ensure it logically relates to the PP subject, i.e., that it is indispensable for the conduct of given public procurement.

The Republic Commission also notes that, notwithstanding its statutory duty to facilitate as much competition as possible in PP procedure, pursuant to Article 10, Para 1 of the PPL, the CA conducts each specific PP procedure to satisfy his objective needs, on the basis of tender documents under which it defines general and additional requirements which correspond to these needs. Consequently, duty to facilitate as much competition as possible cannot be construed so to imply CA's duty to facilitate participation in PP procedure to each interested party in disregard of given public procurement's purpose, or of quality of the services which make its subject. Therefore, notwithstanding CA's statutory duty to facilitate as much competition as possible in PP procedure, on the other hand it does conduct each specific PP procedure in order to satisfy its needs, on the basis of tender documents under which it defines and justifies additional requirements corresponding to these needs.

According to the overall state of facts, as established through reviewing the following:

- tender documents in subject PP procedure;
- the way the claimant in his PoR request challenged CA's conduct in setting additional eligibility requirement in terms of technical capacity; and
- CA's arguments in its response to PoR request;

the Republic Commission finds the claimant groundlessly alleged that the CA in this PP procedure, by means of setting additional requirement that bidders had to have at their disposal 1 truck for transport of preparations and fuel of 5+ tons carrying capacity needed for aerial control of adult mosquitoes, thus effectively favoured certain group of bidders and thereby limited competition and discriminated all other bidders.

The Republic Commission underlines it had in mind the CA's explanation in its response to PoR request that the truck of set carrying capacity and technical performance would enable swift response required from the moment of determined necessity to treat until ensuring all required elements necessary to perform the treatment properly and with quality.

The Republic Commission finds the claimant failed to conclusively establish in his PoR request in what way the CA had actually brought about the alleged undue restriction of competition by setting the additional requirement for bidders to have available a truck of certain carrying capacity, particularly so bearing in mind that the CA allowed that bidders could either possess or lease such truck. With regards to the claimant's suggestion that the same goal could be achieved, for instance, by engaging 10 vehicles of 500 kg carrying capacity a day before to transport preparations to determined location, the Republic Commission finds it to be illogical from the aspect of undue restriction of competition, having in mind that the CA required only 1 truck, not several.

Further, bearing in mind the CA's explanation that the truck of determined performance would enable the swiftest possible transport of the logistics necessary to perform the treatment and the use of favourable weather conditions for a maximally efficient treatment, whereas the organising of a larger number of smaller vehicles the claimant insisted upon, could significantly impact the speed of securing necessary technical conditions, the Commission concludes

that the way the CA had set additional requirement in the challenged part, it actually acted in line with the principles of efficiency and economy set forth under Article 9 of the PPL. Therefore, the claimant's probing whether the airport in Čenej was supplied with sufficient quantity of water is of no relevance on how the CA formulated the disputed additional requirement, particularly having in mind the explanation it gave in its response to PoR request, i.e., that the CA did not want to risk potential difficulties it may have had in terms of water supply along runways in Čenej, which were quite probable due to the lack of a reliable and stable source of water supply.

With the above in mind, the Republic Commission finds that the way the CA exercised its right to decide whether and how it would set in tender documents an additional eligibility requirement in given PP procedure in terms of technical capacity in the challenged part, whereby having been obliged to ensure such requirement did not discriminate bidders, in this case does not constitute a violation of the provisions of the PPL.

On the basis of the foregoing, the reviewed allegation of the claimant is unfounded."

"...Further, the Republic Commission reviewed the claimant's allegation maintaining the CA's requirement that bidder has at disposal an unmanned aircraft to survey the source of mosquito larvae to be unnecessary, and claiming that the use of unmanned aircraft, as an additional mode of control and survey, would only require additional engagement of staff so that a person would have to walk the terrain, detect mosquito larvae and determine their number, and then summon another person who is trained and holds permission to handle unmanned aircraft, to survey sites. The claimant alleged that the use of unmanned aircraft was evidently not necessary, since during the control of number of mosquito larvae in the field, the technicians as expert staff regularly carry GPS devices in line with the rules of profession, and thereafter enter into reports data on quantity and types of mosquito larvae and GPS coordinates of places of detection, and also take snapshots of relevant sites.

In its response to PoR request, the CA explained the additional requirement in the challenged part of tender documents by underscoring, inter alia, that new technologies facilitating precise monitoring of the pesticide application techniques, could be used thanks to the Geographic Information System (GIS) and

geo-positioning devices (GPS) thus enabling complete inspection and analysis of objects/biotopes on intervention sites, numbers of insects in the zones of incidence, and control of devices used for the treatment. The CA explained that the obtained data made it possible to design a strategy for suppressing target organisms with significant savings of the material, time required for application, and its environmental impact, and that the introducing of these elements into programs for applying the preparations intended for mosquito suppression ensures a significant increase in effectiveness of the application of mosquito-larvicide and -adulticide. The CA stressed that the development and application of new technologies in mosquito control programmes had diminished significance of visual orientation, and that the use of unmanned aircraft with GPS system in mosquito control programmes significantly affected the quality of performed treatments. According to the CA, in spite of all devices they carry, the trained field staff cannot perceive the entire size of potential sources; therefore, assessing the size of potential areas to be treated is mainly limited to visual contact and options to access potential areas to determine the expanse to be treated. Hence, lack of visual contact leaves the source zone (or its part) completely neglected since not detected. In this regards, the CA said that designated areas to be treated were directly related to the quantity of preparations to be used; if some potential source zone remained untreated with adequate insecticides, this might bring about mosquito re-infestation from the untreated (or incompletely covered by treatment) into the treated areas, and a logical consequence would be an unavoidable repeat treatment of the same source areas, directly resulting in the increase in costs. The CA affirmed that using an unmanned aircraft (much cheaper than the use of airplane or helicopter) would enable the contractor to determine all source zones and obtain data on potential size of source zones, i.e., to allocate precise quantity of preparations necessary to quash larvae of mosquitoes in the entire area.

In addition, the CA recalled the specificity of the Municipality of Vrbas in that its territory was criss-crossed with: well-developed network of the Danube-Tisa-Danube hydro system canals; the Jegrička River flowing through the southern part of the municipality; numerous lakes; and the following canals running through Vrbas: Vrbas-Bezdan, Bečej-Bogojevo, Savino Selo-Noví Sad, Kosančić-Mali Stapar, in the total length of 39.4 km through the Vrbas Municipality. The CA further explained that Veliki Bački Canal, a part of the Danube-Tisa-Danube system connecting the Danube (at Bezdan) with the Tisa River (at Bečej) and

flowing 12.7 km through the Municipality of Vrbas, presently was too shallow for navigation of river vessels and ships due to pollution and sludge sedimentation and, as such, labelled as one of three “black spots” in Serbia by the Ministry of Environmental Protection. Also according to the CA, the Veliki Bački Canal was considered the most polluted watercourse in Europe with its most polluted segment flowing through the town of Vrbas; with the densest presence of mosquitoes near this impassable and inaccessible canal, the use of unmanned aircraft was indispensable for an overall review and analysis of locations for intervention. Bearing in mind significance of this PP subject and landscape specificities, the CA deemed the additional requirement for bidders to have at disposal at least one unmanned aircraft to survey the sources of mosquito larvae was fully justified.

Due to this CA's explanation, in terms of claimant's assertion that having an aircraft available to survey the mosquito larvae sources in this case was not necessary allegedly because the use of unmanned aircraft required engaging of additional staff, and that technicians while checking the numbers of mosquito larvae in the field anyway carry GPS devices in line with the rules of profession and thereafter enter into reports data on quantity and types of mosquito larvae and the GPS coordinates of places of detection, and also take snapshots of relevant sites, the Republic Commission considers it to be insufficient argument to justify the assertion that the challenged additional requirement in this part, as set by the CA, was not logically related with the PP subject and that thereby it violated Article 76, Para 6 of the Law. Further to this, the Republic Commission recalls that the CA, in its response to PoR request, evidently justified the reasons for setting additional requirement in terms of technical capacity in the challenged part, linking it to the PP subject, and particularly elaborating the Municipality of Vrbas landscape specificities primarily in terms of its inaccessibility, thus justifying necessity to set additional eligibility in this PP procedure and presented its logical ties to PP subject. On the basis of the above, in the opinion of the Republic Commission, this additional requirement in terms of sufficient technical capacity is logically related to the PP subject and subsequently the claimant's allegation challenging the additional requirement as 'unnecessary' is without merits.

Next, the Republic Commission reviewed claimant's allegation that the CA had unjustifiably required bidders to have at disposal at least 5 digital weather sta-

tionsthat have Internet access and display results on web address in real time, for the cited better control and supervision, and claiming it was not clear what would enable the correct reading of results from weather stations, since this is done by meteorologists only, i.e., the Republic Hydrometeorology Service. According to the claimant, the above meant the bidders were forced to hire additional expert staff — meteorologists, to read the weather stations results. The claimant underlined that challenged requirement had discriminated a huge number of potential bidders, although neither logically related to the PP subject, nor its fulfilment being any guarantee of the quality of rendered services.

Further, the Republic Commission reiterates that CA is obliged, pursuant to Article 10, Para 1 of the PPL, to ensure as much competition as possible in PP procedure, but this does not mean it is obliged to define eligibility requirements and/or TS so to enable each interested party to participate in PP procedure. Hence, CA defines the terms and requirements in tender documents in accordance with own objective needs, rather than with business and economic interests of bidders. Therefore, competition is ensured where a sufficient number of bidders can comply with set requirements. The Republic Commission notes that the claimant neither referred to specific facts in his request, or supplied or proposed any proofs which may have contained reasonable grounds indicating the challenged requirement was discriminatory. He merely questioned the way to enable the correct reading of results from weather stations, since this is regularly done by meteorologists only, i.e., the Republic Hydrometeorology Service of Serbia, thus implicating the bidders would have to hire additional expert staff — meteorologists to read the weather stations results.

However, in the Republic Commission's view, the claimant merely referred to the above in general terms, without supplying any specific proof leading to a conclusive finding that the challenged additional requirement was not logically related to PP subject or that it did discriminate bidders, particularly when having in mind, firstly, that neither TS of subject services in Section III, or additional requirements defined in Section IV of tender documents stipulated bidders' duty to hire meteorologists, and secondly, the CA's arguments in its response to PoR request that no special skill was needed to read weather station data (temperature, wind speed, atmospheric pressure, quantity of precipitation).

Pursuant to the above, the Republic Commission finds that allegations presented by the claimant are insufficient to reasonably conclude that the manner of

formulating the challenged additional requirement indeed generated discrimination and thus violated Articles 10 and 12 of the PPL, as well as Article 76, Para 6 of the PPL.

On the basis of the foregoing, the Republic Commission finds this claimant's allegation to be groundless.

Lastly, the Republic Commission considered the claimant's point that the CA, under additional eligibility requirements, required bidders to have available at least 5 universal traps for the control of adult mosquito numbers using compressed SO₂ gas as the attractant, plus at least 20 CDC traps using pellets of dry ice as the attractant. Thus, the CA required two methods for the control of adult mosquito numbers, which the CA was not competent to require, since the World Health Organisation's recommendation is that a single method for the control of adult mosquito numbers is sufficient. The claimant alleged that said requirement was discriminatory and not logically related to the PP subject because its fulfilment was irrelevant for the mosquito control. Besides, he noted that it had been known beforehand which parties did have available two methods for the control of adult mosquito numbers so that it could be concluded who would meet the set additional eligibility requirements.

In its response to PoR request, the CA elaborated this additional requirement in tender documents by explaining that traps spending carbon dioxide as attractant were to be provided from two sources: as compressed SO₂ gas and carbon dioxide produced by sublimation of dry ice, where the use of compressed gas from SO₂-filled bottles also required a timer to set the time of releasing SO₂; there, the quantity of gas released per time unit could be measured precisely, whereby the released quantity remained identical throughout the collection of adult mosquitoes and, with known ratio of kg/bottle, this allowed a precise calculation of the total (cumulative) duration of collection. However, when using dry ice as attractant, according to the CA, there was no way to set a precise quantity of SO₂ release but instead the release would vary over time and depend on temperature, air humidity, atmospheric pressure, and most of all on type of container insulation. In this regard, the CA added that, at the beginning of collection of adult mosquitoes, a small quantity of SO₂ was being generated and it would grow or vary as temperature would change or stabilise. However, the true problem arose during nights with temperatures dropping and thereby causing the reduction in SO₂ emission and, due to this, while collecting adult mosquitoes

could be used both sources of SO₂ to ensure steady SO₂ emission per time unit. The CA stated that in the course of identifying the mosquito fauna, i.e., identifying all species present in given location, it was necessary to use compressed SO₂, whereas that in the course of monitoring local populations, one might use dry ice which ensures SO₂ through sublimation.

Having in mind the foregoing, the claimant's generalized assertion of an existing World Health Organization's recommendation that a single method to control the number of adult mosquitoes was sufficient, does not, in itself, constitute an argument to deliberate on the merits of allegation that the CA, by the way it had formulated the additional requirements challenged by the claimant, effectively committed discrimination and thereby violated Articles 10 and 12, and also Article 76, Para 6 of the PPL. The Republic Commission affirms that the CA in its response to PoR request elaborated, clearly and in detail, the reasons for stipulating the challenged additional requirement and, thus, linked this requirement with the PP subject, by having explained why it believed that the combination of both methods to control numbers of adult mosquitoes was necessary. Bearing in mind that the CA opted to combine two methods in order to ensure steady SO₂ emission per time unit, in the Republic Commission's view, disputed additional requirement is logically related to the PP subject; hence, it follows in this case that the CA did not discriminate any bidder by setting the mentioned requirement, and did not limit competition among bidders, due to which the Republic Commissions finds the claimant's allegations to be unfounded."

**Excerpt from Reasoning of the Republic Commission's Decision
No. 4-00-535/2018 of 05 July 2018:**

"...In light of the cited provisions of tender documents and evidence supplied by the claimant in his bid, the Republic Commission finds that, in its expert evaluation of the claimant's bid, the CA acted properly and in line with Article 107, Para 1 of the PPL to evaluate the claimant's bid unacceptable in terms of Article 3, Para 1, Point 33 of the PPL in conjunction with Article 106, Para 1, Point 2) of the PPL.

From the established facts follows that the CA, under additional requirement in terms of business capacity, required that bidders submit references from five beneficiaries who were state entities/institutions and/or financial organisa-

tions, and that the claimant submitted in his bid five confirmations from five separate reference CAs, out of which two issued by accounting companies and one by a company for production, trade, and business services. In addition to having defined the notion of state authorities, the CA specified that financial institutions also included international financial institutions, commercial banks, insurance companies, leasing companies, etc. The CA evaluated claimant's bid as unacceptable because the latter had submitted the reference confirmations from accounting companies and a company for production, trade, and business services as a proof of meeting the additional requirement in terms of business capacity.

The Republic Commission finds that the way the claimant interprets 'similarity' between financial institutions as defined under tender documents and referent CAs in support of his point that references he submitted should be accepted, has no merits. In that respect, the claimant explained that in this case it was not relevant who the reference CA was, but rather whether there existed the sameness and logical connection between the referenced services and services to be purchased under the subject public procurement. In addition, the claimant alleged in his PoR request that the CA "had limited the circle of CAs", and that the reason he had not invoked this argument in the stage of preparation of bids was that he had believed that the CA "made room" by tender documents to also submit confirmations by CAs whose translations needs had been from the same area as one which was the subject of public procurement.

However, having in mind that:

- the CA explicitly stated in tender documents that the notion of a 'financial institution reference CA' covered international financial institutions, commercial banks, insurance companies, leasing companies, 'and the like',
- the claimant on his part, did not challenge relevant segment of tender documents,
- the claimant did not explain in his PoR request (by invoking finance-related legislation, or opinions of competent authorities, or the like) in which way an accounting company and a company for production, trade, and business services could be considered as financial institutions similar to those defined under tender document ("international financial institutions, commercial banks, insurance companies, leasing companies"),

- the claimant instead made the point that referenced services were in logical connection with services which were the subject of given public procurement,

the Republic Commission finds that the CA acted properly to evaluate that the claimant had failed to meet the additional requirement in terms of business capacity. The supporting reasoning is that in this case the matter of dispute is not which *reference services* were rendered, but rather for which *reference contracting authority* (financial institution), notably, whether those were rendered for such reference CA as defined by the CA in tender documents.

In that respect, the Republic Commission took note of the explanation the CA gave in response to PoR request. Namely, guided by its own scope of competences that primarily focus on preserving price stability and overseeing the financial sector, the CA explained that bidder had to have previous experience in working with financial institutions and state authorities in the field of banking, finance, macroeconomic analysis and Acquis Communautaire.

In this regards, the Republic Commission recalls that Article 15, Para 1 of the Law on National Banks ("Official Gazette of the RS" Nos. 72/2003, 55/2004, 85/2005 — other law, 44/2010, 76/2012, 106/2012, 14/2015, 40/2015 — CC, 44/2018) provides that the Executive Board, in accordance with the law, adopts regulations and other general acts in the areas of control and supervisory functions over entities performing business activities referred to in Article 4, Para 1, Points 6) to 10) of said Law (thereinafter: financial institutions), and in the areas of the protection of rights and interests of consumers of services referred to in Point 11) of that same Article and the issuance and revocation of authorisations for exchange operations and supervision under Point 13a) of that same Article. From Article 4, Para 1, Points 6) to 10) of the same Law does not follow that financial institutions include accounting agencies or maybe companies for production, trade and business services.

On the grounds of the foregoing, the Republic Commission finds the reviewed allegation to be groundless."

**Excerpt from Reasoning of the Republic Commission's Decision
No. 4-00-699/2018 of 20 September 2018:**

"...Article 3, Para 1, Point 33) of the PPL provides that acceptable bid is a bid which is timely, one that CA did not reject due to substantial deficiencies, which is adequate, one that does not restrict or condition either the rights of CA or the obligations of bidder, and which does not exceed the amount of estimated value of concrete public procurement.

Article 80, Para 1 of the PPL provides that in tender documents CA requires the bidders to state in bids whether they intend to entrust partial execution of public procurement to subcontractor, and percentage of total procurement value to be entrusted to subcontractor, which may not be greater than 50%, as well as a share of the procurement subject they intend to deliver through subcontractor, whereas Para 3 of the same Article provides that, where bidder states in bid its intention to subcontract part of procurement to subcontractor, it has to state this subcontractor's name, and if CA and bidder conclude the contract, that subcontractor has to be named in the contract.

Article 80, Para 5 of the PPL provides that bidder supplies evidence on its subcontractors' compliance with mandatory requirements under Article 75, Para 1, Points 1) through 4) of this Law, and evidence on compliance with requirements under Article 75, Para 1, Point 5) of this Law for the share of procurement to be implemented through subcontractor.

Article 107, Para 1 of the PPL provides that CA rejects all unacceptable bids after inspecting and evaluating all bids in PP procedure.

