

CASE STUDY

ON THE CONCESSION/PUBLIC PRIVATE PARTNERSHIP
FOR PROVIDING LABORATORY SERVICES TO THE
UNIVERSITY, REGIONAL AND LOCAL HOSPITALS
PROCEDURE

THE LABORATORY PROJECT

CONCESSION/PRIVATE PUBLIC PARTNERSHIP

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INTRODUCTION

This case study focusses on a concession/PPP signed by the Ministry of Health “*On the Concession/Public Private Partnership for providing laboratory services to the University, Regional and Local Hospitals in Saranda and Lushnje*”.

This case study is prepared as part of the project activities entitled “*Improvement of the Integrity of the Public Contractors. Legislation; Practice and Role of Civic Actors*”. One component of the project is also the empowerment of investigative media and civil actors monitoring public contracting focusing on issues related to the integrity of private contractors.

The Laboratory Project dates back to October 2015 and is implemented by the Ministry of Health. The purpose of this Case Study is to verify compliance with legal procedures by the Contracting Authority in drafting the feasibility study, selecting the most cost-effective PPP project using traditional public procurement, drafting the qualification criteria, ensuring competitiveness among economic operators, and assessing the integrity of the winning economic operators in a concessionary competition.

The methodology applied in preparing this Case Study consist of thorough analysis of the following procedural elements:

- 1) Analysis of the process conducting by the Contracting Authority in relation to identifying the concessionary project, including the conduct of a feasibility study and its submission to the Contracting Authority;
- 2) Analysis of the process conducted by the Contracting Authority related to the feasibility study (the bonus allocated to the economic operator proposing the feasibility study) and the adaptation of this study to the legal provisions for it to be part of the competition;
- 3) Analysis of the decision of the Contracting Authority on the documents required for the competitive procedures, including the drafting of the terms of reference and special qualification criteria;
- 4) Analysis of the decision-making of the Contracting Authority on selecting the winner of the concessionary procedure;
- 5) Analysis of the operator/joined operators selected by the Contracting Authority as the winner of this procedure and specific aspects related to the negotiation of the concessionary agreement;
- 6) Chronology of the Steps of the Contracting Authority.

ABBREVIATIONS

Contracting Authority – CA;

Ministry of Health – MoH;

International Financial Corporation – IFC;

Feasibility Study – FS;

Standard Documents of the Competitive Procedure - SDCP;

Economic Operator - EO;

Consortium of Economic Operators – CEO;

Public Private Partnership – PPP;

Concession Award Commission - CAC;

1) IDENTIFICATION OF THE CONCESSIONARY PROJECT

In December 2015, in the context of its reform to improve the provision of health services, the Ministry of Health decided to study how to improve its laboratory services through the participation of the private sector. In this context, the MoH drafted a feasibility study regarding the project on participation of the private sector in the laboratory network in Albania. In drafting this feasibility study, the Ministry of Health contracted the International Financial Cooperation (IFC), a member of the World Bank Group (WBG) to offer advice on developing this health project through a Partner Private Partnership (PPP).

Referring to the above, and in the context of Law No. 125/2013 “*On Concessions and Public Private Partnership*”, being that the Feasibility Study was drafted by the Ministry of Health, which, in the end, recommended a Concessionary Agreement on Provision of Laboratory services/PPP, this practice constitutes **Proposal Requested by the Contracting Authority – Ministry of Health**.

2) ANALYSIS OF THE STEPS TAKEN BY THE CONTRACTING AUTHORITY RELATED TO THE FEASIBILITY STUDY

An analysis of the Feasibility Study drafted by the Contracting Authority shows that the main steps taken to draft the Feasibility Study consist of:

- a) The need for a project: Current status of laboratories of public hospitals in Albania

With the assistance of the experts selected by the International Financial Cooperation, the Contracting Authority made an evaluation of the 18 laboratories of public hospitals, using an evaluation instrument based on SafeCare standards and methodology. They also evaluated the 5 largest private laboratories.

Evaluation results

The evaluation shows large differences in results among the laboratories subject to evaluation, with areas identified for improvement based on the international quality standards. In general, the large private laboratories were found to be well equipped and with more effective personnel than the public laboratories. However, private laboratories also seemed to face problems with quality as a result off, among others, lack of structural measurements of quality and safety indicators against the approved standards.

The main findings regarding public hospitals were as follows:

1. Service management Adequate education requirements, but limited continued education for laboratory technicians, excessive staff, partially because of old laboratory equipment, and an unclear referral process;

2. Inappropriate Infrastructure and Equipment; Outdated equipment; No regular process of equipment maintenance and calibration

3. Reagentt, Chemicals and Kits Procurement of reagents: decentralized procurement and inventory shortages, appropriate storage of regents, chemicals and kits.

