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| DHOMA E POSAÇME E GJYKATËS SUPREME TË KOSOVËS PËR ÇËSHTJE QË LIDHEN ME AGJENCINË KOSOVARE TË PRIVATIZIMIT | SPECIAL CHAMBER OF THE SUPREME COURT OF KOSOVO ON PRIVATIZATION AGENCY OF KOSOVO RELATED MATTERS | POSEBNA KOMORA VRHOVNOG SUDA KOSOVA ZA PITANJA KOJA SE ODNOSE NA KOSOVSKU AGENCIJU ZA PRIVATIZACIJU |
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C-I.-12-0054

██████████
 Represented by ██████████, Attorney at law,
 ██████████

Claimant

Vs.

Privatisation Agency of Kosovo, Ilir Konushevci 8, Prishtinë/Priština

Represented by attorney at law ██████████

Respondent

The First Panel of the Special Chamber of the Supreme Court of Kosovo on Kosovo Privatization Agency Related Matters composed of the Presiding Judge Alfred Graf von Keyserlingk, Judge Shkelzen Sylaj and Judge Çerim Fazliji after deliberation held on 27 March 2013, issues the following

Judgment

The Claim is rejected as ungrounded

Factual and procedural background

The Respondent is privatizing the Newco ██████████
 ██████████. After two failed tenders it published on 20 April 2012 a third international tender notice. According to the applicable Rules of Tender all interested bidders were obliged to pre-qualify before submitting their bids. Only eligible bidders were allowed to submit their bids. Article 7.2 of the Rules of Tender then prescribes:

Any potential bidder must offer to the Agency documented proof, as specified in forms attached to Annex E, to the extent that the Agency, at its discretion, shall deem acceptable, that the potential bidder satisfies the following criteria:

(a) That it or an Affiliated Company must have proven track record in development, management and operations of hotels and/or SPA Centres with a minimum annual turnover of 3 (three) million EUR for at least each of the 3 consecutive years and a minimum of 20% of total revenues should come from the SPA activities for at least 3 consecutive years,

and

(b) Key personnel: Senior Management Expert with at least 10 years of experience in management/operations of at least two similar projects (hotel/spa), and key medical expert at least 10 years of experience in rehabilitation/therapy treatments.

In case the Potential Bidder has an Affiliated Company, as defined in Article 1 of these rules of Tender, on definition of affiliated Companies, the potential Bidder must provide the Agency with a copy of a written instrument which is legally binding regulating the relation of the potential Bidder with such affiliated company, and that document must include information provided with sub/articles (a)-(d) of the definition of Affiliated Companies.

Art 1of the Rules of Tender defines:

“Affiliated Company” *is any corporation or business entity which:*

(1)(a)Bidder directly or indirectly possesses and controls or (b) is in the ownership or in Bidder’s control. For the purpose of this definition, the meaning of the word “possessed” should mean ownership of over 50% of share capital of corporation kind or ownership of over 50% of interest of that sort of entity; or

(2)Has cooperation relation with the Bidder established through a written instrument which is legally binding as (i) agreement for joint participation,(ii)joint enterprise or(iii) has a contract for managerial services. Duties of parties under this sort of written instrument must clearly be (a) related to Required activities for the business of post privatization of subsidiary(b) establish material inclusion scale for each party in accordance to industrial standard normative of Activities required for the business;(c)emphasise

issued material pledges by each party in support to Foreseen business activities of the subsidiary; and (d) emphasise engagements, liabilities and responsibilities of each party in support to above mentioned activities under (a), (b) and (c).

On 18 June 2012 the Claimant submitted to the Respondent documents for prequalification and after the Respondent by letter of 21 June 2012 (Page 49 of the court file) requested further documents, the Claimant on 26 June 2012 submitted additional information and documents for prequalification. Regarding the detailed list of all documents submitted by the Claimant reference is made to the Claim (Page 4 and 5 of the court file).

By letter of 29 June 2012 (Page 51 of the court file) the Assessment Committee for the evaluation of eligibility rejected the application of the Claimant for inclusion in the list of eligible bidders, stating

“Based on the submitted documentation’ the Committee was not able to reach a conclusion that the required criteria as stipulated in the Rules of Tender are met”

The Claimant challenged this decision and the Respondents Claim Review Committee by letter of 10 July 2012 (Page 56 and 57 of the court file) rejected the complaint, stating

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“Based on documentation submitted By ██████████ GmbH Company, the Committee was not able to reach a conclusion that the required criteria as stipulated in the Rules of Tender are met.