Taking into account the cited statutory provisions, the established facts, and the contents of the claimant's assertions in PoR request and of the CA's response to PoR request, the Republic Commission finds the allegations of the claimant to be groundless.

Namely, the Republic Commission firstly notes that submission of bid with subcontractor is primarily governed by Article 80 of the PPL and that, pursuant to it, bidder submitting the bid with subcontractor is obliged to state the latter's name in the bid and supply evidence on the latter's compliance with mandatory requirements under Article 75, Para 1, Points 1) through 4) of the PPL, and also evidence on compliance with requirements under Article 75, Para 1, Point 5) of

the PPL for the share of procurement to be implemented through subcontractor. Bidder is obliged to submit any other evidence on its subcontractor's compliance with other requirements related to the latter, if set by CA in tender documents. However, in this PP procedure the CA has not stipulated those.

After having considered the following:

- in tender documents of this PP the CA stipulated bidder's duty to supply in bid a completed "Form No. 2" for subcontractor (to prove compliance with requirements under Article 75, Para 1, Points 1) through 4) of the PPL), that is, a "valid licence issued by the Republic Geodetic Authority", without specifying the content of this licence (to prove compliance with requirement under Article 75, Para 1, Point 5) of the PPL),
- the selected bidder's bid did contain a completed and signed "Form No. 2" and licence to work for "K.R.U.LJ." d.o.o. Belgrade upon Decision of the Republic Geodetic Authority No. 952-03-706/12 of 28 September 2012, as well as geodetic license of the first order for Č.K.,

in the view of the Republic Commission, the selected bidder supplied all evidence as required under given tender documents and provisions of the PPL.

Since the selected bidder, in addition to above-cited license and decision, also supplied licenses and decision issued by the Republic Geodetic Authority (as required by given tender documents) pertaining to "Geozenit" Novi Pazar, and since the claimant, in the view of the Republic Commission, in his PoR request failed to presented sufficient argumentation conducive to concluding beyond any doubt that the supplied decisions and licences in the selected bidder's bid did not pertain to the subject services described under "Form No. 12", the claimant's allegations in terms of acceptability of the selected bidder's bid concerning the provision of Article 75, Para 1, Point 5) of the PPL, are found to be groundless.

In addition to the above, the Republic Commission notes that selected bidder was not obliged to also submit its "Agreement with Subcontractor" wherein contractor and subcontractor precisely define mutual rights and obligations, as the claimant alleged. Therefore, the contract supplied in the selected bidder's bid is neither prescribed under the PPL nor stipulated by the CA as a mandatory integral part of the bid and, consequently, the selected bidder's bid cannot be rejected as unacceptable in terms of Article 106, Para 1 of the PPL on the account of supplied contract and its content.

Upon reviewing the claimant's assertion that the content of the selected bidder's bid did not detail the part of subject procurement that subcontractor would perform, the Republic Commission finds it to be ungrounded. The supporting reasoning is that the entire content of the selected bidder's bid explicitly revealed that bidder, "Geozenit" Novi Pazar, would entrust to subcontractor, "K.R.U.LJ." d.o.o. Belgrade, a part of the public procurement in the amount of 5% of the bid value (amount of '22,739.25' relative to the total bid value of RSD 454,785.00), which was in line with the CA's requirement in tender documents that the bidder could not subcontract the execution of a part of public procurement greater than 40%.

Similarly, taking into account that the CA in this PP procedure did not explicitly require bidders to declare part of public procurement to be entrusted to a subcontractor by means of specifying relevant positions the CA set in "Form No. 12 – Description of geodetic services", and that the contents of "Bid form" and "Form No. 6" explicitly revealed that bidder "Geozenit" Novi Pazar would entrust to subcontractor "K.R.U.LJ", d.o.o. Belgrade the rendering of "geodetic services" for which the subcontractor holds licences, in the total amount of 'RSD 22,739.25' or 5% of the bid value, the Republic Commission finds that this case contains no legal grounds to reject the selected bidder's for the reasons stated by the claimant in given PoR request.

Upon reviewing the claimant's assertion that the CA was obliged to reject the selected bidder's bid for having failed to supply the list of authenticated signatures of persons authorised to represent subcontractor "K.R.U.LJ.", d.o.o. Belgrade, or another equivalent document proving undoubtedly that indeed an authorized person signed "Bidder's statement on proving compliance with eligibility requirements in PP procedure referred under Article 75 of the PPL", the Republic Commission finds it to be ungrounded.

Namely, upon reviewing the subject tender documents, the Republic Commission established that the CA included "Form No. 10 – Authorisation to sign a bid" as its integral part, which authorises a person listed in this Form to sign the bid in given PP procedure in the name and on the account of bidder. In a note of this Form, the CA entered that the bidder "with the authorisation also supplied a photocopy of the list of 'Authenticated signatures of persons authorised for representation' (OP-Form) as excerpt from the competent Court – Form 4, or other equivalent document by an administrative authority in charge of private

entrepreneurs". Hence, it follows that the CA only stipulated duty to submit "OP-form" for a bidder who would sign the bid, but not for subcontractor; consequently, the selected bidder's bid cannot be rejected on the account of bidder omitting to supply "OP-Form" for the subcontractor, too.

In addition, the Republic Commission recalls that the claimant's arguments, as presented in PoR request or in evidence purportedly corroborating his allegations, failed to supply the grounds for the conclusion that "Form No. 2 – Subcontractor's statement on proving compliance with eligibility requirements in PP procedure under Article 75 of the PPL" submitted in the selected bidder's bid, had actually been signed by person other than the subcontractor's authorised person.

In terms of the claimant's assertions, in the view of the Republic Commission, from the foregoing follows that the CA acted properly to evaluate the selected bidder's bid as acceptable, pursuant to Article 107, Para 1, in conjunction with Article 3, Para 1, Point 33) of the PPL, due to which the claimant's PoR request remains completely without merits."

**Excerpt from Reasoning of the Republic Commission's Decision
No. 4-00-703/2017 of 30 June 2017:**

"...Namely, from the arguments presented in the supplement to PoR request can be concluded that the claimant's allegation of the bid of FMO "UKUS" from Kovačica having essentially been flawed in terms of Article 106, Para 1, Point 2 of the PPL in that this bid failed to prove compliance with additional eligibility requirement in terms of technical capacity, was based on an undisputed fact that the CA had established a commission tasked to determine compliance with conditions for the production of offered goods, and to inspect facilities of bidder FMO "UKUS" from Kovačica, and to verify technical requirements for the production and successful execution of potential contract based on the concluded framework agreement. On 25 April 2017, the commission paid a visit to this bidder, which resulted in the finding that "the bidder does not possess technical requirements for the production and successful execution of potential contract based on the concluded framework agreement, because it does not possess necessary machines and devices without which is not possible

to meet the stipulated quality requirements”, and that “the bidder does not possess any moulds, and that the modelling, grading and duplication of such moulds in all sizes according to the assortment of sizes, will require a longer period of time.”

In that respect, the Republic Commission recalls that pursuant to Article 3, Para 1, Point 33 in conjunction with Article 61, Para 1 of the PPL, the evaluation of acceptability may and must be conducted solely on the basis of the actual content of tender documents that all potential bidders were aware of from the moment they received them. This means that for the evaluation of acceptability of filed request, in this part, the relevant fact is the way in which the tender documents, designed for given public procurement, have actually defined the content of this additional eligibility requirement in terms of technical capacities, one that the CA has undeniably set in exercise of the legal authority under Article 76, Para 2 of the PPL.

Further to the above, the Republic Commission examined Chapter 4 – “Eligibility requirements in the procedure (Articles 75 and 76 of the PPL) and instructions how to prove compliance”, and thereupon established that in the Point 4.2 – “Additional requirements”, under Point 4.2.2, the CA decided that eligible to participate in subject PP procedure were bidders which had available sufficient technical capacities, that is, possessed the production line (machines, devices, appliances and the like, without setting the numbers thereof) or had a lease agreement or an agreement on business and technical cooperation with company possessing all of the above.

The way to prove compliance with this additional eligibility requirement in PP procedure is defined in Part 4.3 – “Instructions to prove compliance with requirements”, under item 4.3.6 which stipulates that the proofs of having available sufficient technical capacities are as follows:

- bidder’s statement on technical equipment (where bidder is also producer of offered goods), signed and certified by bidder’s competent person. There are no particular rules on its structure, and bidder is expected to declare, for instance, the following: whether it possesses a production line (machines, devices, appliances and the like, without setting the numbers thereof) or holds a lease agreement for the above, or

- agreement on business-technical cooperation with producer or distributor of the subject goods, or another document (where bidder is not producer of offered goods) advising beyond any doubt that if framework agreement or PP contract are concluded with bidder, this bidder will be able to obtain necessary quantity of subject goods so to comply with his duties as set under framework agreement or PP contract.

From the fact that the CA set the additional requirement for sufficient technical capacity in broadest terms, requiring that bidder “possesses production line (machines, devices, appliances and the like, without setting the numbers thereof)” but without specifying types or numbers of machines, devices, appliances or other equipment, it follows that the findings made upon visit paid by the commission established and “tasked to inspect facilities of bidder FMO “UKUS” from Kovačica and verify technical conditions for the production and successful execution of potential contract based on the concluded framework agreement”, presented in the document registered with the CA under number 196/34/16 of 26 April 2015, do not constitute the grounds to conclude that bidder FMO “UKUS” from Kovačica does not meet this additional eligibility requirement.

The supporting reasoning is that from the content of said document does not follow that the visit has established that bidder FMO “UKUS” from Kovačica does not possess such machines, devices, appliances etc. as explicitly listed in the statement on technical equipment, which statement is indisputably compliant with tender documents, and attached as an integral part of this bidder’s bid.

Further, the Republic Commission notes that from the content of said document follows that the conclusion according to which bidder FMO “UKUS” from Kovačica “does not possess technical conditions for the production and successful execution of potential contract based on the concluded framework agreement, because it does not possess necessary machines or devices without which it is not possible to comply with the set quality requirements”, and that “it does not possess any moulds, and that the modelling, grading and duplication of such moulds in all sizes according to the assortment of sizes, will require a longer period of time” was based on checking whether its “machine pool, in addition to other shoemaking machines and equipment” also includes “machines necessary to comply with quality according to requirements SORS 8805/13 and TS for PJ Garde”, as follows: machine for attaching welt on base

insole, machine for forming left and right “Goodyear” stiffeners, machine for punching front part of footwear using “Goodyear” technology for right and left shoes, machine for cutting off overage of punched part for “Goodyear” sewing, “Goodyear” sewing machine, sewing machine for midsole and inner sole, machine for thread siliconizing to make the finished product waterproof, shoe chiller and “Goodyear” machine for evening (item 5 of document registered with the CA under number 196-34/16 of 26 April 2015).

Namely, the claimant invokes the conclusion of the document the CA registered under number 196-34/16 of 26 April 2015, which reads as follows:

“Footwear of FMO ‘UKUS’ from Kovačica does not possess technical conditions for the production and successful execution of potential contract based on the concluded framework agreement, because it does not possess necessary machines and devices (sewing machines for welt and midsole, machine for thread siliconizing to make the finished product waterproof, footwear chilling chamber, without which the set quality requirements cannot be met.” Further, the commission notes that this manufacturer does not possess any moulds, and that the modelling, grading and duplication of such moulds in all sizes according to the assortment of sizes, will require a longer period of time.”

Finally, on the basis of the foregoing the Republic Commission concludes that the claimant did not fully interpret the content of document registered with the CA under number 169-34/16 of 26 April 2015, to which it referred in the supplement to its request presenting the argument that the bid of bidder FMO “UKUS” from Kovačica was essentially flawed in terms of Article 106, Para 1, Point 2 of the PPL, since the claimant has only elaborated parts having a meaning of conclusion regarding the fact of not possessing technical conditions for production, but at the same time it has failed to furnish any reasons paving the way to such conclusion, where the elaborated parts, as it came to be determined, did not have any merits in terms of the way the additional eligibility requirement for sufficient technical capacity had been set in tender documents.

On the grounds of the foregoing, the Republic Commission finds that PoR request is groundless in its entirety.”

**Excerpt from Reasoning of the Republic Commission's Decision
No. 4-00-1285/2017 of 24 October 2017:**

"...Article 10, Para 1 of the PPL provides that CA is obliged to facilitate as much competition as possible in a PP procedure, whereas Para 2 of this Article provides that CA may not restrict competition, and in particular it may not prevent any bidder from participating in public procurement by unjustified use of negotiated procedure or by using discriminatory requirements, technical specifications, or criteria.

Article 76, Para 2 of the PPL provides that CA sets in tender documents additional eligibility requirements in PP procedure in terms of financial, operational, technical and personnel capacities whenever it is necessary having in mind the subject of public procurement.

Article 76, Para 6 of the PPL provides that CA sets eligibility requirements in such way so that these do not discriminate bidders and are logically related to the PP subject.

From the established facts follows that PP subject of challenged Lot 1 is the provision of maintenance servicing of medical devices Avance S/5 manufactured by General Electric: two manufactured in 2009, the other two in 2010, and the final two in 2014. Within additional requirements regarding "staff capacity" the CA required the bidders to prove that, prior to the call for competition, they had had at least 5 medical equipment repairers with at least one electrical engineer. Therefore, in this case, the CA did not require the bidders to have employed specially qualified and trained maintenance repairers, as explicitly insisted by claimant in his PoR request thereby asserting that the CA should have required the bidders that their repairers hold either certificate or confirmation of completed training issued by the manufacturer. The claimant's underlying reason to insist on trained repairers was the reflection of his view that only natural persons who had completed the training and were registered in manufacturer's records were allowed to access the latter's intellectual property in this way and thus with certainty satisfy the manufacturer that the equipment was indeed being repaired by technically trained persons. In that respect, the claimant alleged that not a single manufacturer in the world would allow just any natural person to access the critical and vital parts of a medical system. According to this line of reasoning, in the view of the claimant, the training of persons designated to

service the medical equipment was a mandatory requirement, one to be proved by manufacturer's confirmation or certificate.

According to the contents of its response to PoR, the CA invoked the provisions of the PPL as justification for declining to accept the claimant's counsel that all repairers hold manufacturer's certificate, asserting it would be in contravention of the law, i.e., that an unjustified use of such discriminatory requirement would restrict the competition among bidders. The CA further justified its position by claiming that in this way the claimant would be the only one capable to submit an acceptable bid, as the single certified maintenance shop for the equipment listed under Lot 1 in the territory of the Republic of Serbia. In addition, the CA revealed it had had poor experience with maintenance shops whose employees were certified repairers of medical equipment, because they had never timely responded to call to repair, they had tended to keep equipment for a prolonged period of time in maintenance, and the repair costs these maintenance shops had charged were extremely high. Due to the above, and due to limited funds allocated for this public procurement, in this PP procedure the CA chose not to set duty that bidders employ repairers with manufacturers' certificates as an eligibility requirement, also because the authorised medical equipment maintenance shops had very high prices of working hours and spare parts.

The Republic Commission recalls that the nature of each PP determines whether there will be a need to formulate specific requirements. This means that CA in line with its needs may define such terms and conditions in tender documents whose fulfilment implies that, when selecting the bid, it is going to select the bid of such bidder which, according to its capacities, is capable of successfully executing contract to be awarded in each individual PP procedure. The CA's sole limitation in defining additional requirements in tender documents is to ensure these requirements are logically related to PP subject and do not discriminate bidders. Here, the claimant did not claim that the CA's choosing to require repairers who were not trained and certified by the manufacturer of equipment to be serviced, in effect either amounted to the restriction of competition or was not logically related to PP subject. Quite the contrary, the claimant insisted solely that training of persons designated to service the medical equipment had to be a mandatory requirement, to be proved by manufacturer's confirmation or certificate. In the view of the Republic Commission, the claimant's assertion that training of repairers was a

mandatory requirement is unfounded, given that mandatory requirements are provided for under Article 75, Para 1, Points 1) through 5) of the PPL, and that additional requirements were set in line with the CA's needs. Consequently, holds the Republic Commission, the CA was not obliged to define in tender documents the additional requirements the claimant insisted on. Hence, the fact that it did not need certificated repairers to service the subject anaesthetic machines, in the view of the Republic Commission, justifies the CA's intention to facilitate a larger number of bidders to bid in this PP procedure. Thus, the CA acted precisely in line with provisions of the PPL. The Republic Commission finds that the CA did facilitate a larger number of bidders to bid in by not requiring them to have employed certificated repairers. Otherwise, it would have significantly and unnecessarily narrowed down a group of bidders eligible for this PP procedure and, in the CA's words, it would only have facilitated participation of the single bidder who owned the only certified maintenance shop in the territory of the Republic of Serbia and employed repairing staff certified by the manufacturer of the subject anaesthetic machines to be serviced. Besides, the claimant did not provide any adequate proof to support his claim that repairers not trained by manufacturer were not capable of providing adequate servicing of machines to be serviced in an equally good way as the trained ones. On the grounds of the foregoing, the reviewed claimant's allegations is found to be groundless.

Furthermore, the Republic Commission reviewed the claimant's allegation asserting that the CA should have required 2 instead of 5 repairers in tender documents.

Having reviewed data on the PP Portal, it has been established that by document titled "Response to the questions" No. 11-19/17-2 of 18 September 2017, to an interested party's suggestion that the CA in Lot 1 should require bidders to have at least 2 repairers of whom one electric engineer, the CA replied that thus-formulated requirement was indicative, since there was only one manufacturer-certified maintenance service operating in the territory of the Republic of Serbia employing a small number of repairers.

From the established facts follows that the CA, in terms of staff capacities, required the bidders to have at least 5 repairers for medical equipment maintenance, of whom at least one electrical engineer.

Justifying thus-formulated requirement, the CA revealed in its response to PoR request that in the past it had had negative experience with bidders with small number of repairers. It further elaborated that the underlying guidance in setting the level of staff capacity was this quite sensitive category of machines that functioned in the operating rooms and were of critical importance during surgeries; another vital input was that maintenance shops were servicing more than one hospital, due to which and lacking sufficient repairers they, at times, had not been able to comply with the deadline for response and/or deadline for service execution. Hence, in order to avoid such an outcome, the CA required higher staff capacities of bidders rendering them able to respond in all situations during the term of the contract.

Having in mind the above, in the view of the Republic Commission, the way the staff capacity as an eligibility requirement was defined in this case, is above all logically related to the PP subject. The supporting reasoning takes into account the CA's argument it was necessary to require 5 repairers rather than 2, after the lesson learned through negative experience with bidders with insufficient number of repairers and consequent problems in running business, in that of being unable to comply with deadline for response and/or deadline for service execution. On the other hand, the claimant challenged the set number of repairers arbitrarily and without adequate argumentation, by alleging that if five machines had broken down at the same time, a single trained repairer would have been sufficient for the field response and call to remedy defects. However, the claimant here merely made an assertion, but offered no evidence, that the subject public procurement could execute 2 repairers. Also, when challenging staff capacity in PoR request, the claimant did not allege that by requiring the bidders to have 5 employed repairers the CA had effectively favoured a certain bidder, but merely that thus had been excluded opportunity to participate for the bidders with 2 repairers; in the view of the Republic Commission, this explanation cannot be taken as one which makes the above assertion founded.