4. Management of samples and results A very limited range of tests is conducted in public hospitals; Poor documentations of test results: high risk of errors; No Documented Quality Management System

5. Serious threat to the overall patient care: no quality check; Internal quality check (IQC), External Quality Assurance (EQA)

6. Serious issues related to Waste Management and Health and Safety at Work; Waste Management, Production, and Separation. Storage, treatment, elimination and transport of Laboratory Waste, Management of Laboratory Waste Water; Health and safety at work

Laboratory Self-assessment

The main findings of the Private Laboratories were:

Active sector of private laboratories; General difference among providers of private laboratories services; Poor regulation; No networks of private laboratories; Rouge motivation (medical doctors working both for state and private laboratories refer their patients toward the private ones); Selective (As result of limited regulations, the provision of private laboratory services remains mostly limited to people selecting the best quality, where the government does not effectively benefit from the expertise or innovation in the private sector to create efficiency or improve access to quality); Large individual expenses (private laboratory services are not covered by the Mandatory Health Insurance); Infrastructure, equipment, and personnel; Ranking based on international quality standards; Considerable volumes of tests made in private hospitals; Packages (All the private laboratories observed offered standard laboratory packages) (see feasibility study, page 7 - MoH).

- b) Following the above-mentioned preliminary steps, the Contracting Authority with the assistance of IFC, took the following steps:
 - *Analyzed the current demand for public laboratory services; (see feasibility study, pg. 16 - MoH)*
 - *Consulted international references (top-down) (see feasibility study, pg. 19 – MoH);*
 - *Took into consideration the context of health reforms (see feasibility study, pg. 20 – MoH);*
 - *Made an estimation of the expected demand for laboratory services (see feasibility study, pg. 21 – MoH);*
- c) Later, the Contracting Authority made a description of the project, giving an overview of how public hospitals laboratories could be reorganized based on international PPP examples of public hospitals laboratories (*see feasibility study, pg. 21-24 – MoH*).

Having analyzed several models, identifying respective risks and allocating them of the parties that could best manage such risks, and having also made a technical and financial analysis of project consisting of reorganizing laboratories in the Republic of Albania, the Contracting Authority concluded that: *Based on the above, it can be said with some relative certainty that the Laboratory Project in Albania could be expected to provide value for the money spend by the Government if it is based on a PPP (see feasibility study, pg. 83 – MoH).*

The Contracting Authority noted that:

The objective of this project is to improve the public laboratory service in Albania by involving a private partner in structuring and operating a network of public laboratories, to invest in the laboratory infrastructure and information technology, establish a quality management system ,and proposing prices that are equivalent to those of our counterparts in the region.

The network of public laboratories includes one central laboratory in Tirana, six regional standard laboratories, an 11 emergence laboratories in hospitals. The final combination of the laboratories and their location shall be left up to the bidder to suggest as part of it Bid.

The model intended to be achieved is the so called one level network. Such network is expected to optimize service for the patient, increase access to first quality laboratory services, and group resources in order to reduce the investment needed to serve the population.

In practical terms, this means:

A laboratory package for emergency tests to be available in all hospitals. This includes laboratory tests to be conducted in a short time, which is why they cannot be send to the central laboratory;

A standard interim test package, including emergency tests, to be provided by the standard hospital laboratories in the main districts;

The rest, specialized and sophisticated tests as per the list of reference of laboratory tests to be conducted in one central laboratory (see feasibility tests, pg. 24 - MoH).

LIST OF HOSPITALS

(1) University Hospital “Mother Tereza”; (2) University Hospital “Shefqet Ndroqi”; (3) University Trauma Hospital; (4) University Hospital “Koço Gliozheni”; (5) University Hospital “Mbretëresha Geraldinë”; (6) Regional Hospital of Durrës; (7) Regional Hospital of Berat; (8) Regional Hospital of Fier; (9) Regional Hospital of Vlora; (10) Regional Hospital of Shkodra; (11) Regional Hospital of Elbasan; (12) Regional Hospital of Korça,

(13) Regional Hospital of Gjirokastrë; (14) Regional Hospital of Dibër; (15) Regional Hospital of Kukës; (16) Regional Hospital of Lezhë; (17) Hospital Lushnje; (18) Hospital Sarandë (see SDCP, Annex 23 - MoH).

Experts opinion on the drafting of the feasibility study:

- 1)** The main observation and concern regarding the feasibility study prepared by the Contracting Authority is: lack of comparison between the PPP model and the public procurement alternative to allow for the project to be developed applying the former, and this is in fact a legal requirement to be analyzed by the Contracting Authority. Such legal requirement is based on:
 - a) Article 19 “*Feasibility study of concessions/public private partnership*”, paragraph 3 of Law No. 125/2013 “*On Concessions and Public Private Partnerships*” provides that “*In feasibility studies, special attention shall be paid to the public interest, environmental impact and protection, sustainability, financial viability of the project, indicators of value for money, harmonization of the project with the national objectives and strategic sectorial objects, direct and indirect financial risks, and impact on both the central and local government budget, the necessary financial support, the technical and commercial viability, as well as the market interests and the capability of the project to attract interest economic operators and financial supporters*”.
 - b) Article 4 “*Feasibility study*”, paragraph 2 of the Decision of Council of Ministers no. 575, dated 10.7.2013, provides that: “*In a feasibility study, which provides detailed information in its summary report, the main characteristics of the project shall be defined, based on a technical, economic and financial analysis, analysis of the environmental and social impact, as well as on an analysis of whether the project drafted as a concession/PPP is economically more favorable compared to the alternative traditional procurement.* ”;
 - c) Further, article 8 “*Explanation of the concession/PPP decision*”, paragraphs 1 and 7, provide that: Article 8, Paragraph 1: “*If the cost effectiveness and sustainability of the project is confirmed based on the analysis undertaken in compliance with article 3 to 7, the concession/PPP commission shall proceed with explaining the decision on determining whether a concession/PPP seems to be the most appropriate model for implementing the project*”;