It was not confirmed that Affiliated Company have proven track record of development, management and operation of hotels and/or SPA Centres and that a minimum of 20% of total revenues come from SPA activities for at least 3 consecutive years.

.....

As regards the company in question the documentation confirming the legal relevance between ██████████ GmbH Company and ██████████, ██████████ and ██████████ GmbH companies have not been submitted.

.....

However according to the Rules of tender section 7.13 The Management decision can be challenged at the Special Chamber.”

On 6 November 2012 the Claimant submitted a claim to the SCSC challenging this Decision. The Claimant states that it submitted all the necessary documents required by the Rules of Tender in order to prove that it has the necessary experience and financial means. The Claimant states that this decision, which contained a legal advice that it could be appealed to the Special chamber, is ungrounded and seeks that it is declared null and void. Further, the Claimant requests that the Respondent discloses what other applicants have submitted for prequalification and, if the Respondent refuses to do so for reasons of confidentiality, that it submits such information to the court for a “in camera” inspection. The Claimant also requests that the court if he establishes that the Claimant complied with the tender, orders retendering, stating that the Claimant is prequalified. He further requests that the court orders also retendering if no bidder complied or if the Claimant has been treated unfairly. The Claimant also requests that the Respondent is ordered not to conclude the sale with the winning bidder of the last tender.

The Claimant alleges that after his exclusion from bidding only one bidder, offering a lower price remained. He argues that the Respondent tries to avoid a competitive sale.

In its defence submitted to the Special Chamber on 3 December 2012 the Respondent submits that the claim should be rejected as inadmissible or as ungrounded. The Respondent has the opinion that pursuant to Article 4.1 of the Special Chamber Law only a decision rendered by the Agency’s Board of Directors may be challenged before the Special Chamber, while in this case the challenged decision was rendered by the PAK Review Committee. Concerning the challenged selection of winning bidder, the PAK states that such claim is inadmissible because none of the 3 prequalified bidders had been selected yet. The Respondent states that the tender procedure was legal, legitimate and was carried out in full compliance with the rules of tender and the PAK Law.

The Respondent disputes the allegation that it had cancelled bids with higher bid prices and it had continued the procedure with lower bid prices. It states that the Claimant is the only disqualified bidder, while the procedure continued with other 3 bidders.

On 6 November 2012 the Claimant filed a request for a preliminary injunction prohibiting the Respondent from selling the Newco [REDACTED] until the claim is finally adjudicated. On 14 November 2012 the Specialized Panel 1 rejected the Request for Preliminary Injunction as ungrounded.

Regarding further details of the parties' submissions reference is made to the court file.

Legal Reasoning

The Claim is admissible.

As the Rules of Tender in Article 7.13 and the Respondent himself in its letter of 10 July 2012 correctly state the decision of the Claim Revue Committee disqualifying the Claimant can be appealed to the Special Chamber.

Article 4.1.1 that the Special Chamber has exclusive Jurisdiction over cases involving
“a challenge to a decision or other action of the KTA or the Agency taken pursuant to, respectively, the KTA Regulation or the Law on the Privatization Agency of Kosovo.

The panel understands this provision as a regulation on Jurisdiction, not as a regulation on what can be challenged in court.

But the right to challenge the disqualification derives from the fact, that this is not just an internal procedural step of the Respondent but a decision excluding the Claimant from further participation in the competition. It is in the apparent interest of both parties that the right of the Claimant to participate be reliably established before the winning bidder is defined. By this unnecessary efforts for the Claimant and the Respondent in the further procedure and time delay are avoided. Especially it is avoided that the final decision of the Respondent must be reversed on the ground that the Claimant has been disqualified without justification.

The Claim is not grounded.

Based on the Rules of Tender whose legality and fairness are not challenged by the Claimant the Respondent had the right to disqualify the Claimant.

1.