Bearing in mind the foregoing, the Republic Commission finds that the arguments in CA's response to PoR request that were the CA's guidance in setting the level of staff capacities were clear and logical, in line with the CA's objective needs, and logically related to the PP subject. Namely, in the opinion of the Republic Commission, the CA has thus justifiably facilitated a smooth conduct of the subject public procurement."

**Excerpt from Reasoning of the Republic Commission's Decision
No. 4-00-1352/2017 of 21 November 2017:**

"...Starting from the arguments presented in given PoR request, the Republic Commission finds it may be inferred that the claimant deems that the content of additional eligibility requirement, in terms of necessary level of business capacity, is not logically related to the subject-matter of public procurement because the CA should have also accepted as relevant the works concerning the anti-corrosion protection of other facilities, instead of only those performed on towers of the transmission lines and portlets of low voltage level of 110 kV and higher, because the latter by their nature could be by far more complex, and especially because, as the claimant alleges, it follows from the content of Section 7 of template contract which is an integral part of tender documents, that the transmission lines will be in a voltage-free state in the course of works.

However, upon insight into tender documents designed for this PP procedure, the Republic Commission established that arguments presented in the reviewed PoR request do not correspond to the facts.

The Republic Commission established that an integral part of tender documents is Form 5.14 titled "Plan for carrying out works on anti-corrosion protection", containing the list of facilities on which will be performed the works that are the subject of this PP and including, inter alia, data on voltage level and number of days for the execution of works; for each individual facility, there are set definite numbers of days for execution of works with disconnection, and numbers of days for execution of works with connection.

In addition, the Republic Commission established that another integral part of tender documents is Chapter II titled "Technical part", which in terms of Article 61, Para 4, Point 5 of the PPL in relation with Article 70 of the PPL, is the TS for works to be procured as a mandatory element of tender documents, in which the CA specified through the PP subject by means of enumerating its characteristics including the manner of execution, level of quality, methods for oversight and quality assurance, safety, etc.

Table marked as "V-4 — Other requirements", another integral part of this section in tender documents, under number 3 for the manner of performing works on the tower definitely stipulates "equipment under voltage", except for the

third zone (distance greater than the prescribed safe distance from the parts under voltage).

Having in mind the presented facts, the Republic Commission finds that content of Section 7 of template contract cannot be interpreted as the claimant did, i.e., as a proof that transmission lines will be voltage-free during execution of works, but rather — and exclusively — as the defining of CA's duties for the works to be executed under disconnection of facilities, meaning that the CA is obliged to obtain written permit concerning the date of the commencement of works and necessary voltage-free state of transmission line, and to designate person responsible for disconnecting the facilities on which the works will be executed.

Considering the foregoing, the Republic Commission affirms that in this case it has not been established that Article 76, Para 6 of the PPL was violated for reasons presented in PoR request, in that the challenged additional eligibility requirement was not logically related to subject-matter of public procurement in terms of the nature of facility on which the works on anti-corrosion protection would be executed and in terms of the way to execute those, which necessarily have specificities of their own. According to the CA's wording in response to PoR request, the works at hand were to be performed on facilities under voltage of 110 kV and over 25 m high, without scaffolding; thus, for the sake of safety of both facilities and workers tasked with executing the works and for the sake of quality of executed works, it is vital that bidders had experience in execution of such works in the projected scope and deadlines.

In that respect, the Republic Commission notes that Article 76 of the PPL affords a statutory option for CA to set additional eligibility requirements in PP procedure in tender documents, should CA assesses it necessary considering the PP subject.

Article 76, Para 2 of the PPL provides that CA sets in tender documents additional eligibility requirements in PP procedure in terms of financial, operational, technical and personnel capacities whenever it is necessary having in mind the subject-matter of public procurement.

Further, in light of the argumentation presented in PoR request, the Republic Commission finds there is no collision between the content of the additional eligibility requirement in given PP procedure in terms of necessary level of

business capacity as set by the CA, and the content of the additional eligibility requirement in terms of necessary level of staff capacity, as indicated by the claimant.

Namely, the purpose of setting additional requirement in terms of necessary level of business capacity is to ensure participation of bidders who possess required experience for the execution of PP subject, whereas the purpose of setting additional eligibility requirement in terms of level of staff capacity is to ensure participation of bidders which also possess adequate staff structure for the execution of PP subject.

From the foregoing follows that, in terms of tender documents developed for the conducting of this PP procedure, each bidder possessing required experience in carrying out works on anti-corrosion protection on towers of transmission lines and portlets of low voltage level of 110 kV and higher, will at the same time have to prove, inter alia, to has available at least 50 metal painters holding valid certificate for working at elevations exceeding 20 meters, certificate for working in the vicinity of voltage, and valid medical certificate for working at heights (section 4 — “Instructions how to prove compliance with requirements from tender document”, Part “Additional requirements”, Point 7.3).”

Excerpt from Reasoning of the Republic Commission’s Decision No. 4-00-1477/2017 of 18 December 2017:

“...Besides the aforementioned, the Republic Commission finds that the matter of what was acceptable for the CA as a relevant reference to verify compliance with the additional eligibility requirement in terms of required level of business capacity, was actually the subject of RfC which the claimant, as an interested party, sent to the CA before the expiry of deadline for the submission of bids, exercising statutory option under Article 63 of the PPL, as well as the subject of response the CA gave thereto.

Specifically, upon insight into documents on this PP procedure, submitted to it to adjudicate in this case, and upon insight into questions and answers regarding tender documents posted on the PP Portal on 5 October 2017 (also submitted within documents related to this PP procedure — registered under No. 404-849/17-015/6 of 4 October 2017), the Republic Commission established that

the claimant, in the capacity of an interested party in the subject PP procedure, had posed the following question to the CA:

“Do you recognise engagement of the construction machinery and labour in civil engineering for the construction of roads and highways and corridor 10, as a reference?”

According to its duty under Article 63, Para 3 of the PPL, the CA answered, as follows:

“Bidder is obliged to submit reference complying with requirements in terms of sufficient business capacity set in tender documents (reference on works performed on asphaltting the streets and local roads, or construction of non-categorized roads or field pathways), as the only way for preparing an acceptable bid. A proof of bidder’s business capacities cannot be the engagement of the construction machinery and labour in civil engineering to execute certain works, but instead the confirmation of the execution of contracts concluded between the bidder and reference buyer or CA.”

Considering the way the tender documents formulated the content of additional eligibility requirement in terms of required level of business capacity and the way to prove compliance (here including all clarifications thereon, given pursuant to Article 63 of the PPL and posted on the PP Portal), the Republic Commission concludes that from the established facts follows:

- a compliant bidder in this PP procedure would be one which in the requested period, as a contracting party or a contractor under a concluded contract on works, has executed contracts concluded with a referenced CA, whose subject were the works on asphaltting streets and local roads, or construction of non-categorized roads or field pathways;
- this means that the bidder here was engaged as contractor for cited works on the basis of contract concluded with the referenced CA, that those works had a certain minimum value, and that the bidder has fully complied with all contractual obligations, in accordance with contracted quality and within contracted deadline;
- in present case, the clarifications of tender documents given pursuant to Article 63 of the PPL explicitly excluded that the engagement of construction machinery and labour in civil engineering to execute certain works may

serve as a relevant reference to verify compliance with said additional eligibility requirement.

Next, the Republic Commission reviewed the claimant's bids for Lots 3 and 4, and established that their integral parts were:

- completed Reference List Form (Form No. 7) with data disclosing that during 2015 and 2016 the bidder had executed the works valued RSD 30,081,753.00 for CA "Trace PZP" d.o.o. Vranje; and
- completed Form No. 8 (confirmation of execution of concluded contracts) issued by "Trace PZP" d.o.o. Vranje, stating that the subject of Contract No. 10/2 of 28 February 2015, concluded with the claimant, was the engagement of machinery and equipment for the works on asphaltting roads and highways.

Bearing in mind the facts established from the contents of claimant's bids for Lots 3 and 4 in this PP procedure, the Republic Commission finds them to support the conclusions drawn by the CA in the course of expert evaluation of whether the evidence supplied with the bids, from the aspect of tender documents designed for the conducting of this PP, proved the compliance with the additional eligibility requirement in terms of required level of business capacity.

Namely, from the content of claimant's request follows that presented reference is not a reference related to a previously executed contract wherein the claimant had been engaged as contractor of works on asphaltting streets and local roads, or construction of non-categorized roads or field pathways.

Contrary to the required, the presented reference relates to a contract whose subject dealt only with engagement of machines and equipment the claimant had at its disposal. Having in mind publicly available information of who could possibly be a real procurer contracting the works for the construction and asphaltting of roads and highways, it may be reasonably concluded that for the cited works were used machines and equipment of "Trace PZP" d.o.o. from Vranje — which could have only had the capacity of an entity to whom the actual procurer had entrusted to perform the works.

The corollary of the established facts is that evidence supplied in the claimant's bid for the subject PP procedure, in terms of tender documents designed for the conducting thereof, did not prove compliance with the additional eligibility

requirement regarding the necessary level of business capacity. The Republic Commission concludes it means that the claimant's bid cannot be evaluated as an acceptable bid as defined under Article 3, Para 1, Point 33 in relation with 106, Para 1, Point 2 of the PPL; therefore pursuant to Article 107, Para 1 of the PPL, meaning *ex lege*, the CA was obliged to reject it, since Article 107, Para 1 of the PPL provides that CA is obliged to reject all unacceptable bids after inspecting and evaluating all bids in PP procedure."

— the remaining part of the statement of reasons:

(Specifically, Article 107, Para 1 of the PPL provides that CA is obliged to reject all unacceptable bids after inspecting and evaluating all bids in PP procedure.

Having in mind that in the course of PP procedure CA is legally bound by Article 107, Para 1 of the PPL to reject all unacceptable bids after having inspected and evaluated bids, the Republic Commission concludes that in the case at hand, in terms of the provisions of the PPL, it has not been established that the CA incorrectly evaluated the claimant's bid.

Further to this, taking into account that arguments offered in filed requests contain the claimant's assertion that "pursuant to the principle of prohibition of discrimination as set forth in Articles 12 and 76, Para 6 of the PPL, the CA had to interpret eligibility requirements so that those did not discriminate the bidders and so that those were logically related to the PP subject", the Republic Commission finds that according to Article 3, Para 1, Point 33 in relation with Article 61, Para 1 of the PPL, the evaluation of acceptability may and must be conducted solely on the basis of the actual content of tender documents that all potential bidders were aware of from the moment they received them. This means that, in order to find out whether the offered evidence prove the compliance with additional eligibility requirement in terms of business capacity, the relevant fact is the way in which the tender documents, designed for given public procurement, have actually defined the content of this additional eligibility requirement in terms of technical capacities, one that the CA has undeniably set in exercise of its legal authority under Article 76, Para 2 of the PPL.

Taking into account that from the established state of facts follows the indisputable conclusion that the CA, when assessing whether the claimant proved its compliance with the additional eligibility requirement in terms of the necessary level of business capacity, has acted consistently in line with tender

documents designed for the conducting of subject PP procedure, the Republic Commission finds that in this case has not been identified violation of Articles 12 and 76, Para 6 of the PPL on the account of reasons presented in the reviewed PoR requests.)

**Excerpt from Reasoning of the Republic Commission's Decision
No. 4-00-1834/2017 of 20 January 2017:**

“...Further, the Republic Commission reviewed the merits of claimant's allegation challenging the selected bidder's manner of proving its compliance with additional requirement in terms of technical capacity, and found it to be groundless.

Insight into the subject tender documents established that the technical capacity requirement was defined so to require the bidders to have available minimal technical equipment, which implied the possession of: a) at least 1 total station; b) at least 1 metal pipe locator; c) at least 1 ground penetrating radar with adequate data processing software; d) at least 1 profiler, whereby for the proving of compliance with any of these was necessary for Points a), b), c), d) to supply proofs in the form of copies of purchase contract (invoice), inventory list for the previous year, or another legal basis for utilising equipment, such as an equipment leasing agreement or an equipment renting agreement valid on the day of opening the bids, with adequate annexes.

Insight into the content of the selected bidder's bid established that for proving the compliance with said requirement, among other evidence, the bidder supplied the Agreement on Lease of Geodetic Equipment: measuring system for determining the positions of underground lines and installations (tracker — scanner), and ground penetrating radar manufactured by “Mala” Sweden, type Ramac X3M, serial number TR50001, concluded on 3 February 2016 between a participant in joint bid of there-selected bidder “Geodata PGJ” d.o.o. Obrenovac as a lessee of equipment and a contracting party, and “Geozs” d.o.o. Belgrade as the lessor of equipment and the other contracting party.

Insight into the content of the above agreement established its Section 5 stipulates that the contracting parties conclude the subject agreement for an indefinite period, and that the lease begins on the day of handing over the equipment, on which will be drawn up the minutes.

Attached to the bid was the invoice for the purchase of the equipment which was the subject of the concluded agreement on lease.

Further insight into the content of subject bid established that also supplied was the Agreement on lease of equipment for geodetic and geophysical measuring “Stratabox subprofiler”, an instrument that measures stratification and structures up to 40 m depth of soil, concluded on 1 January 2016, by and between the contracting parties “Ageo” d.o.o Belgrade as a lessor of equipment and a contracting party, and a participant in joint bid “Geodata PGJ” d.o.o. Obrenovac as a lessee of subject equipment and the other contracting party.

Insight into the content of the above agreement established its Section 1 stipulates that the lessor as the owner of “Stratabox subprofiler” device leases the “Stratabox subprofiler” sonar, for geodetic and geophysical soil measuring on the shore and in the water.

Attached to the bid was a copy of the invoice, naming the device as “Stratabox geophysical instrumental”.

Therefore, from the established facts follows that, in order to prove compliance with the technical capacity requirement as stipulated in tender documents, the bidder had to prove it had available minimal technical equipment, which implied the possession of: a) at least 1 total station; b) at least 1 metal pipe locator; c) at least 1 ground penetrating radar with adequate data processing software; d) at least 1 profiler, whereby for the proving of compliance with any of these was necessary for Points a), b), c), d) to supply proofs in the form of copies of purchase contract (invoice), inventory list for the previous year, or another legal basis for utilising equipment, such as an equipment leasing agreement or an equipment renting agreement valid on the day of opening the bids, with adequate annexes.

In the case at hand, by proving compliance with said requirement in that part, and acting in line with tender documents, the selected bidder supplied evidence of having legal basis to use equipment required in terms of technical capacity, notably, agreements on lease of equipment for at least 1 ground penetrating radar with adequate data processing software, and at least 1 profiler.

From the contents of evidence attached to the selected bidder’s bid, here – the agreement on lease for the use of equipment, notably, the measuring system

for determining the positions of underground lines and installations (tracker – scanner), and ground penetrating radar manufactured by “Mala” Sweden, type Ramac X3M, serial number TR50001, concluded on 3 February 2016 between a participant in joint bid of there-selected bidder “Geodata PGJ” d.o.o. Obrenovac as a lessee of equipment and a contracting party, and “Geozs” d.o.o. Belgrade as the lessor of equipment and the other contracting party, it can be established beyond any doubt that this agreement was concluded for an indefinite period and, consequently, that it is still in force and can be used in the subject PP procedure.

A related fact is that, for relevant doubts in the matter of whether the subject agreement was still valid/legally effective, the claimant failed to supply any suitable evidence to support its doubts raised in its request.

Accordingly, since it can be undoubtedly inferred from the contents of submitted agreement of lease that it was concluded for an indefinite period – as in being still in effect, and since on the other hand the claimant in its request raised doubts on validity of concluded agreement but failed to supply concrete evidence in order to prove that subject agreement was terminated – as in no longer producing legal effects, the Republic Commission finds that, in terms of this specific PP procedure, there are no grounds not to accept the subject evidence proving the compliance with the technical capacity requirement.

Regarding the claimant’s allegations challenging the way of proving compliance with said requirement in terms of the contents of evidence titled: Agreement on lease of equipment for geodetic and geophysical measuring “Stratabox sub-profiler”, an instrument that measures stratification and structures up to 40 m depth of soil, concluded on 1 January 2016, by and between the contracting parties “Ageo” d.o.o Belgrade as a lessor of equipment and a contracting party, and a participant in joint bid “Geodata PGJ” d.o.o. Obrenovac as a lessee of subject equipment and the other contracting party, the Republic Commission recalls that insight into the content of the above agreement established that its Section 1 stipulated that the lessor as the owner of “Stratabox subprofiler” device leased the “Stratabox subprofiler” sonar, for geodetic and geophysical soil measuring on the shore and in the water.

In that respect, the Republic Commission explicitly notes that, in its response to the request, the CA has clarified the purpose of the device for which was

submitted the above agreement on lease therein it clarifying that the instrument served to measure stratification and structures up to 40 m depth of soil, wherefrom follows that the subject device, offered by the selected bidder, can be deemed as “profiler” in line with definition of the subject device given under the clarification of tender documents of 19 October 2016.

In the view of the Republic Commission, the claimant’s assertion that the data contained in the supplied contract did not correspond to the data contained in the supplied invoice, in that the invoice named the device as: ‘Stratabox geophysical instrumental’, do not have any bearing on verifying compliance with the subject requirement pursuant to the subject tender documents.

The supporting reasoning is that, for the case where bidders prove compliance with the technical capacity requirement not by ownership of subject equipment, but instead by another legal basis for the use of that equipment, such as an agreement on lease, tender documents did not oblige them to supply invoices for the machines to be used which were the subject of a lease agreement. On the grounds of the above, since the provisions of subject tender documents on proving the right to use required machines did not require the provision of relevant evidence (invoice) in order to prove compliance with that requirement, the Republic Commission finds that the claimant’s assertions challenging the content of the supplied evidence, i.e., invoice on purchase of required machines, do not have any bearing on the assessment of compliance with the subject requirement.

In addition, the Republic Commission specifically affirms that from the contents of supplied agreement on lease it is indubitably inferred it contains no reference on duration of concluded agreement. Further, recalling that provisions of Article 597, Para 1 of the Law of Contracts and Torts (“Official Gazette of the SFRY”, Nos. 29/78, 39, 95, 45/89, Decision of the CCY, and 55/89, “Official Gazette of the FR Y” No. 31/93, and “Official Gazette of SaM” No. 1/2003 – Constitutional Chart) stipulate that a lease agreement whose duration is not defined or cannot be inferred from circumstances of the case or from local trading practices, is to be terminated by notice which either party may serve on another while honouring an agreed notice timeline, it follows that the agreement at hand was concluded for an indefinite period, and this, in the view of the Republic Commission, means that this agreement is still valid.

Since the claimant, on the other hand, in its request raised doubts on validity of concluded agreement but failed to supply concrete evidence in order to prove that subject agreement was terminated — as in no longer producing legal effects among contracting parties, the Republic Commission finds there are no grounds not to accept the subject evidence corroborating the compliance with the technical capacity requirement.

On the grounds of the foregoing, the Republic Commission finds that this PoR request is completely groundless.”

4

Deficiencies not Relevant for Determining the Contents of Bid

Through its views given under the reasoning (statement of reasons) of its decisions on specific PoR procedures, presented in this part of the Bulletin, the Republic Commission has elaborated the relevance of identified deficiencies in bids for ability to determine the actual content of bid and their relevance as the grounds for rejection in the stage of expert evaluation of bids. The first four points of Article 106, Para 1 of the PPL clearly define deficiencies of bids due to which such bids have to be rejected in the course of expert evaluation; accordingly, Point 5 of the same Article reflects the legislator's intent that only bid's essential deficiencies in terms of its content, i.e., inability to determine its actual content, or inability to compare a bid with other bids due to such deficiency, should be taken as the grounds for duty to reject such bid in terms of Article 107, Para 1 of the PPL.

Given the nature of allegations in a number of PoR requests challenging CA's actions in expert evaluations of bids, during the course of PoR procedure the Republic Commission often has to deliberate the impact and relevance of deficiencies identified in bids, notably, whether those have resulted in inability to determine the actual content of bid. This is why this part presents selected examples where bidders erroneously deemed certain deficiencies to be essential flaws. Considering that PP procedures are the outcome of market's inner workings which boost competition and enable CAs to receive most competitive and best bids, this provision is applied in a way which ensures that only deficiencies of relevance for the content of bid be deemed as essential ones and, to this end,

those are distinct from deficiencies which are of a formal nature and do not affect the content of bid.

Given that content of bid is determined by provisions of tender documents, there are numerous examples of groundless requests alleging purported deficiencies in bids, in terms of which the tender documents contained no explicit requirements; here, the Republic Commission's view is that such cases cannot be interpreted so to prejudice bidders, primarily taking into account the provisions of Article 61, Para 1 of the PPL. Likewise, given that for the content of bid is vital its compliance with terms and conditions defined under tender documents, the fact that bidders fail to supply evidence in the same format as required by tender documents is of no relevance for its content, provided that bidders supply another evidence capable of undeniably proving compliance with essential requirements set under tender documents.

Similarly, there are cases where claimants allege they identified certain 'flaws' in supplied evidence, such as those with different naming of evidence supplied in bid relative to naming required in tender documents, or cases where evidence was not certified or was supplied in a foreign language without translation; however, with the common point in all instances being that they did not challenge the supplied evidence in terms of their content or validity, such allegations were found groundless. Likewise, in cases where CAs fail to act in compliance with Article 79, Para 5 of the PPL, and by provisions of tender documents require submission of proofs even though such evidence is publicly available on webpages of competent authorities, a potential failure to submit required proofs is not equated with inability to determine the actual content of bid, since such data can be established on webpages of competent authorities.

**Excerpt from Reasoning of the Republic Commission's Decision
No. 4-00-1365/2017 of 28 November 2017:**

"...Article 77, Para 4 of the PPL provides that CA may stipulate in tender documents that compliance with all or with some individual requirements, other than requirement under Article 75, Para, 1 item 5) of this Law, is to be proved by bidder's statement given subject to full criminal and material liability, whereby the bidder confirms that it fulfils the requirements.

Article 79, Para 2 of the PPL provides that where bidder submitted declaration under Article 77, Para 4 of this Law then, prior to making its decision on awarding contract, the CA is obliged to ask the bidder whose bid was evaluated as most advantageous to submit copies of required evidence on compliance with requirements, and it may also ask for the originals or certified copies of all or of only some of proofs, for the sake of inspection.

Taking into account all established facts and cited legal provisions, the Republic Commission notes that the CA stipulated in tender documents for this PP procedure that fulfilment of mandatory requirements under Article 75, Para 1 of the PPL bidder had to prove by giving the declaration referred to in Article 77, Para 4 of the PPL, with the declaration form being a part of tender documents. Thus, in terms of Article 11, Para 4, Point 2) of the Rulebook on mandatory elements of tender documents in PP procedures and method of demonstrating compliance with requirements ("Official Gazette of the Republic of Serbia", No. 86/15), the CA definitely chose that option and allowed bidders to supply declaration instead of evidence.

In accordance with the above, a participant in joint bid of selected bidder "Fareng" d.o.o. Belgrade, has undeniably supplied signed and stamped declaration on the form provided in tender documents and given under criminal and material liability, stating that the mandatory requirements provided by Article 75, Para 1, Points 1) through 4) of the PPL have been met.

Thus, taking into account the above and the fact that in tender documents for this PP procedure, in accordance with Article 77, Para 4 of the PPL, the CA stipulated that compliance with mandatory requirements under Article 75, Para 1, Points 1) through 4) of the PPL were to be proven by submission of declaration on the form provided under tender documents, in the opinion of the Republic Commission, by having submitting the statement on compliance with mandatory requirements by bidder "Fareng Ltd" Belgrade as a participant in joint bid, the selected bidder did act in accordance with request under tender documents and thus proved it fulfilled mandatory eligibility requirements, in the manner permitted by cited PPL provisions and by provisions of tender documents for this PP procedure.

Namely, the selected bidder's bid undeniably contains declaration of "Fareng" d.o.o. Company Belgrade, as a participant in joint bid, stating that this com-

pany is registered in the Register of Bidders kept by the Agency for Business Registers, pursuant to Decision No. BNP 10820/2013 of 7 February 2013; insight into it confirmed the claimant's statement, namely that this decision referred to Register of business entities and registered the change of one of operating data.

However, in the case at hand, after opening the bids in accordance with Article 79, Para 2, of the PPL and finding the selected bidder's bid to be the most advantageous one, the CA asked the selected bidder to submit evidence proving compliance with mandatory requirements under Article 75, Para 1, of the PPL. Further to this, the Republic Commission took note that the claimant referred exactly to this fact — which had also been noted in the challenged decision on awarding contract — as the CA's action that allowed the selected bidder, belatedly and after the expiry of deadline for the submission of bids, to obtain and supply evidence proving its compliance with mandatory requirements; the claimant also stated that such evidence dated after expiry of deadline for the submission of bids, which goes contrary to tender documents and the CA's memo, cannot be relevant. Taking it all into account, the Republic Commission finds there is no legal obstacles to also obtain documents from competent institutions after the receipt of the CA's request referred to in Article 79, Para 2 of the PPL.

Namely, where CA stipulates an option to prove compliance with mandatory requirements by declaration pursuant to Article 77, Para 4 of the PPL, just like in case at hand, CA may invite the bidder to provide relevant evidence confirming the veracity of given declaration only after having evaluated the most advantageous bid. Since such invitation happens after the expert evaluation has identified the most advantageous bid, the bidder receiving the CA's invitation referred to in Article 79, Para 2 of the PPL knows for certain that it is going to conclude the contract once it complies with the CA's request and obtains and submits sought evidence. This allows the date of issuing of requested documents to come after the CA's invite to supply all or only certain pieces of evidence on compliance with mandatory requirements, but before the decision on awarding contract. The purpose of Article 79, Para 2 of the PPL is to enable CA to check the veracity of declaration in PP procedure and make sure the bidder really complies with requested requirements.

The provision of Article 77, Para 3, of the PPL deals with how long ago was issued evidence the bidders submit in bids, where they declined to exercise the option to supply declaration referred to in Article 77, Para 4 of the PPL instead of evi-

dence. This former provision sets forth that any evidence is valid even if issued after opening of bids, which in this case is 30 June 2017. Therefore, it means that acceptable are not only confirmations issued 2 months before the bids opening, but also that all confirmations issued after the bids opening, i.e. after 30 June 2017, are valid proof of compliance with mandatory requirements in terms of Article 79 Para 2 of the PPL.

Consequently, there are no grounds in the claimant's contention that the key factor for evaluating the selected bidder's bid as unacceptable was the fact that a participant in the selected bidder's joint bid was not registered in the Register of Bidders on the day of bids' opening, since the selected bidder acted in accordance with requests under tender documents and, pursuant to Article 77, Para 4, of the PPL, supplied declaration on compliance with mandatory requirements on the declaration form included in tender documents, and supplied evidence on compliance with relevant mandatory requirements upon the CA's invitation pursuant to Article 79 Para 2 of the PPL."

Excerpt from Reasoning of the Republic Commission's Decision No. 4-00-1673/2017 of 10 January 2018:

"...Next, the Republic Commission notes it has already been established and stated that the part of tender documents titled "Additional Requirements" (whose final contents were defined through Amendment to tender documents No. 1 posted on the PP Portal on 23 October 2017, and Amendment to tender documents No. 3 posted on the PP Portal on 2 November 2017), also defined the additional eligibility requirement in this PP procedure in terms of necessary level of technical capacity, according to which this requirements would fulfil bidders which, at the time of submitting bid, had at their disposal the functioning technical equipment defined under the same chapter of tender documents and in the tabular view which was an integral part of Form No. 10, whereby the legal basis for such disposition were to be either property, lease, or rent, and that it stipulated the bidders needed to submit evidence proving, according to the nature of requirement, that they had at their disposal the requested equipment (as property, lease or rent).

Having in mind the foregoing, and the contents of PoR request from which follows as undisputed that the group of bidders, to which the subject PP con-

tract was awarded, did supply in its bid evidence requested by tender documents proving that they had at disposal, among other things, the requested double excavators and a finisher of working width of at least 8 m, which fact was additionally verified and confirmed also by insight into the bid, the Republic Commission finds that the claimant has groundlessly alleged this group of bidders had failed to prove it possessed the required technical equipment, purportedly because there were not provided photocopies of registration licenses, information chips of registration licenses, the copies of compulsory insurance policies for the vehicles valid on the day of the bids opening.

Namely, pursuant to Article 106, Para 1, Point 2 of the PPL, an essential deficiency of bid which, in terms of Article 3, Para 1, Point 33 and in relation to Article 107, Para 1 of the PPL, constitutes the grounds to reject it as unacceptable, only exists if bidder fails to prove it fulfils additional eligibility requirements set by CA in tender documents. In the case at hand, this was not established, since the additional requirement in terms of technical capacity was defined so to require evidence of having at disposal certain technical equipment, and here this fact was not disputed by the reviewed PoR request.

Furthermore, the Republic Commission finds that, in terms of Article 3, Para 1, Point 33 of the PPL defining the notion of acceptable bid, 'completeness of bid' itself is not a precondition for its acceptability as alleged by the claimant, according to the contents of its PoR request.

Potential deficiencies of a bid must have features of an essential deficiency under Article 106 of the PPL to provide the grounds for its rejection as an unacceptable one pursuant to Article 107, Para 1 of the PPL, having in mind that only existence of essential deficiencies results in unacceptability of bid in terms of Article 3, Para 1, Point 33 of the PPL.

Related to the above, the Republic Commission especially notes that its Fourth Plenary Session, held on 16 April 2014, adopted General Legal Position No. 18 pursuant to explicit legal authority granted by Article 146 of the PPL. This general legal position holds that, where some parts of bid do not contain a piece of information the bidder was obliged to submit in line with requirements stipulated in the tender documents, CA cannot reject such bid on the account of essential deficiencies if bidder has already supplied the requested information

in another part of bid, and CA can identify the actual contents of bid in terms of Article 106, Para 1, Point 5 of the PPL.

On the grounds of the foregoing, the Republic Commission finds that the fact that no evidence was supplied for certain technical equipment, as noted by PoR request, did not amount to deficiency of selected bid in terms of Article 106, Para 1, Point 5 of the PPL that made it impossible to determine its contents on whether the pertinent group of bidders had at disposal those machines, since it was determinable by other evidence supplied in the bid, such as lease agreement and inventory lists. This also means this fact does not constitute the reason for unacceptability of bid in terms of Article 3, Para 1, Point 33 of the PPL nor, consequently, the basis for its rejection in terms of Article 107, Para 1 of the PPL”.

**Excerpt from Reasoning of the Republic Commission's Decision
No. 4-00-340/2018 of 26 April 2018:**

“...Article 3, Para 1, Point 33 of the PPL provides that acceptable bid is a bid which is timely, one that CA did not reject due to substantial deficiencies, which is adequate, one that does not restrict or condition either the rights of CA or the obligations of bidder, and which does not exceed the amount of estimated value of concrete public procurement.

Article 93, Para 1 of the PPL provides that CA may request bidders to supply additional explanations that will be useful in the course of examining, evaluating and comparing bids, and it may also conduct control (inspection) of bidder or its subcontractor.

Article 93, Para 3 of the PPL provides that CA may not demand, allow, or offer, any alterations to the elements of bid relevant for applying the criterion for awarding contract, or any change that would turn an inappropriate or unacceptable bid into an appropriate or acceptable one, unless otherwise follows from the nature of PP procedure.

Article 107, Para 1 of the PPL provides that CA rejects all unacceptable bids after inspecting and evaluating all bids in PP procedure.

Having in mind the facts established in this case, notably, the CA's request stipulated in tender documents that for items 1-5 and item 46 in Batch 3 is neces-

sary to submit attest on health safety, and having in mind the contents of the selected bid in that it contains reports on testing health safety of the goods offered for said items, the Republic Commission finds that the selected bidder has submitted bid for Batch 3 fully compliant with the requirements of tender documents.

The fact that neither Report on testing No. 3803080103 of 12 March 2018 for product under item 2 (self-folding toilet paper made of 100% cellulose) nor Report on testing No. 3803080101 of 12 March 2018 for product under item 5 (napkins made of 100% cellulose) contain signatures of the laboratory's authorized persons on places designated for signatures or the seal of Laboratory "Anahem" Belgrade as issuer of reports, in this case cannot be of relevance for evaluating the selected bidder's bid as unacceptable on the accounts offered by the clamant.

Namely, when deciding on the case the Republic Commission kept in mind that the claimant did not dispute the contents of supplied reports in its PoR request, but instead pointed to the fact that neither one contained either laboratory's seal or signatures of the laboratory's authorized persons, whereas Laboratory "Anahem", acting upon the CA's request to verify the disputed reports, confirmed it was their issuer, and thus confirmed the validity of reports supplied in the selected bidder's bid (for items 2 and 5, in Batch 3).

Due to the aforementioned, and according to the fact of the case, the Republic Commission finds that the CA had no grounds to reject the selected bidder's bid as unacceptable in terms of Article 107, Para 1 of the PPL on the accounts offered by the clamant, and that the allegations of the claimant are groundless.

Upon reviewing the claimant's assertion that the CA, pursuant to Article 93, Para 3 of the PPL, could not accept the selected bidder's bid even with additional clarification as it would be contrary to the provisions of the PPL since there was no legal way to transform an incorrect bid containing an essential deficiency into a correct one, the Republic Commission after having examined the complete documentation of the procedure notes that here the CA did not act contrary to Article 93, Para 3 of the PPL; the supporting reasoning is that CA's actions did not create any change which would transform an incorrect or unacceptable bid into a correct or acceptable one, and that the selected bidder performed expert evaluation on the basis of documents furnished with the bid."

**Excerpt from Reasoning of the Republic Commission's Decision
No. 4-00-424/2018 of 6 June 2018:**

"...Article 18, Para 3 of the PPL provides that where CA finds, in the course of the review and evaluation of bids that a part of bid should be translated into Serbian language, it shall set an adequate deadline to the bidder for translating that part of the bid into Serbian.

Article 106, Para 1, Point 5) of the PPL provides that the CA has to refuse a bid which contains other deficiencies due to which is not possible to determine the actual contents of the bid, or to compare it with other bids.

From the established facts follows the CA stipulated in tender documents that bids had to be drafted in Serbian, and where a document was in a foreign language, it had to be translated into Serbian and sealed by certified translator. It also follows that integral parts of the selected bidder's bid were certificates written in a foreign language but not translated into Serbian and sealed by certified translator.

According to the entire established facts, the Republic Commission finds that in this case the CA did not have grounds to evaluate the selected bidder's bid as unacceptable for the reasons stated by the claimant.

Namely, pursuant to Article 18, Para 3 of the PPL, where CA cannot determine the contents of evidence because documents were written in a foreign language, it may request the bidder to translate relevant part of the bid into Serbian.

Having in mind the above, the fact that the bidder with its bid supplied said documents (pages 454-456) in a foreign language, in the opinion of the Republic Commission, could potentially be the grounds for the CA to apply Article 93, Para 1 of the PPL, in relation to Article 18, Para 3 of the PPL; or, the CA could invite the selected bidder to submit the translation of those documents into Serbia, if it could not determine their actual contents because of a foreign language.

Since the CA did not refuse the selected bidder's bid as unacceptable for submitting a part of bid, namely, certificates on testing on pages 454-456 in a foreign language, and did not use the option to request their translation into Serbian, in the view of the Republic Commission this undoubtedly means that the CA was able to determine the actual contents of the bid and to compare it with other

bids in that part. Thus, submission of this part of bid in a foreign language did not result in inability to determine its actual contents, or in inability to compare it with other bids.

Pursuant to the above, the Republic Commission especially notes that the claimant in PoR request did not challenge the contents of documents supplied in a foreign language in the selected bidder's bid, but merely pointed out that this bidder had not submitted the mentioned part of the bid in Serbian as requested by tender documents. Given that the CA was obviously able to determine the actual contents, which was also not disputed by the claimant's PoR request, the fact that no sealed translation by certified translator was supplied as requested by tender documents, in the view of the Republic Commission, does not constitute an essential deficiency of the bid and, consequently, could not influence the acceptability of the selected bidder's bid."

Excerpt from Reasoning of the Republic Commission's Decision

No. 4-00-1684/2017 of 24 January 2017:

"...Article 3, Para 1, Point 33) of the PPL defines the acceptable bid as a bid which is timely, one that CA did not reject due to essential deficiencies, which is adequate, one that does not restrict or condition either the rights of CA or the obligations of bidder, and which does not exceed the amount of estimated value of concrete public procurement.

Article 76, Para 2 of the PPL provides that CA sets in tender documents additional eligibility requirements in PP procedure in terms of financial, operational, technical and personnel capacities whenever it is necessary having in mind the subject of public procurement.

Article 79, Para 5 of the PPL provides that CA stipulates in tender documents that bidder is not obliged to supply evidence publicly available at websites of competent bodies, and specifies such evidence.

Article 106, Para 1, Point 2 provides that CA is obliged to refuse a bid where bidder fails to prove compliance with additional requirements.

From the established facts follows that the CA as additional requirement in terms of human resources capacity stipulated that bidders employ at least

one mechanical engineer holder of License 430 (Responsible contractor for thermotechnics, thermal energy, processing and gas techniques) and at least one electrical engineer holder of License 450 (Responsible contractor for electrical installations of low and medium voltage, thermotechnics, thermal energy, processing and gas techniques). The evidence to be supplied were a copy of License 430 with confirmation on holding a valid license issued by the Serbian Chamber of Engineers, and a copy of License 450 and confirmation on holding a valid license issued by the Serbian Chamber of Engineers.