According to Article 7.2 a) the Claimant or

“ an Affiliated Company must have proven track record in development, management and operations of hotels and/or SPA centres with a minimum annual turnover of 3 (three)million EUR for at least each of the 3 consecutive years and a minimum of 20% of total revenues should come from the SPA activities for at least 3 consecutive years, ”

The Claimant himself had no experience in hotels and/ or SPA centres. He also does not allege that his affiliate companies [REDACTED], [REDACTED] or [REDACTED] have such experience. Insofar he only refers to [REDACTED] and [REDACTED] management.

By Exhibit 13 of the court file (Page 102 till 110) he submits in detail:

a.

[REDACTED] runs a [REDACTED] GmbH, which is an association of 10 hospitals with a turnover of 40 Million Euro. Hereby the activity of [REDACTED], consisting in Marketing and negotiating generates 30 Million Euro. The hospitals are independent and compete with each other. The association presents itself in the areas administration, marketing and Distribution in a uniform way externally and internally.

The court finds that this is not a consistent allegation of the operation of hospitals. [REDACTED] serves to these hospitals but it does not operate them. Further the Claimant does not even allege that the turnover of 40Million, respectively 30 Million refers to three consecutive years.

b.

[REDACTED] according to Exhibit 13 also has the [REDACTED] GmbH. This may give relevant experience, however Exhibit 3 does not disclose the turnover of this company. This means also this allegation is not sufficient.

Further Art.7.2a Rules of Tender request a proven track record. The submission of written information without signature is not a proof.

2.

But anyhow the contribution of [REDACTED] cannot be counted in favour of the Claimant. The relation between the Claimant and [REDACTED] as defined in the Management Service Agreement (Exhibit 12, page 98 till 101 of the court file) is insufficient.

Art. 1 of the Rules of Tender defines:

“Affiliated Company” is any corporation or business entity which:

.....

(2) Has cooperation relation with the Bidder established through a written instrument which is legally binding as (i) agreement for joint participation, (ii) joint enterprise or (iii) has a contract for managerial services. Duties of parties under this sort of written instrument must clearly be (a) related to Required activities for the business of post privatization of subsidiary (b) establish material inclusion scale for each party in accordance to industrial standard normative of Activities required for the business; (c) emphasise issued material pledges by each party in support to foreseen business activities of the subsidiary; and (d) emphasise engagements, liabilities and responsibilities of each party in support to above mentioned activities under (a), (b) and (c).

The Management Service agreement in the second sentence merely states that the claimant is interested to manage the company together with [REDACTED] team. This sentence does not create any legal obligation for [REDACTED], not even for the Claimant. Then under point 8 the agreement states that in case the Claimant will acquire Banja e Pejes [REDACTED] team will provide the full expertise and experience of its members, partners and affiliates for the management and operation of the enterprise. This sentence does not emphasise engagements, liabilities and responsibilities of each party.

Therefore the Respondent did not violate the right of the Claimant in disqualifying him from the tender and therefore the decision of 10 July 2012 cannot be declared null and void.

The Claimant also at this stage of the tender procedure has no right to request that the respondent discloses to him or to the court what other applicants have submitted for prequalification. The court must not and may not inspect this in camera. Neither does the submission of the Claimant justify the order that the Respondent abstains from selling to the winning bidder and issues a new tender. For all these requests the Claimant did not name a legal basis and there is no legal basis.

Court fees

The court does not assign costs to the Complainants as the courts presidium till now did not issue a written schedule which is approved by the Kosovo Judicial Council (Art.57 Paragraph 2 Special Chamber Law). This means that till now there is no sufficient legal base to impose costs.

Legal Remedy

An appeal may be filed against this Judgment within 21 days with the Appellate Panel of the Special Chamber. The Appeal should be served also to the other parties and to the Trial Panel by the Appellant within 21 days. The Appellant should submit to the Appellate Panel evidence that the Appeal was served to the other parties.

The foreseen time limit begins at the midnight of the same day the Appellant has been served with the written Judgment.

The Appellate Panel rejects the appeal as inadmissible if the Appellant fails to submit it within the foreseen time limit.

The Respondent may file a response to the Appellate Panel within 21 days from the date he was served with the appeal, serving the response to the Appellant and to the other parties.

The Appellant then has 21 days after being served with the response to his appeal, to submit his response to the Appellate Panel and the other party. The other party then has 21 days after being served with the response of the Appellant, to serve his rejoinder to the Appellant and the Appellate Panel.

Alfred Graf von Keyserlingk

[signed]

Presiding Judge