The selected bidder in its bid provided confirmation of the Serbian Chamber of Engineers on holding valid License 430 for graduated mechanical engineer N.Đ., license number 430 5600 04, and confirmation of the Serbian Chamber of Engineers on holding valid License 450 for graduated electrical engineer M.R., license number 450 7069 04, without copies of these licenses, which the CA noted down in the Report on expert evaluation of bids and its Decision on awarding contract, also noting that the check on the Serbian Chamber of Engineers' web page confirmed these persons did hold the required licenses.

Having in mind the established facts, the Republic Commission finds that the CA correctly evaluated the selected bidder's bid as acceptable in terms of challenged additional requirement. Namely, information concerning membership of the proposed engineers in the SCE is publicly available and can be checked on the SCE's web page by searching the members. Since the bidder failed to submit copies of Licenses 430 and 450 for proposed engineers, and supplied only the SCE's confirmations on holding valid license 430 for proposed engineer N.Đ. (license number 430 5600 04) and on holding valid license 450 for proposed engineer M.R. (license number 450 7069 04), the CA looked consulted the Chamber's web site as a publicly accessible register. Thus, the CA positively established that proposed engineers did hold licenses covered by confirmations supplied by the selected bidder in its bid, namely, that N.Đ. is a mechanical engineer holder of License No. 430560004, and that M.R. is an electrical engineer holder of License No. 450706904. Additional evidence that they are holders of valid licenses are data in confirmations of the Serbian Chamber of Engineers verifying they have paid their dues, and that their licenses have not been revoked by the Court of Honour, as of 4 March 2018 (for employed engineer M.R.) and as of 18 March 2018 (for employed engineer N.Đ.).

The Republic Commission recalls that the CA was obliged to design tender documents in full compliance with Article 61, Para 1 of the PPL, so that bidders could prepare acceptable bids pursuant to it. In this case, the CA failed to specify which evidence out of stipulated mandatory ones are considered to be publicly available data, and therefore not necessary to submit in the bid, which is CA's duty in terms of Article 79, Para 5 of the PPL. Accordingly, the selected bidder's omission to provide copies of licenses and to insert webpage where data is accessible, does not constitute an essential deficiency of bid in terms of Article 106, Para 1, Point 2) of the PPL. The supporting reasoning is that the contents of tender documents reveal it was not prepared in full compliance with Article 79, Para 5 of the PPL, which was the CA's duty under Article 61, Para 1 of the PPL, due to which bidders cannot suffer adverse consequences because of so designed tender documents. Therefore, the CA acted properly to seek insight into the publicly available register of the SCE during expert evaluation of bids.

Consequently, having in mind that the CA through insight into publicly accessible register of the SCE verified that proposed engineers held valid licenses required by tender documents, as also ascertained by the SCE's confirmations, and that validity of an existing document only could be confirmed, the fact that licences were not supplied with the bid does not constitute the reason to evaluate the selected bidder's bid as unacceptable in terms of Article 106, Para 1, item 2) of the PPL, as suggested by the claimant; thus, the claimant's request was found to be groundless."

**Excerpt from Reasoning of the Republic Commission's Decision
No. 4-00-602/2018 of 18 June 2018:**

"...Article 3, Para 1, Point 33) of the PPL defines the acceptable bid as a bid which is timely, one that CA did not reject due to essential deficiencies, which is adequate, one that does not restrict or condition either the rights of CA or the obligations of bidder, and which does not exceed the amount of estimated value of concrete public procurement.

Article 61, Para 1 of the PPL provides that CA should develop tender documents so that bidders can prepare acceptable bids pursuant to it.

Article 76, Para 2 of the PPL provides that CA sets in tender documents additional eligibility requirements in PP procedure in terms of financial, operational, technical and personnel capacities whenever it is necessary having in mind the subject of public procurement.

Article 79, Para 5 of the PPL provides that CA has to state in tender documents that bidder is not obliged to supply evidence that is publicly available at websites of competent bodies, and to specify such evidence.

Article 106, Para 1, Point 2 provides that CA is obliged to refuse a bid where bidder fails to prove compliance with additional requirements.

From the established facts follows that the CA stipulated additional requirement in terms of business capacity requiring, among other things, that bidders hold certificate EN ISO 3834-2 issued on the basis of reference document EA-6/02 M2013 by the certification body for products (reference standard ISO/IEC 17065) and/or the certification body for systems (reference standard ISO/IEC 17021) whose validity areas cover welding processes 111 and 311 on pipes, boilers, and pressurized vessels; the requested evidence of compliance was that bidders supply photocopy of valid certificate issued by the accredited certification body with the scope of accreditation for conformity assessment. The CA in its tender documents stipulated that bidders were not obliged to submit evidence publicly accessible on web pages of competent bodies provided that instead they insert the webpage where requested data (evidence) is publicly accessible.

In that regard, the Republic Commission recalls that the CA was obliged to design tender documents in full compliance with Article 61, Para 1, of the PPL, so that bidders can prepare acceptable bids pursuant to it. In this case, the CA failed to specify in tender documents which evidence out of stipulated ones are considered to be publicly available data and therefore not necessary to submit in the bid, which is CA's duty in terms of Article 79, Para 5 of the PPL. Consequently, even though the claimant alleged it to be the grounds for evaluating the selected bidder's bid as unacceptable, the selected bidder's omission to provide the evidence on scope of accreditation of certification body "TÜV SÜD Industrie Service GmbH" as the issuer of certificate EN ISO 3834-2 that was supplied in the selected bidder's bid for a participant of the group of bidders belonging to the selected bidder "Tipo Kotlogradnja Ltd Belgrade", which is suggested by the

claimant as the grounds for evaluating this bid as unacceptable, cannot constitute an essential deficiency in terms of Article 106, Para 1, Point 2) of the PPL.

The supporting reasoning is that from the contents of both the claimant's allegation and attachment to its PoR request, and from the CA's arguments presented in its response to PoR request definitely follows that information on the scope of accreditation of certification body "TÜV SÜD Industrie Service GmbH" was publicly accessible information, readily determinable by insight into the register of the German accreditation body (DAkKS Deutsche Akkreditierungsstelle GmbH). Namely, both the claimant in its attachment to its PoR request and the CA in its response to PoR request supplied an excerpt from the register of the German accreditation body concerning the scope of accreditation of certification body "TÜV SÜD Industrie Service GmbH".

Further, the Republic Commission especially notes that the claimant in its PoR request did not challenge the scope of accreditation of certification body "TÜV SÜD Industrie Service GmbH", merely suggesting that, possibly, it was not in accordance with the scope of accreditation required under tender documents; instead, the purported reason for unacceptability of the selected bidder's bid was the fact that the evidence on the accreditation scope of certification body "TÜV SÜD Industrie Service GmbH" was not supplied in the bid.

Therefore, tender documents reveal it was not developed in full compliance with Article 79, Para 5, of the PPL, because although it contains the clause that bidders are not obliged to supply evidence which is publicly accessible on websites of competent bodies if they insert the web page where required data (evidence) is publicly accessible, it does not specify such evidence, which was the CA duty pursuant to the cited provision. Further, bidders cannot suffer adverse consequences of improperly developed tender documents. Consequently, the CA acted properly in evaluating acceptability of the selected bidder's bid in the stage of expert evaluation of bid, notably, in evaluating compliance with additional requirement in terms of business capacity, when it resorted to verifying data by means of insight into publicly accessible register of the German accreditation body and thereupon evaluated the selected bidder's bid as acceptable.

Therefore, having in mind the contents of the reviewed PoR request, the Republic Commission finds that the CA had no grounds to refuse the selected bidder's bid by applying Article 106, Para 2, of the PPL on the accounts suggested

by the claimant in its PoR request concerning the compliance with additional requirement in terms of business capacity.

The supporting reasoning is that, in the view of the Republic Commission, information concerning the scope of accreditation of certification bodies constitute information which could already be known to the CA, as publicly accessible information, and by means of verifying it the CA was able to definitively determine the scope of accreditation of certification body “TÜV SÜD Industrie Service GmbH” as the issuer of certificate EN ISO 3834-2 that was supplied in the selected bidder’s bid.”

**Excerpt from Reasoning of the Republic Commission’s Decision
No. 4-00-242/2017 of 27 April 2017:**

“...Article 3, Para 1, Point 33) provides that acceptable bid is a bid which is timely, one that CA did not reject due to essential deficiencies, which is adequate, one that does not restrict or condition either the rights of CA or the obligations of bidder, and which does not exceed the amount of estimated value of concrete public procurement.

Article 106, Para 1, Point 5) of the PPL provides that CA has to refuse a bid which contains other deficiencies due to which is not possible to determine the actual contents of the bid, or to compare it with other bids.

Taking into consideration complete state of facts, the Republic Commission notes that the selected bidder’s omission to insert unit prices of parts from which sets are made at some positions with instead stating the price of the sets only, is of no relevance for evaluating its bid as unacceptable, given that from tender documents follows that the PP subject for the disputed positions was delivery, mounting and connecting of the set as a totality, and not of its separate units. Besides, responding to the CA’s request for further clarification, the selected bidder confirmed that for the disputed positions it provided price of the set, based on sub-positions which made a set.

The Republic Commission especially notes that unit prices of parts from which sets are made would be relevant only if given procurement also included the subsequent maintenance of the systems (energy, structural, cable, telephone,

etc, systems) in terms of replacement of parts from which sets are made, which is not the case in the case at hand, given that the disputed positions only deal with the purchase, delivery and mounting of sets, as a part of public procurement of works on decoration and adaptation of a building.

Considering all the above and considering that from the price of set in disputed positions can be inferred the total offered price, without stated unit prices of parts from which sets are made and, thus, the total payable amount for the CA and the actual contents of the selected bidder's bid, the CA in this case did not have legal grounds to evaluate this bid as unacceptable pursuant to Article 3, Para 1, Point 33) and in relation to Article 106, Para 1, Point 5) of the PPL, on the accounts proposed by the claimant, and consequently the reviewed PoR request is found to be groundless."

Excerpt from Reasoning of the Republic Commission's Decision No. 4-00-297/2015 of 25 April 2017:

"...Article 106, Para 1, Point 5) of the PPL provides that CA has to refuse a bid if it contains other deficiencies due to which it is not possible to determine the actual contents of the bid, or to compare it with other bids.

From the established facts follows that the CA's additional requirement — business capacity — requested bidders to possess a minimal business capacity and to have earned income from delivered goods of at least RSD 8,700,000.00 excluding VAT, between 1 January 2012 — 31 December 2014.

The CA stipulated the list of delivered goods along with confirmation slips issued and signed by relevant CAs as a proof of compliance with this additional requirement.

Article 61, Para 1 of the PPL provides that CA should develop tender documents so that bidders can prepare acceptable bids pursuant to it.

In that regard, when defining additional eligibility requirements the CA is obliged to provide clear and precise details thereon to potential bidders, so that they can prepare acceptable bids in terms of Article 3, Para 1, Point 33) of the PPL, both in terms of requirements included in stipulated conditions, such as necessary level of earned income, financial capacity, certain number of staff

with adequate qualifications, and in terms of evidence proving compliance with the additional requirement in the defined manner.

From the contents of tender documents, in the section defining additional requirement for business capacity, definitively follows that the CA did not specify that bidders were obliged to deliver goods which are the subject of this PP procedure within requested period, that is, to deliver solely the teaching material. On the contrary, insight into tender documents and the way the challenged requirement was defined, undeniably establishes that the CA conditioned compliance with additional requirement in terms of business capacity by earned income of at least RSD 8,700,000.00 excluding VAT, "from delivery of goods".

Hence, even though the PP subject was the procurement of teaching material, under the disputed additional requirement the CA neither stipulated nor connected in any way that compliance with additional requirement in terms of business capacity was conditioned solely by the delivery of teaching material, in the set minimal amount, but instead defined it as business income on the basis of delivered goods, which means any delivered goods.

Thus, the selected bidder's bid could not be refused in terms of Article 106, Para 1, Point 2) of the PPL, because the confirmation of reference CA "UNIVERSAL" d.o.o. Novi Sad confirmed that the selected bidder delivered the goods — the school and office supplies, rather than the "teaching material" as the subject of given public procurement was defined.

The Republic Commission notes that, regardless of which business capacity the CA chooses, a lawful conduct in the phase of expert evaluation of bids implies adherence to provisions of tender documents for each eligibility requirement, pursuant to Article 61, Para 1 of the PPL.

Namely, a prerequisite for proper expert evaluation of bids in PP procedure is that CA evaluates compliance with mandatory and additional eligibility requirements solely as defined under tender documents; in that regard, there is no room for guessing, assuming and interpreting apart from what was explicitly provided for by the provisions of tender documents.

Specifically, under additional requirement the CA requested bidders to have earned a minimal "business income" from delivered goods. In that regard, the Republic Commission recalls that Article 2, Para 1, Point 7) and Sub-Point

2) of the Law on Accounting (“Official Gazette of the Republic of Serbia”, No. 62/2013) provides that business-related income earned within a specific period is demonstrated in legal entity’s balance sheet and this, in the opinion of adjudicator, implies that the definition of business-related income suggests it concerns the total revenue a legal person earned over a given period, rather than revenue from the sale/delivery of a certain type of goods.

Furthermore, this body notes that the contents of the claimant’s PoR request challenged evidence proving the selected bidder’s compliance with additional requirement in terms of business capacity, and did not challenge whether delivered goods match the goods required by tender documents; in that regard, the claimant called to mind that selected bidder supplied the list of reference CAs instead of the list of delivered goods, due to which “it was not possible to conclusively determine whether and which goods the selected bidder delivered in the requested period”, making it impossible to determine the actual contents of the bid during expert evaluation of bids.

While reviewing the subject PoR request, the Republic Commission as the body adjudicating in terms of Article 157 of the PPL within the limits of filed PoR request, has acted in accordance with cited provision and along the claimant’s assertions, so to come up with its position and establish the facts concerning the challenged elements.

Further to the above, after establishing the facts this body confirmed that evidence proving compliance with required business capacity, to be supplied as stipulated under tender documents, comprised not only confirmations issued and signed by relevant CAs but also the list of the delivered goods, and that, on the other hand, the selected bidder supplied the reference list and the list of buyers (contracting authorities) to whom the goods were delivered.

However, in addition to this reference list/buyers to whom it had delivered goods within relevant period, the selected bidder also supplied confirmations from buyers included in the reference list.

The contents of these confirmations undeniably reveal which goods, of which value, and in which period the selected bidder delivered to buyers (contracting authorities).

Namely, confirmation of buyer “UNIVERSAL” d.o.o. Novi Sad shows that from 1 January 2012 through 31 December 2014 the selected bidder delivered school

and office supplies to the former valued RSD 12,447,795.63 excluding VAT, whereas confirmation of buyer Preschool institution “Poletarac” shows that from 1 January 2012 through 31 December 2014 the selected bidder delivered goods — expendable teaching supplies valued RSD 1,769.737.19 excluding VAT.

Hence, the selected bidder’s omission to supply the list of delivered goods with instead supplying the list of buyers (contracting authorities) to whom the goods were delivered, does not constitute a deficiency in terms of Article 106, Para 1, Point 5) of the PPL due to which could not be determined the actual contents of the bid, because the buyers’ confirmations enabled concluding whether and which goods were delivered in relevant period and the value thereof, all of which the claimant challenged by cited allegation.

Thus, this body finds the claimant’s allegation contained in its PoR request to be groundless, since the claimant’s argument that the actual contents of the bid could not be determined on the basis of the supplied evidence is unfounded.

Furthermore, this body recalls the claimant eventually did challenge the confirmation of reference buyer “UNIVERSAL” d.o.o. Novi Sad in that the delivered goods covered by the confirmation were “the school and office supplies” which begged the question of “what constituted/included the school and office supplies” — but as late as in the lawsuit with the Administrative Court in Belgrade of 6 May 2015 requesting the annulment of Decision No. 4-00-297/2015 of 31 March 2015. In this lawsuit the claimant contended the Republic Commission in its Decision 4-00-297/2015 of 31 March 2015 failed to explain how and in what way did the selected bidder prove by then-supplied evidence (reference list and buyers’ confirmations) that it had delivered the goods — the teaching material, of requested value.

In that regard, the Republic Commission recalls and reaffirms that during the course of deliberating the merits of claimant’s PoR request, it examined the grounds of claimant’s allegations — which did not dispute the reference nature of delivered goods covered by the confirmation of buyer “UNIVERSAL” d.o.o. Novi Sad; notably, at that time, no question was raised on “what was the office material” and whether it was actually the teaching material.

On the contrary, the claimant merely made generalized allegations that from the supplied evidence could not be determined whether and which goods were delivered, so the Republic Commission did not examine compliance with the

additional requirement in terms of business capacity on whether the goods covered by challenged confirmation had been reference goods or not.

Concerning the claimant's contention provided in lawsuit, this body, as stated in the previous parts of its subject decision, recalls that the CA, when defining the additional requirement in terms of requested business capacity, did not link its fulfilment solely by the delivery of "teaching material" (for a certain period, in a requested minimal amount), but instead stipulated a generalized formulation that bidders had to have earned a certain business-related income on the basis of "delivered goods" in requested period and in requested minimal amount.

Therefore, due to such-defined tender documents, bidder's compliance with additional requirement could not be evaluated on the basis of the parameter suggested by the claimant, notably, solely through delivery of the teaching material.

In the opinion of the Republic Commission, the selected bidder's bid could not have been refused in terms of Article 106, Para 1, Point 2) of the PPL in relation to Article 105, Para 1, Point 5) due to the reasons provided in PoR request; as a result, the Republic Commission decided pursuant to Article 157, Para 6, Point 2), as worded in Paragraph 1 of the disposition of this Decision."

Excerpt from Reasoning of the Republic Commission's Decision No. 4-00-1346/2017 of 7 October 2017:

"...Article 3, Para 1, Point 33) provides that acceptable bid is a bid which is timely, one that CA did not reject due to essential deficiencies, which is adequate, one that does not restrict or condition either the rights of CA or the obligations of bidder, and which does not exceed the amount of estimated value of concrete public procurement.

Article 106, Para 1, Point 3) provides that CA has to refuse a bid if the bidder fails to provide the requested collateral.

Article 107, Para 1 of the PPL provides that CA has to reject all unacceptable bids after inspecting and evaluating all bids in PP procedure.

From the established facts follows that the CA stipulated in tender documents that bidders had to submit in their bids completed own promissory note (bill of

exchange) to guarantee the seriousness of bid, valued 2% of bid value excluding VAT, signed and certified by the person authorized for representation, and registered pursuant to Article 47a of the Law on Payment Transactions and pursuant to the NBS's Decision on detailed conditions, the contents, and the manner of keeping the Register of Bills of Exchange and Mandates; and authorization (mandate) that promissory note valued 2% of bid value excluding VAT may be billed for payment without bidder's consent, whereby authorization's duration had to be at least as long the bid's validity period, and bidder has to state it in the Bid Form (Bid Validity), for the case where the bidder after expiry of deadline for the submission of bids modifies, amends, or revokes its bid, or declines to conclude the PP contract although its bid was evaluated as most advantageous one, or if bidder fails to provide a financial security stipulated under tender documents.

The selected bidder entered the amount of RSD 1,727,040.00 as total price with VAT in the Form "Specification with offered price's structure" adding in handwriting the bid value excluding VAT was RSD 1,439,200.00. Further insight established that selected bidder's financial security was: a promissory note of AB 1092467 series, in the amount of RSD 28,784.00, signed and sealed with the selected bidder's seal, and a mandate (authorization) for the promissory note payee, with serial number AB 1092467, in the amount of RSD 28,784.00 which is 2% of the total bid value excluding VAT.

Insight into submitted documents establish that the CA, upon selected bidder's written consent of 19 September 2017, corrected a calculation error observed in the selected bidder's bid concerning the offered price excluding VAT; therefore, after corrected calculation the bid's total price was RSD 1,511,700.00 excluding VAT.

Having in mind the established facts, the Republic Commission notes that the selected bidder submitted the requested financial security: a promissory note and an authorization which at the time of submission were filled in accordance with the CA's requests in tender documents, i.e. values 2% of bid's value excluding VAT. Namely, as already established, the selected bidder in its promissory note and authorization entered the amount of RSD 28,784.00, making 2% of the total price excluding VAT, in the Form "Specification with offered price's structure", having in mind that the selected bidder in the same form entered RSD 1,439,200.00 as the price excluding VAT; this proves the selected bidder in

preparation of its bid has acted in accordance with CA's request from tender documentation.

On the other hand, it is a fact that the CA, upon written consent of the selected bidder, on 19 September 2017, corrected calculation error in the latter's bid concerning the amount of offered price excluding VAT, so that the corrected offered price was RSD 1,511,700.00 excluding VAT.

However, as miscalculation happens in bid preparation, and as the CA corrected calculating error upon selected bidder's consent and in accordance with Article 93, Para 4 of the PPL, such calculating correction of bid, recognised and permitted by the PPL, should not result in unacceptability of bid just because the supplied financial security, requested as a percentage relative to the price, do not correspond to the corrected amount of the bid. Thus, where even the PPL permits and provides for the correction of an error in stated price, in the opinion of this body it would be inappropriate and contrary to the principle of efficiency provided in Article 9 of the PPL and therefore unjustified to evaluate the selected bidder's bid as unacceptable because the amounts of the supplied promissory note and related authorization display an amount which is for RSD 1,450.00 lesser than 2% (after correction of calculating error in selected bidder's price).

By supplying promissory note and related authorization in the amount of 2% of the total price stated in the bid, as established during the opening of bids and entered in the relevant minutes, the selected bidder did provide the requested collateral for the bid in this PP procedure. The fact that its amount is slightly less than the price with corrected calculating error, which was done in a procedure fully compliant with the PPL, does not constitute an essential deficiency of the bid in terms of Article 106 of the PPL. This opinion is further supported by the selected bidder's commitment to supply a new collateral at the point of concluding the contract, notably, a promissory note guaranteeing proper delivery of works in accordance with the contract price, that is, 10% of the contracted price. Once this new collateral is supplied, the promissory note guaranteeing the seriousness of bid will lose its purpose and relevance in this PP procedure."

**Excerpt from Reasoning of the Republic Commission's Decision
No. 4-00-803/2018 of 2 August 2018:**

Article 3, Para 1, Point 33) of the PPL provides that acceptable bid is a bid which is timely, one that CA did not reject due to essential deficiencies, which is adequate, one that does not restrict or condition either the rights of CA or the obligations of bidder, and which does not exceed the amount of estimated value of concrete public procurement.

Article 61, Para 1 of the PPL provides that CA should develop tender documents so that bidders can prepare acceptable bids pursuant to it.

Article 61, Para 5 of the PPL provides that CA may specify in tender documents the type of financial security instruments by which bidders guarantee the compliance with their duties in PP procedure and compliance with their contractual obligations, and also refund of advance payment (various forms of pledge of securities or other movables, mortgages, promissory notes, guarantees by other legal entity with adequate creditworthiness, bank guarantees, insurance policies, etc.).

Article 106, Para 1, Point 3) of the PPL provides that CA has to refuse the bid if bidder fails to provide the requested collateral.

Pursuant to cited provisions of the PPL, the Republic Commission notes it is obligatory that CA prepares understandable tender documents, with precise requests, including for way of providing the means of financial security and the way of completing the forms under tender documents which make the mandatory contents of the bid, so that the bidders could prepare their bids guided by so stipulated requirements in order to have their bid evaluated as acceptable.

Therefore, most relevant for preparing and submitting bids are the contents of tender documents, and the consistent adherence to tender documents both by bidders when preparing bids and by CA when evaluating bids, which is all a prerequisite for lawful and proper conducting of PP procedure. In that regard, from CA's duty, referred to under Article 61, Para 1 of the PPL, to develop tender documents so that bidders can prepare acceptable bids pursuant to it, follows that bidders will prepare their bids as specified in tender documents. Since the contents of each bid is directly determined by the contents of tender documents, its acceptability will be evaluated against the requirements stipulated thereunder.

Having in mind the established facts, the Republic Commission finds that in this case, in tender documents' section on financial securities the CA stipulated bidders had to submit a commercial bank's declaration on readiness to issue a bank guarantee for proper delivery should the bidder be awarded the contract for given PP, valued on 10% of contract value excluding VAT.

However, given the specificity of PP subject and the formulation of tender documents' section where bidders had to state their offered prices for the services in question, the Republic Commission finds that bidders, at the point of preparing bids, did not have relevant information on final contract value if they got awarded this contract. The supporting reasoning is that the PP subject in this case comprises the service of extension of support for existing Microsoft licenses for a period of three years, for which bidders knew required quantities at the point of submission of bids, and were able to infer the agreed value since the quantities for this service were defined, whereas for additional TrueUp and StepUp Microsoft licensed products for a period of three years, bidders in their bids only offered unit price per positions, because the CA had not stipulated in tender documents the needed quantities thereof, but instead stipulated that the final contract value would be determined by adding up the prices for extending the licenses for three years and by multiplying unit prices for new licenses from TrueUp and StepUp pricelists with needed quantities as needs would emerge over the period of three years, whereby the final contract value may not exceed the estimated value of public procurement.

Also undisputed is that bidders, while preparing bids, did not know the amount of estimated value of this PP, since the CA plainly stipulated in tender documents that the estimated value would be declared at the public opening of the bids.

From the established facts follows the CA did not develop tender documents in accordance with Article 61, Para 1, and related to Article 61, Para 5, of the PPL, in the part stipulating specific financial securities the bidders had to supply in their bids. The explanation is that bidders, at the point of preparing bids and seeking to obtain bank's statement on readiness to issue bank guarantee for proper delivery could not accurately establish, on the basis of formulation of tender documents' sections on determining the contract implementation and on establishing the total value of the contract, the actual amount on which to obtain a bank guarantee, and which amount in contract implementation would

be tantamount to 10% of contract value excluding VAT. The Republic Commission particularly notes that bidders at the point of preparing bids, were not aware of the estimated amount of this PP, which fact also underscored the CA in its response to PoR request.

In the light of tender documents being imprecisely developed in the section stipulating request for supplying bank's statement of readiness to issue guarantee for good delivery, since the amount of such guarantee was not clearly stated, and bidders did not know which value in this case would amount to 10% of contract value excluding VAT, the Republic Commission finds that the selected bidder's bid cannot be evaluated as unacceptable in terms of Article 3, Para 1, Point 33) in relation to Article 106, Para 1, Point 3) of the PPL, in the way and for the reasons the claimant suggested in its PoR request, because bidders cannot suffer adverse consequences of unclear and inaccurate formulations of requirements under tender documents. Consequently, the reviewed allegation is found to be groundless."

5

Reasons for Cancelling PP Procedure Set Forth by Article 109, Para 2 of the Public Procurement Law

In line with the provisions of the PPL, CAs have an option to cancel PP procedure by adopting decision on cancelling PP procedure if relevant requirements under Article 109, Paras 1 and 2 of the PPL are met.

Article 109, Para 2 of the PPL sets statutory grounds for decision on cancelling PP procedure, where the finding of expert evaluation in given public procurement is that requirements were not met for decision on awarding contract, or on concluding framework agreement, or on recognition of qualification; as a rule, pursuant to Article 107, Para 3 of the PPL, this means that not a single bid was received having the status of an acceptable bid according to the requirements set under provisions of Article 3, Para 1, Point 33 PPL.

Pursuant to Article 109, Para 2 of the PPL, CA has statutory grounds to cancel PP procedure due to two reasons that may occur at any stage of conducting a PP procedure, meaning that those do not have to be a consequence of an expert evaluation of bids, in the way provided for under Para 1 of this Article of the PPL, as follows:

- where there are objective and verifiable reasons which could not have been foreseen at the time of initiating the procedure and which make it impossible for initiated procedure to be completed,

- where there are reasons due to which CA's need for the relevant procurement ceased, for which reasons it will not be repeated during the same budget year or within the next six months.

Additional duty of CA where PP procedure is terminated by decision on cancelling procedure are set under Article 109, Paras 3, 4, and 5 of the PPL, whereby it is obliged to:

- explain in writing its decision to cancel PP procedure, particularly stating the reasons for cancellation and advice on legal remedy, and to post it on the PP Portal and on its own website within three days from the day of making such decision,
- within five days from the day on which decision on cancelling PP procedure becomes final, CA has to publish notice thereon with data defined in Annex 3K,
- decide on expenses for preparing bids under Article 88, Para 3 of the PPL in the decision on cancelling PP procedure.

In that respect, Article 109, Para 6 of the PPL provides that the final decision on cancelling the procedure is an enforceable document in terms of expenses for preparing the bid, whereas Paras 7 and 8 of the same Article provide that if certain information within decision constitute a business secret in terms of the law governing the protection of business secrets, or are confidential in terms of the law governing the confidentiality of data, such information from the decision will not be published, whereby, in this case, the decision in its integral version is to be submitted to the Public Procurement Office and to the State Audit Institution.

Excerpt from Reasoning of the Republic Commission's Decision No. 4-00-268/2018 of 13 April 2018:

"...In its response to PoR request of 20 March 2018, the CA explained that pursuant to Article 50 of the PPL, this PP procedure 7/18 – geodetic services, was jointly launched pursuant to Decision on conducting PP procedure by several CAs, No. 4404-39/18-03 of 14 February 2018, by City Administration for Urbanism, Construction, Housing and Legal Property Affairs (hereinafter:

C.A. Urbanism), City Administration for Budget, Finance, Economy, Agriculture and Investments (hereinafter: C.A. Budget), and City Administration for Environmental Protection and Improvement (hereinafter: C.A. Environ). The estimated PP value for C.A. Urbanism was RSD 1,500,000.00, for C.A. Budget was RSD 420,000.00, and for C.A. Environ was RSD 830,000.00. The estimated value of public procurement for all three CAs amounted to RSD 2,750,000.00. Based on the proxy from Decision on conducting PP procedure by several CAs No. 404-39/18-03 of 14 February 2018, C.A. Urbanism took Decision on initiation of PP procedure 7/18 – geodetic services, No. 404-39/18-03 of 19 February 2018 with estimated value of RSD 2,750,000.00 excluding VAT; the funds were allocated by Decision on Budget of the City of Jagodina for 2018. Bearing in mind the provisions of the PPL and of the Law on Budgetary System, the CA declared that the contract in this PP procedure was to be concluded in the amount of estimated values for all three CAs, whereas C.A. Urbanism could not assume commitment on under the concluded Contract in the amount of RSD 1,800,000.00 because in its budget it had available RSD 1,235,394.00 under Position 78 for the given service. In addition, for each CA in the group the CA entered in a tabular view: Amount of funds in the budget with VAT, Estimated value of the PP, Assumed liabilities with VAT; Amount of funds for PP with VAT; from all of which follows that C.A. Urbanism, C.A. Environ due to previous commitments, and C.A. Budget, do not possess sufficient funds for the subject public procurement, in its estimated value. According to said tabular view, the CA maintains that the claimant's request is groundless, because this PP procedure was cancelled due to objective and verifiable reasons which could not have been foreseen at the time this PP procedure was initiated, which make it impossible to finalize initiated procedure because of inability to assume new liabilities due to lack of the planned funds for the services which is the subject of this PP procedure. In support of arguments stated in its response to PoR request, the CA supplied copies of: C.A. Urbanism's 2018 Public Procurement Plan No. 404-8/18-04 of 17 January 2018, C.A. Budget's 2018 Public Procurement Plan No. 404-3/18-03 of 17 January 2018, C.A. Environ's 2018 Public Procurement Plan No. 1/18 of 19 February 2018, C.A. Urbanism's Chart of Accounts covering 1 January 2017 – 31 December 2017, C.A. Budget's Chart of Accounts covering 1 January 2017 – 31 December 2017, C.A. Environ's Chart of Accounts covering 1 January 2017 – 31 December 2017, Decision on the Budget of the City of Jagodina for 2018.

Article 109, Para 2 of the PPL provides that CA may cancel PP procedure for objective and verifiable reasons which could not have been foreseen at the time of initiating the procedure and which make it impossible for initiated procedure to be completed, or due to which CA's need for the relevant procurement ceased, for which reasons it will not be repeated during the same budget year or within the next six months. Para 3 of the same Article provides that CA is obliged to explain in writing its decision to cancel PP procedure, particularly stating the reasons for cancelling the procedure and advice on legal remedy, and to post it on the PP Portal and on its website within three days from the day of making such decision.

From quoted provisions follows that procedure may be cancelled for two groups of reasons: those which could not have been foreseen at the time of initiating the procedure and which make it impossible for initiated procedure to be completed, and those due to which CA's need for relevant procurement ceased; the cited reasons for cancellation have to be based on objective facts which are unambiguous and verifiable, and affect the ability to conduct specific PP procedure, and explicitly reasoned in line with duty provided for under Article 109, Para 3 PPL.

From established facts follows that this PP was conducted on behalf of several CAs pursuant to Decision on conducting PP procedure by several CAs No. 4404-39/-03 of 14 February 2018. The CA terminated this PP by Decision on cancelling the procedure No. 404-39/18-03 of 6 March 2018, stating therein inability to assume new liabilities due to the lack of planned funds for the service which was the subject of this PP.

Having in mind the established facts, and particularly taking into account that in tender documents the CA defined this PP subject as the successive rendering of relevant geodetic services, up to the amount of estimated value of this PP procedure, and taking into account the arguments the CA presented in its reply to PoR request of 20 March 2018 and supporting evidence supplied therein, explaining the lack of planned funds for the service which was the subject of this PP, stating, inter alia, that due to previous commitments some of CAs did not possess funds matching the estimated PP value, notably, that due to the level of remaining PP earmarked funds in their budgets, some of CAs were not capable of assuming future liabilities on the account of the subject PP procedure, the Republic Commission finds that in this case there is no merits in claimant's

assertion that the CA in did not have legal grounds terms of Article 109, Para 2 of the PPL to take Decision on cancelling the procedure No. 4404-39/-03 of 6 March 2018.

Namely, on the basis of all of the above, and particularly considering evidence the CA supplied in support of explanations in its response to PoR request of 20 March 2018, the Republic Commission finds the CA would not be able to finalize the given PP procedure as stipulated in tender documents, through successive rendering of geodetic services up to the amount of estimated value of this PP procedure, given that several CAs in the group did not possess funds matching the estimated PP value, in that their respective budgets had no sufficient funds for the service which was the subject of this public procurement.

Having also in mind the contents of Decision on cancelling the procedure No. 404-39/18-03 of 6 March 2018, the Republic Commission finds there is no merits in claimant's assertion that subject Decision was inconsistent with Article 109, Para 3 of the PPL, given that the CA stated therein that it cancelled subject PP procedure due to inability to assume new commitments because of the lack of planned funds for the service which was subject of the public procurement.

Accordingly, considering the CA's explanation in its Decision on cancelling the procedure, the Republic Commission finds that the CA did not act in contravention of Article 109, Paras 2 and 3 of the PPL, and decides as worded in Paragraph 1 of the disposition of this Decision."

**Excerpt from Reasoning of the Republic Commission's Decision
No. 4-00-662/2018 of 13 July 2018:**

"...On 25 June 2018, the CA submitted to the Republic Commission its response to PoR request and documents relevant for adjudicating in subject procedure. The response stated the CA had received memo of President of the Town Hall (TH) of Obrenovac, on 15 May 2018 notifying the CA, due to circumstances that had occurred concerning this PP, namely, that the PP procedure (completion of works in the subject PP) on the part of the CA evidently would not be finalized by August of the current year as foreseen by the position provided in the first Amendment to the PP plan of the PE for the Construction of Obrenovac No. 685 of 28 February 2018 (Position Đ.1, serial number 24), to immediately suspend all

activities related to public procurement of works No. R-6/2018 — reconstruction and adaptation of the facility Stara Opština. The CA went on to elaborate that the reason for immediate suspension of all activities within the PP procedure cited in this memo of President of TH Obrenovac of 15 May 2018, was the fact that TH Obrenovac was going to redirect the subject appropriation from the CA's financial plan to the funding of another capital project — the resumption of works on swimming pools. Since said memo notified the CA that TH Obrenovac' budget had no funds earmarked for finalisation of works on swimming pools, and since those works were the priority of TH Obrenovac, the CA, as stated in its reply, was informed thereunder that it should be deemed as of the day the CA received the memo (15 May 2018) said funds became redirected to another public enterprise. Pursuant to the above, and since the Assembly of TH Obrenovac is the founder of the CA, and since the CA's operations are funded by special subsidy scheme granted to it by its founder, which is the only source of funding the CA's operations, given that the CA performs activities of general interests and has no options to generate own revenues, pursuant to Article 109, Para 2 of the PPL, the CA cannot make a decision on awarding contract to the selected bidder, because there are no secured funds for the subject public procurement, that is, there occurred objective and verifiable reasons which could not have been foreseen at the point of initiating the procedure and which make it impossible for initiated procedure to be completed. Hence, since from said memo — notice of TH Obrenovac, i.e., President of TH Obrenovac follows that the consent of the Assembly of TH Obrenovac UŠ-01 No. 06-6/6 of 10 January 2018 was withdrawn, and since the CA PE for the Construction of Obrenovac had no statutory grounds for decision to award the contract to the selected bidder, given that it no longer had the secured funds to execute said decision, the CA decided to cancel the procedure pursuant to Article 109, Para 2 of the PPL.

In further response to the claimant's allegations, the CA stated that the Assembly of TH Obrenovac in its session of 19 June 2018 had adopted the first amendment to the Programme for Business Operations with first amendment to the Financial Plan of the PE for the Construction of Obrenovac for 2018; the enactments adopted by the Assembly of TH Obrenovac specified all financial appropriations and all coming changes in the Enterprise's financial and investment operations. As the CA further stated, on page 19 of the first amendment to the Programme for Business Operations with first amendment to the CA's financial plan, there were no funds in Position Đ.1.1, earmarked for reconstruc-

tion and adaptation of facility Stara Opština, meaning consequently, the CA had acted conscientiously and in line with “bona fide” principle when adopting the challenged decision. Hence, i.e., pursuant to the rules governing the CA’s business operations, the CA acquired legal grounds to amend its PP Plan in the part concerning the subject financial appropriation only after receipt of Decision on Consent No. 2205 of 21 June 2018 to First Amendment to the Programme for Business Operations with first amendment to the Financial Plan of the PE for the Construction of Obrenovac for 2018; accordingly, the CA did so and posted on its web page and on the Portal of the PPO. This amendment was adopted on 21 June 2018 and the subject PP (Decision No. 1.3.19 “Reconstruction and adaptation of the facility Stara Opština”) was erased due to occurrence of objective circumstances (lack of funds). In its response to PoR request, the CA covered the claimant’s allegation challenging the powers of the Mayor by acknowledging a certain autonomy of Mayor to modify himself certain decisions of the Assembly, to determine changes in appropriations among budgetary beneficiaries. In this regard, the CA in its response invoked the Law on Budgetary System and the Statute of TH Obrenovac, pursuant to which, as a person monitoring the execution of the budget, another role of mayor is to also monitor cost-effectiveness and rationality in spending budgetary funds, thus finding the mayor’s choosing to notify the CA that there would not be sufficient funds for the subject procurement, was completely proper. Namely, according to the CA — Article 22 of the Statute of TH Obrenovac (“Official Journal of the City of Belgrade No. 19/14) in the part regarding the presumption of competence provides the following: “Where neither a law nor another regulation determine which authority is competent to perform tasks falling under the mandate of town hall, all tasks on regulation of relations under the mandate of town hall shall be performed by assembly of a town hall, whereas the tasks of executive nature shall be performed by executive bodies of the town hall.” Having in mind that such a case was not provided for under any legal act (where in between two sessions of the Assembly of TH Obrenovac, its President or another entity learns there are no funds for execution of a PP procedure with the subsidised public funds beneficiaries, like the CA), in this kind of situation was applied the cited provision of the Statute, meaning that the executive body of TH Obrenovac — Mayor TH Obrenovac acted in line with his duties and powers, and notified the CA accordingly, which in turn has resulted in the cancellation of the subject PP procedure.

First of all, the Republic Commission recalls that it has already decided upon request of the same claimant, in the same open PP procedure for works — reconstruction and adaptation of Stara Opština, PP No. R-6/2018 whose notice to bid had been posted on the PP Portal on 12 January 2018, and issued Decision No. 4-00-298/2018 of 29 March 2018 thereby upholding PoR request as grounded and partially cancelling the subject PP at the stage of expert evaluation of bids and adoption of decision on awarding contract No. 120/7 of 28 February 2018 and Decision on Amending Decision No. 120/9 of 9 March 2018.

Examining the grounds of present PoR request, and having reviewed supplied documentation on the subject PP procedure, the Republic Commission decided as in Paragraph 1 of the disposition of this Decision, on the grounds of the following reasons:

Insight into Decision on cancelling procedure No. 120/11 of 22 May 2018 established that the CA in the Reasoning stated that on 15 May 2018 it had received memo of President of TH Obrenovac, notifying that, due to circumstances that had occurred concerning the subject PP, namely, that the PP procedure (completion of works in the subject PP) on the part of the CA evidently would not be finalized by August of the current year as foreseen by the Position provided in the first Amendment to the PP plan of the Public Enterprise (PE) for the Construction of Obrenovac No. 685 of 28 February 2018, to immediately suspend all activities related to public procurement of works No. R-6/2018 — reconstruction and adaptation of the facility Stara Opština. In President of TH Obrenovac' memo of 15 May 2018, as further elaborated by the CA, the cited reason for immediate suspension of all activities within the PP procedure was the fact that TH Obrenovac was going to redirect the subject appropriation from the CA's financial plan to the funding of another capital project — the resumption of works on swimming pools. Since said memo notified the CA that TH Obrenovac' budget had no funds earmarked for finalisation of works on swimming pools, and since those works were the priority of TH Obrenovac, the CA was thus informed that as of the day the CA received the memo (15 May 2018) it should be deemed that said funds became redirected to another public enterprise. Pursuant to the above, and since the Assembly of TH Obrenovac is the founder of the CA, and since the CA's operations are funded by special subsidy scheme granted to it by its founder, which is the only source of funding the CA's operations, given that the CA performs activities of general interests and has no options to generate own

revenues, pursuant to Article 109, Para 2 of the PPL, the CA cannot make a decision on awarding contract to the selected bidder, because there are no secured funds for the subject public procurement, that is, there occurred objective and verifiable reasons which could not have been foreseen at the point of initiating the procedure and which make it impossible for initiated procedure to be completed.

Insight into supplied documentation established that on 14 May 2018 the CA sent "Invite to make statement" No. 1653, addressed to TH Obrenovac, President, and Head of TH Obrenovac. Namely, in this memo the CA reported on how the subject PP progressed and informed that, if it were to decide on awarding contract for given public procurement the decision-making would have to wait until the expiry of deadline for the submission of bids and, if so, and provided that no PoR request were filed, the contract could only be concluded at the earliest on 28 May 2018, which date would, in turn, prompt the works to commence as late as in June. Given that finalization of the subject PP/execution of the contract pursuant to First Amendment to the PP Plan, as memo further advised, had been scheduled for August at the latest, which according to the above presently was evidently not possible, and instead would only be possible by the end of the year, and since the funds for this PP had been allocated from the budget of TH Obrenovac, this all made it necessary that the CA be notified as soon as possible whether it would be able to conclude contract with the selected bidder after having adopted decision on awarding contract, notably, whether it would be having available funds as initially allocated under the procurement plan before the end of 2018 budgetary year, pursuant to the consent of the Assembly of TH Obrenovac VIII-01 No. 406-6/6 of 10 January 2018.

Further to this CA's memo and acting upon it, the Town Hall of Obrenovac sent its statement No. 1668 of 15 May 2018, signed by Town Hall President, advising that in light of the circumstances presented in "Invite to make statement", and given that the PP procedure was not finalized and that no contractor was selected for the project of reconstruction and rehabilitation of the facility "Stara Opština", it was necessary to immediately suspend all activities on said project, because the Town Hall was going to redirect the funds for this project, by means of Decision on Budget, to another capital project (resumption of works on swimming pools) due to the lack of fresh funds in the budget which would have been planned for the cited purpose.

Having reviewed available documents and the PP Portal, it is established that on 25 June 2018 the CA posted the second amendment to the PP Plan wherein the subject PP, previously included under No. 1.3.19 “Reconstruction and adaptation of the facility Stara Opština” was deleted due to, as reasoned thereunder, emergence of objective circumstances — the lack of funds.

An integral part of the available documents was Decision on consent to First Amendment to the Programme for Business Operations and First Amendment to the Financial Plan of the PE for the Construction of Obrenovac for 2018, of 19 June 2018, issued by the Assembly of the Town Hall of Obrenovac.

Article 109, Para 2 of the PPL provides that CA may cancel PP procedure for objective and verifiable reasons which could not have been foreseen at the time of initiating the procedure and which make it impossible for initiated procedure to be completed, or due to which CA's need for the relevant procurement ceased, for which reasons it will not be repeated during the same budget year or within the next six months.

Cited provisions permit the cancelling of procedure might occur for two groups of reasons, those which could not have been foreseen at the time of initiating the procedure and which prevent initiated procedure to be completed, and those due to which ceased CA's need for relevant public procurement, which requires the cited reasons for cancellation to be based on objective facts that affect the ability to conduct specific PP procedure, and explicitly reasoned in line with duty provided for under Article 109, Para 3 PPL.

In this case, from the established facts follows that the CA initiated this PP procedure as an open PP procedure for works — reconstruction and adaptation of the facility Stara Opština, PP No. P-6/2018, and then terminated it by having adopted decision on cancelling the procedure in the stage of expert evaluation of bids because it could not make decision on awarding contract to the selected bidder since there had not been secured funds for the subject public procurement.

Namely, as the CA has stated both in its Decision on cancelling the procedure and in its response to PoR request, on 15 May 2018 it received memo of President of TH Obrenovac notifying the CA, due to circumstances that had occurred concerning this PP, namely, that the PP procedure (completion of works in the subject PP) on the part of the CA evidently would not be finalized by August of the

current year as foreseen by the position provided in the first Amendment to the PP plan of the PE for the Construction of Obrenovac No. 685 of 28 February 2018 (Position Đ.1, serial number 24), to immediately suspend all activities related to public procurement of works No. R-6/2018 — reconstruction and adaptation of the facility Stara Opština, which was the latter's reply to the former's memo of 14 May 2018 wherein the CA's sought the latter's statement on whether the former (CA) would be having available funds before the end of 2018 budgetary year, pursuant to the consent VIII-01 No. 406-6/6 of 10 January 2018.

Given that said memo, as the CA stated in the reasoning of its Decision on cancelling the procedure and in its response to the claimant's allegations, notified it should be deemed that as of the day of the memo's receipt, the CA remained without funds because the funds initially allocated for the procurement at hand, due to inability to implement in within the planned timeline, became earmarked for the funding of another capital project — the resumption of works on swimming pools; also, given that the Assembly of TH Obrenovac was the founder of the CA whose operations were funded by special subsidy scheme granted to it by its founder, which is the only source of funding the CA's operations, given that the CA performs activities of general interests and has no options to generate own revenues, then, in the case at hand, as the CA itself stated, it could not make decision on awarding contract to the selected bidder, because there were no secured funds for implementing the subject public procurement; hence, the CA was forced to cancel the procedure pursuant to Article 109, Para 2 of the PPL.

Having in mind the explanation given by the CA, both in the challenged Decision on cancelling the procedure and in its response to PoR request, the Republic Commission notes that the CA in this case did not act contrary to Article 109, Para 2 of the PPL. Namely, in the view of the Republic Commission, the arguments presented by the CA in its Decision and additional clarification given in its response to PoR request refer to objective and verifiable reasons to the effect that the way of funding the CA's functioning — through special subsidy scheme granted to it by its founder which was the Assembly of TH Obrenovac, that the CA due to the newly developed situation had no more the funds needed for the execution of the subject public procurement.

Therefore, given that by its memo of 15 May 2018, President of TH notified the CA to suspend all activities related to the subject PP because the Town Hall was

going to redirect the funds designated to finance the PP at hand to another capital project by means of amending the Decision on budget, and given that amendment to the PP Plan deleted previous Item 1.3.19 “Reconstruction and adaptation of the facility Stara Opština” due to, as reasoned thereunder, emerging of objective circumstances — lack of funds, as the consequence of amended Programme for Business Operations and Financial Plan of 19 June 2018, it is therefore beyond any doubt that in this case the reason the CA invoked was objective and verifiable and of a direct effect on ability to realize given PP in that the lack of funds prevented the CA from implementing the subject PP, according to which the CA cancelled the subject PP procedure pursuant to Article 109, Para 2 of the PPL.”

**Excerpt from Reasoning of the Republic Commission’s Decision
No. 4-00-1042/2017 of 04 October 2017:**

“...On 31 July 2017, the CA sent to the Republic Commission its response to PoR request and complete documentation in the subject PP procedure. In this response, the CA maintained there were no merits in claimant’s allegations that Decision on cancelling the procedure was contrary to Article 109, Para 1 of the PPL, i.e., that it was not made based on the report on expert evaluation of bids. Namely, according to the CA, after the opening of bids on 26 June 2017, the commission compiled its report on expert evaluation of bids on 28 June 2017 but, at that point, there were no reasons to initiate cancellation of the subject procedure pursuant to this report. As the CA further explained, its PP officer M.R. made an official note of a problem which had emerged on 4 July 2017 when, after a short leave, he had found on his desk a parcel sent by post express. Having analysed statements given by its employees, the CA concluded that the bid of bidder “AMS Osiguranje” had been delivered by post express to the CA’s registry office at 19:10 hours, as recorded in the duty book by the on-duty gatekeeper. Given that the next day was a non-working day (Saturday), the parcel was delivered to the on-duty technical office, which had kept it in the Technical Sector (with all its employees absent on annual leave) for as late as 4 July 2017. The CA added that, pursuant to the Regulation on job classifications and to respective labour contracts, the receiving of mail was beyond those employees’ job description, and that the persons in charge

of mail reception were business secretary and courier/archivist. Accordingly, the CA confirmed the claimant's assertion that the receiving of the offer of "AMS Osiguranje" was registered on the envelope as of 4 July 2017, that is, in compliance with the PPL, after having been found on a PP officer's desk, but it had been indubitably delivered to the CA on 23 June 2017. Lastly, the CA made a point it had undertaken its best in an effort to solve the unforeseen problem. It had even notified all bidders participating in the subject PP procedure of this problem, with a situation-appropriate proposal to open the bid of "AMS Osiguranje", which the claimant refused asserting that would be unlawful, i.e., in contravention of the provisions of the PPL.

After having examined the merits of PoR request and upon reviewing the submitted documentation in the subject PP procedure, the Republic Commission decided as worded in Paragraph 1 of the disposition of this Decision for the following reasons:

Insight into submitted documentation and the PP Portal established that the invitation to bid stated that deadline for the submission of bids was 26 June 2017 until 08:30 hours, and that bid opening would be held on the same day at 10:30.

Insight into Minutes on opening bids No. 4487 of 26 June 2017 established that timely bids, submitted before 08:30 on 26 June 2017, were bids of five bidders: ("Milenijum osiguranje", Belgrade, "Dunav osiguranje", a.d.o. Čačak, "Sava neživotno osiguranje", a.d.o. Čačak, "Triglav osiguranje", a.d.o. New Belgrade, affiliate Čačak, "Wiener Städtische osiguranje", a.d.o. Belgrade).

Insight into Report on expert evaluation of bids No. 911 of 28 June 2017 established that expert evaluation of submitted bids was performed and that the CA's Commission, pursuant to the stipulated criterion for contract awarding "lowest price offered", proposed to award the contract for Lots 3 and 4 to the claimant.

Insight into Decision on cancelling the procedure No. 5140 of 19 July 2017 established that the CA in its reasoning concluded the PP procedure had been cancelled in the stage after the expiry of deadline for the submission of bids and before decision on selecting most advantageous bid, and that the reason for the cancellation was occurrence of subjective and verifiable reasons which could not have been foreseen at the point of initiating the procedure and which made it impossible to finalize the initiated procedure transparently and observing the principles of equality and competitiveness. As the rea-

soning further goes, decision on awarding contract was prepared for signing on 4 July 2017. However, that same day around 13:00, a fast-mail parcel of a yet another bidder was delivered to the desk of PP officer while absent on a leave. According to the CA, even without opening the envelope with the bid marked for PPMB-U-01/2018 insurance, it was evident it was sent by bidder “AMS Osiguranje” a.d.o. Belgrade. Mentioned bidder had sent its bid by express post, and it ended up being delivered to the gatekeeper’s of the CA’s technical sector at 19:10 hours on 23 June 2017. On-duty gatekeeper received the parcel, recorded it in the duty book and the next day (given that it was a non-working day) handed it over to a colleague on duty in the technical sector. In light of the above, as the CA went on explaining its reasons to make the challenged decision on cancelling the procedure, the bid of bidder “AMS Osiguranje” a.d.o. Belgrade had been timely delivered, and therefore should have been taken into consideration, since the bid opening was scheduled for 26 June 2017. The CA confirmed the error had been made on its part, because the parcel had not been handed over where it should have been, i.e., to an authorised person — technical secretary or courier. Therefore, upon having analysed the mentioned situation the CA’s commission concluded it would be most appropriate to cancel the subject procedure.

Insight into the bid of bidder “AMS Osiguranje” d.o.o. Belgrade established it had been sent via “post express” parcel RE572108907RS, and registered on the envelope by the CA under No. 4680 with 13:00 indicated as the time of receipt.

Verifying on web page of the PE PTT “Srbija”, Courier Service of the Post of Serbia, in the section ‘Tracking the status of consignment’ established that parcel RE572108907RS was delivered to the CA at 19:15 on 23 June 2017.

Article 3, Para 1, Point 31) of the PPL provides that timely bid is a bid received by CA within deadline specified in the invitation to bid.

Article 109, Para 2 of the PPL provides that CA may cancel PP procedure for objective and verifiable reasons which could not have been foreseen at the time of initiating the procedure and which make it impossible for initiated procedure to be completed, or due to which CA’s need for the relevant procurement ceased, for which reasons it will not be repeated during the same budget year or within the next six months.

Having in mind the cited statutory provisions and thoroughly established facts, in the view of the Republic Commission, the CA acted correctly by cancelling the PP procedure due to the mentioned circumstances.

Namely, pursuant to Article 109 of the PPL the CA cancelled the subject PP procedure and explained it in the Decision on cancelling the procedure, because due to a failure on the part of the CA (the bid was not timely handed over to an authorised person — technical secretary or courier to properly record it, write down on the envelope the date and time of the receipt, and deliver it to PP officer) the bid of bidder “AMS Osiguranje” a.d.o. Belgrade, even though timely submitted, was not taken into consideration, i.e., was not opened with the other bids.

In that respect, the Republic Commission notes that “AMS Osiguranje” a.d.o. Belgrade sent the bid in the subject PP procedure via “post express” as parcel RE572108907RS, received by the CA at 19:10 on 23 June 2017, as definitely established upon insight into electronic display of said parcel. Further, the fact that the parcel was received by the CA at the gatekeeper’s on said date, i.e., 23 June 2017, is corroborated by the official note of employee S.N. confirming he received and signed for this express post parcel at 19:10 on 23 June 2017, and recorded the receipt in the RTO service logbook.

Hence, from the established facts it can be undisputedly determined that the bid submitted by “AMS Osiguranje” a.d.o. Belgrade for the subject PP procedure, was received by the CA on 23 June 2017, which means before the expiry of deadline set under the invitation to bid as 26 June 2017, and which also means the bid was evidently submitted timely in accordance with Article 3, Para 1, Point 31) of the PPL. Therefore, there are no grounds in the claimant’s assertion that it could not be determined with certainty when the bid of “AMS Osiguranje” a.d.o. Belgrade was actually received, and assertion that as the relevant point in time for evaluating its timeliness should be taken the date on which it was registered by PP officer (4 July 2017).

In the view of the Republic Commission, bearing in mind the CA’s arguments as well as the following: that “AMS Osiguranje” a.d.o. Belgrade did submit a timely bid to participate in subject PP procedure; that solely due to failures on the part of the CA — as chronologically detailed in the Decision on cancelling the procedure — it this bid was not recorded in the minutes and opened like other

bids on the day of bid opening; that in this way “AMS Osiguranje” a.d.o. Belgrade was prevented from participating in the subject procedure as a bidder, in spite of having timely submitted it and thereby complied with the first precondition set forth by the PPL for acquiring status of a bidder; the cited facts constitute justified and verified reasons which prevented the finalization of the initiated procedure in full compliance with the provisions of the PPL.

To be exact, from the provision of Article 109, Para 2 of the PPL follows that the reason which leads to the cancelling of PP procedure has to be objective, verifiable, one that could not have been foreseen at the point of initiating the procedure, and which make it impossible for initiated procedure to be completed. In that respect, the Republic Commission notes that the CA uses erroneous wording for reasons which made it necessary to cancel the subject PP procedure, naming them as subjective. Namely, both in its Decision on cancelling the procedure and in its response to PoR request, the CA gave pertinent explanation in detailed and elaborated fashion, of reasons which as such could not have been foreseen at the initiating of the procedure, and which under existing circumstances make it impossible to finalize the initiated procedure in observance of the principle of equality of bidders, and which undoubtedly constitute reasons of an objective nature against the ability to finalize the subject PP in compliance with the PPL, regardless of being caused from the conduct of natural persons who were involved in a series of actions the CA has described.

Therefore, in the view of the Republic Commission, given that “AMS Osiguranje” a.d.o. Belgrade has timely filed submitted its bid to participate in subject procedure, given that it cannot suffer adverse consequences due to actions of the CA's employees thus preventing “AMS Osiguranje” a.d.o. Belgrade to participate in subject PP procedure on an equal footing with other bidders, the CA could not finalize the initiated procedure properly and in full compliance with the PPL due to the cited circumstances; hence, the Commission finds there are no merits in the claimant's assertion challenging the regularity of the adoption of Decision on cancelling a PP procedure.”

**Excerpt from Reasoning of the Republic Commission's Decision
No. 4-00-1074/201 of 05 October 2017:**

“...While considering the allegations in given PoR request, the Republic Commission began with insight into Decision on cancelling the procedure No. 404-495/III-01-2017 of 19 July 2017. It established the subject PP procedure had been cancelled in the stage before the expiry of deadline for the submission of bids, pursuant to Article 109, Para 2 of the PPL. The reason was that the subject PP required the securing of a large amount of funds in the CA's budget over the course of 10 years whereas the financial inflow into this budget turned to be lower than planned, whereby the subject PP posed a great threat/risk regarding the solvency of CA's budget. Further, subsequent market research revealed that the service of replacing bulbs with LED lighting could be procured much sooner and for a much smaller amount, thus prompting conclusion there was no need to go on with the subject PP in the current year.

In addition, the Republic Commission established that the subject PP, as an open PP procedure for services — public procurement for awarding contract on public-private partnership for energy-related services applying energy saving measures using “LED” technology in the territory of the Municipality of Bor, had been initiated by the CA's Decision to initiate procedure No. 404-393/2017-III-01 of 30 May 2017, and that the CA had posted invitation to bid and respective tender documents on the PP Portal on 31 May 2017, and that thereafter, on 19 July 2017, it had made Decision on cancelling the procedure No. 404-495/III-01-2017.

Article 109, Para 2 of the PPL provides that CA may cancel PP procedure for objective and verifiable reasons which could not have been foreseen at the time of initiating the procedure and which make it impossible for initiated procedure to be completed, or due to which CA's need for the relevant procurement ceased, for which reasons it will not be repeated during the same budget year or within the next six months, whereas Para 3 of the same Article provides that CA is obliged to explain in writing its decision to cancel PP procedure, particularly stating the reasons for cancelling the procedure and advice on legal remedy, and to post it on the PP Portal and on its website within three days from the day of making such decision.

Hence, according to Article 109, Para 2, of the PPL, CA has the option to decide on cancelling PP procedure in any stage of its conducting, provided the conditions set forth under cited Article of the PPL were met.

Thus, the statutory grounds for decision on cancelling PP procedure pursuant to Article 109, Para 2 of the PPL require existence of objective and verifiable reasons which could not have been foreseen at the time of initiating the procedure and which make it impossible for initiated procedure to be completed, or due to which CA's need for the relevant procurement ceased.

Bearing it all in mind, the Republic Commission recalls that in this case the CA withdrew from conducting the subject PP procedure in the stage before the expiry of deadline for the submission of bids, meaning in the stage in which potential bidders had not submitted their bids yet, and meaning that thereby without having suffered any adverse consequences due to the CA's decision on cancelling the procedure as the grounds for the latter's giving up on procurement of the subject services in the way foreseen at the onset of the procedure's initiation.

On that occasion, in the reasoning of its Decision on cancelling open PP procedure for awarding contract on public-private partnership for energy-related services applying energy-saving measures using "LED" technology in the territory of the Municipality of Bor, the CA stated as follows: that the subject PP required the securing of a large amount of funds in the CA's budget over the course of 10 years whereas the financial inflow into this budget turned to be lower than planned, so that the subject PP posed a great threat/risk regarding the solvency of CA's budget, and that subsequent market research revealed that the service of replacing bulbs with LED lighting could be procured much sooner and for a much smaller amount.

Namely, by cancelling subject PP procedure under the reasoning of the Decision on cancelling the procedure, the CA chose not to procure energy-related services of applying energy-saving measures using "LED" technology in the territory of the Municipality of Bor as initially planned, meaning through awarding contract on public-private partnership. Thus, the appropriateness of CA's conduct in this matter falls under the scope of competencies of other authorities as applicable in the case at hand.

On the basis of the foregoing, and having in mind: the relevant stage of the PP procedure, the way the claimant challenged the CA's actions, the reasoning of the Decision on cancelling the procedure, and the CA's arguments in its response to PoR request, the Republic Commission finds the CA did not act contrary to Article 109, Para 2 of the PPL. In this regard, the Republic Commission finds that the subject Decision on cancelling the procedure contains explanation of all reasons which had led to the cancelling of PP procedure, and which had revealed cessation of the need for this PP procedure in which PoR request had been filed, namely, that the need to conduct it as initially planned — through awarding public-private partnership contract — had ceased to exist. On the grounds of all of the above, the Republic Commission finds the PoR request to be unfounded."

**Excerpt from Reasoning of the Republic Commission's Decision
No. 4-00-1585/2017 of 14 December 2017:**

"...Article 109, Para 1 of the PPL provides that CA makes decision on cancelling PP procedure on the grounds of report on expert evaluation of bids, if the requirements were not met for awarding contract or for decision on concluding framework agreement, or if requirements were not met for making decision on recognizing qualifications.

Having in mind that Article 3, Para 1, Point 33) of the PPL defines the notion of acceptable bid so that, among other aspects, a bid is unacceptable if it exceeds the estimated PP value, and that pursuant to Article 107, Para 1 of the PPL CA is obliged to reject all unacceptable bids including those whose offered values exceed the amount of the estimated value of PP. Further, pursuant to Article 109, Para 1 of the PPL, CA adopts decision on cancelling the PP procedure if the requirements for awarding contract were not met.

As it is undoubtedly established in this case that the CA set RSD 8,631,500.00 excluding VAT as the estimated value of Lot 4, and that the value of the claimant's bid exceeded the estimated value by RSD 1,648,790.00 (the offered price was RSD 10,280,290.00 excluding VAT), the Republic Commission concludes that the CA did have the grounds to reject claimant's bid as unacceptable, in line with Article 107, Para 1 of the PPL and in conjunction with Article 3, Para 1, Point 33) of the PPL.

Since Article 109, Para 1 of the PPL provides that CA makes decision on cancelling PP procedure on the grounds of report on expert evaluation of bids if the requirements were not met for awarding contract, and since in this PP procedure both bids received by the CA were evaluated as unacceptable, the Republic Commission concludes that the CA did have legal grounds to make decision on cancelling the procedure.

The Republic Commission recalls that Article 107, Para 4 of the PPL provides for CA an option (not duty) to award the contract to bidder whose bid offers price higher than the estimated PP value, pursuant to statutory requirements, meaning if the offered price is not higher than comparable market price and if prices offered in all acceptable bids are higher than the estimated PP value. Given the non-obligatory nature of this statutory option, the Republic Commission notes that CA may apply this provision and award contract to the bidder with price higher than the estimated PP value, provided that other requirements under this Article are met. Therefore, in spite of having decided in the previous expert evaluation of bids, pursuant to Article 107, Para 4 of the PPL, to choose as most advantageous the bid of the selected bidder which offered price higher than the estimated PP value (higher by 7.47%), in the new expert evaluation of bids the CA is not obliged to reapply the same Article of the PPL so to award contract to the claimant, whose offered price was higher by 19.11% than the estimated value for Lot 4.

The underlying reasoning is supported both by non-obligatory nature of Article 107, Para 4 of the PPL granting option to, without imposing duty on, CA to select as most advantageous a bid exceeding the estimated PP value, and by fact that the price offered by the claimant exceeds the amount of the estimated value considerably more than one offered by the previously selected bidder.

As for the claimant's assertion that the CA violated Article 109, Para 4 of the PPL in that it posted notice on cancelling the procedure a day after having posted Decision on cancelling the procedure on the PP Portal, the Republic Commission finds this fact irrelevant in terms of a diverse decision of this entity, considering that neither claimant nor any other participant in the procedure suffered any adverse consequences due to such conduct of the CA, given that the claimant timely filed its PoR request, as also could have done any other bidder participant in this PP procedure."

**Excerpt from Reasoning of the Republic Commission's Decision
No. 4-00-1011/2017 of 16 March 2018:**

Article 109, Para 2 of the PPL provides that CA may cancel PP procedure for objective and verifiable reasons which could not have been foreseen at the time of initiating the procedure and which make it impossible for initiated procedure to be completed, or due to which CA's need for the relevant procurement ceased, for which reasons it will not be repeated during the same budget year or within the next six months.

Pursuant to Article 109, Para 3 of the PPL, CA is obliged to explain in writing its decision to cancel the PP procedure, particularly stating the reasons for cancelling the procedure and advice on legal decision, and to post it on the PP Portal and on its website within three days from the day of making such decision.

Republic Commission points out that statutory grounds for decision on cancelling PP procedure in terms of Article 109, Para 2 of the PPL require existence of objective and verifiable reasons which could not have been foreseen at the time of initiating the procedure and which are inherently such that make it impossible to complete the initiated procedure or due to which CA's need for the relevant procurement ceased.

Also, pursuant to Article 109, Para 3 of the PPL, CA is obliged to explain in writing its decision to cancel the PP procedure, paying particular attention to state the reasons for cancelling it.

From the established facts follows that, after having received the Republic Commission's Decision No. 4-00-388/2018 of 18 May 2017, the CA repeated expert evaluation of bids upon which it made Decision on cancelling the procedure No. 1715 of 6 July 2017.

The contents of the Decision on cancelling the procedure and reasons stated thereunder clarify that the Ministry of Labour, Employment, Veteran and Social Affairs allocated funds to the CA for fire prevention for 2017, which was the basis for initiating PP procedure No. 02-17, and that at the moment the PP procedure was initiated, the CA was not aware whether it was granted the funds for construction and craft works, which were the subject of PP No. 03-17.

The supporting reasoning is that the CA received the Amended Distribution of Funds to Social Welfare Institutions (to the Ministry's indirect beneficiaries)

pursuant to the Law on the Budgetary System of the Republic of Serbia for 2017, allocating the funds to the CA to initiate PP procedure for the execution of construction and craft works, on 27 February 2017, notably, after it has initiated PP No. 20-17. This means that on the day PP procedure No. 2-17 was initiated, the CA did not know that the Ministry would allocate to it the funds for the construction and craft works, and hence could not have foreseen either in tender documents or in template PP contract for PP procedure No. 02-17 that the delivery of fire protection equipment would be conditioned with the execution of another PP procedure.

Because the construction and craft works had to be completed, the CA explained it had initiated PP procedure No. 03-17 for the works that had to be executed in entirety before induction of the fire protection equipment supplier who was to be selected in PP procedure No. 02-17, particularly because a part of the works related to the reconstructions of electrical wiring.

Accordingly, with the established facts in mind, the Republic Commission recalls that at the point of initiation of PP No. 02-17, the CA was unaware of whether it had been granted funds for execution of the construction and craft works that were the subject of PP procedure No. 03-17, for which the given PP procedure for works was initiated in March of 2017, i.e., after the initiation of PP procedure No. 02-17.

Further to the above, and in light of connectedness and mutual conditionality of subject PP procedures, in that the installation of the new fire protection equipment — as the subject of PP procedure No. 02-17, was conditioned by prior completion of the construction and craft works (a part of which was the reconstruction of electrical wiring) — as the subject of PP procedure No. 03-17, the Republic Commission finds the CA's arguments in its Decision on awarding contract No. 1715 of 6 July 2017 is justifiable in the part stating it was not possible to conduct and finalise PP procedure No. 02-17 within the set deadlines, because it was necessary to firstly complete the construction and craft works (a part of which was the reconstruction of electrical wiring), and only thereafter to install the fire protection equipment.

In addition, the Republic Commission notes that, bearing in mind the mutual connectedness and conditionality of initiation of PP procedures 02-17 and 03-17, and the fact that the CA, in the meantime and due to withdrawal of

granted funds rescinded the contract it had concluded with the selected bidder in PP procedure 03-17, one can infer that upon rescinding of contract on construction and craft works on the adaptation of facility there ceased to exist opportunity to install fire protection equipment as the subject of PP procedure No. 02-17.

On the grounds of the foregoing, and having in mind established facts, presented evidence, and the CA's reasons and explanations in its Decision on cancelling the procedure of 6 July 2017 and in its response to PoR request, the Republic Commission finds that the CA justified its reasons to cancel this PP procedure in terms of Article 109, Para 2 of the PPL.

On the basis of the above, the Republic Commission finds that in this case the CA did not act contrary to Article 109 of the PPL, due to which it finds the reviewed request to be entirely unfounded."

**Excerpt from Reasoning of the Republic Commission's Decision
No. 4-00-603/2017 of 31 May 2017:**

"...Article 109, Para 1 of the PPL provides that CA makes decision on cancelling PP procedure on the grounds of report on expert evaluation of bids, if the requirements were not met for awarding contract or for decision on concluding framework agreement, or if requirements were not met for making decision on recognizing qualifications. Para 2 of the same Article provides that CA may cancel PP procedure for objective and verifiable reasons which could not have been foreseen at the time of initiating the procedure and which make it impossible for initiated procedure to be completed, or due to which CA's need for the relevant procurement ceased, for which reasons it will not be repeated during the same budget year or within the next six months.

Pursuant to Article 109, Para 3 of the PPL, CA is obliged to explain in writing its decision to cancel the PP procedure, particularly stating the reasons for cancelling the procedure and advice on legal decision remedy, and to post it on the PP Portal and on its website within three days from making such decision.

Republic Commission recalls that in terms of Article 109, Para 2 of the PPL, it is necessary to have objective and verifiable reasons which could not have been foreseen at the time of initiating the procedure and which make it impossible for

initiated procedure to be completed, or due to which CA's need for the relevant procurement ceased.

Also, pursuant to Article 109, Para 3 of the PPL, CA is obliged to explain in writing its decision to cancel the PP procedure, particularly stating the reasons for cancelling it.

From the established facts follows that, after receiving the Republic Commission's Decision No. 4-00-1778/2016 of 20 January 2017, the CA continued to comply with the order issued under this Decision: it addressed the claimant, group of bidders "Dimničar" a.d. Belgrade and "Ekonoenergetika" d.o.o. Belgrade requesting them to supply required evidence; then, after receiving requested evidence, on 10 February 2017 the CA sent memo to the Ministry of Labour, Employment, Veteran and Social Affairs, Sector for Labour, requesting additional clarification. The latter gave its opinion, which the CA received on 24 February 2017.

From the established facts follows that during the proceedings pursuant to PoR request in this PP procedure filed by group of bidders "Dimničar" a.d. Belgrade and "Ekonoenergetika" d.o.o. Belgrade, on 11 January 2017, in the CA-owned kindergarten facility "Kraljica Marija" in Miloša Pocerca Street in Belgrade, there occurred breakdown of the valve on the pipe leading to expansion tank located in the attic of the kindergarten, which put the lives of toddlers in that kindergarten under threat, and the Secretariat for education and child protection of Belgrade was accordingly notified thereon.

It is further established that the Secretariat for education and child protection in its memo of 18 January 2017, received by the CA on 24 February 2017, gave the permission to the CA to urgently repair the breakdown and execute works on repairing damage caused by the valve breakdown in kindergarten facility "Kraljica Marija", in order to make the facility operational in the shortest period possible. Afterwards, on 27 February 2017, the CA initiated PP procedure for the procurement of construction and craft works and HVAC installations in "Kraljica Marija" facility as permitted by the Secretariat for education and child protection.

The tentative time frame planned by this Decision for initiation and conducting of PP procedure and implementation of procurement was February 2017.

Therefore, having in mind the established facts, the Republic Commission recalls that in given PP procedure, on 11 January 2017, during the PoR procedure

conducted before the acting entity, there occurred an accident caused by pipe breakdown in a kindergarten facility owned by the CA.

Due to the above, especially aware that when the accident occurred the CA still has not received the Republic Commission's Decision No. 4-00-1778/2016 of 20 January 2017, which it subsequently received on 30 January 2017, and upon having previously obtained the approval of the relevant Secretariat for education and child protection Belgrade, on 27 February 2017 the CA was compelled to initiate PP procedure for the construction and civil works and HVAC installation in facility "Kraljica Marija" to repair the consequences caused by the accident.

On the grounds of the foregoing, and having in mind established facts and the CA's reasons and explanations in its Decision on cancelling the procedure and in its response to PoR request, the Republic Commission finds that the contents of supplied evidence one can infer beyond any doubt that objective and verifiable reasons arose, which could not have been foreseen at the time of initiating the procedure and which made it impossible for initiated procedure to be completed, by which the CA was guided, in terms of Article 109, Para 2 of the PPL, while cancelling the subject PP procedure.

In that respect, since this accident brought about unforeseen circumstances and since the CA did not have sufficient funds to execute given PP No. 5/2016 in terms of the needs planned for 2017 to be funded by appropriation 5113, the Republic Commission finds that the CA justified the reasons for cancelling this PP procedure, and in so doing did not act contrary to Article 109 of the PPL.

On the other hand, the Republic Commission recalls that given PP procedure was not cancelled because the CA's need for given PP ceased; instead, it was cancelled due to occurrence of objective and verifiable reasons (an accident in a CA-owned kindergarten), which could not have been foreseen at the time of initiating the procedure and which made it impossible for initiated procedure to be completed, as also confirmed by the CA. Moreover, the CA revealed that after the accident-related repair, there were no sufficient funds to execute the subject public procurement, adding that after the budget revision for the current budgetary year it planned to secure the funds in relevant appropriation for this PP, and initiate a new PP procedure.

The Republic Commission also notes that it may be inferred from the Decision on initiating procedure of 27 February 2017 for works on repairing the damage

that the CA conducts the procurement as a PP procedure exempt from the provisions of Article 39, Para 2 of the PPL, which is why the CA did not act contrary to the PPL; hence, the claimant's allegations are rejected as unfounded.

Pursuant to the above, the Republic Commission finds that in given situation, the CA did not act contrary to Article 109 of the PPL, due to which the reviewed request is found to be completely unfounded."



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