Article 8, paragraph 7: “*If a comparison between the public procurement approach and a concession/PPP shows that the second choice would offer the best value for money, the Contracting Authority may decide to prepare the procedures for awarding a concessionary/PPP agreement. If the comparison between the public procurement approach and the alternative concession/PPP approach shows that the second option*

would not offer the best value for money, the Contracting Authority shall reconsider implementing the project applying the public procurement approach”.

Referring to the Feasibility Study, paragraph 12.2, it is clear that the Contracting Authority, with the suggestion of the IFC Consultant, this essential legal requirement is not taken into consideration. Thus, regarding this component the Feasibility Study notes that: *“The compliance of the Project with the second definition, which should “offer net definition compared to the public procurement procedure for the same specific project”, is usually analyzed by using quantitative exercise, known as the Public Sector Comparison (PSC). The PSC compares the project costs and incomes from the same project applied in two different development scenarios: public procurement versus PPP. However, due to many problems with the PSC methodology, especially when no similar projects are implemented in the country, the use of such a qualitative approach is not recommended in the case Of Laboratory Project of Albania”.* Having listed several specific reasons, such as a) *comparison of hypothetical scenarios; b) lack of full life cycle costs, and c) the PSC is based on assumptions that cannot be proven*, the IFC consultant recommended that a qualitative approach should be taken in the initial stages of the project assessment to analyze the value for money instead of the PSC approach, especially considering that there is no comparable public activity with sufficient historical data (*see feasibility study, pg. 80 – MoH*).

Based on the above mentioned legal requirements, and referring to the fact that the Contracting Authority – Ministry of Health – did not take them into consideration and did not exhaust therefor its legal obligation to compare the PPP model with the public procurement one, which would show that the cost effectiveness of the PPP project compared to the public procurement would lead to the application of the latter, I conclude that one of the key legal requirements, which is mandatory to be analyzed by the Contracting Authority, is in this case not fulfilled.

- 2)** The feasibility study shows an unclear economic value of the project, because the Contracting Authority itself concluded in the last section of the feasibility study “Final recommendation” (*see feasibility study, pg. 86 – MoH*):

Due to the lack of reliable data, it is not possible to estimate the incomes based on the number of tests conducted. The recommended structure of incomes reflects the lack of solid information on volumes.

- minimum monthly income guaranteed,

- a monthly payment based on an invoice collecting the incomes for the tests conducted up to two monthly limits (one limit for hospitalized patients, and one limit for ambulatory services), and

- private incomes from uninsured patients and tests that are not covered by the Fund, that is individual private payments.

The financial analysis concludes that the project could be both affordable to the Public Authority, and attractive for potential private investors, according to these conditions. The actual tender results only may confirm this preliminary conclusion.

It is recommended that maximum monthly budgets are set for both the hospitalized patients and the ambulatory ones for each hospital. The correction variable will be the level of service for ambulatory patients: if the monthly budget does not cover all the demand, the ambulatory patients with nonurgent requests will be able to choose whether to pay for these services privately or postpone these services for the next month.

Experts opinion on the estimation of the project value:

Article 20 “*Estimation of the value of concessions/public private partnership*” of Law No. 125/2013 “On Concessions and Public Private Partnership”, provides that:

1. *The Contracting Authority shall calculate the estimated value of the concession/public private partnership as a total value of the scope of the the concession/public private partnership, including all the potential changes and options to the concession/public private partnership agreement, without VAT.*

2. *The estimated value of the concession shall be calculated based on the data provided by the respective feasibility study, or summarized analysis of the concession award.*

3. *The estimated value of the public private partnership shall be calculated applying the definitions of the public procurement legislation.*

Referring to the above mentioned legal framework, as well as based on the review of the feasibility study, it turns out that: the Value of the (Project) Contract in the amount of 13,005,966,000 lekë, without VAT, (thirteen billion and five million and nine hundred and sixty six thousand), which was published by the contracting authority in the contract notice, does not contain any reference to any financial analysis based on technical, quantitative, or statistical elements of the laboratory service.

Based on the above, it seems that this legal requirement was not exhausted.

- 3) Referring to the feasibility study, it results that there will be a reduction of the number of laboratory employees from 504 at the moment to 390, which means that there will be some social impact from the implementation of this project. The feasibility study does not explain in an exhaustive manner what the alternative solutions could be to reducing such social impact. Article 4 “*Feasibility study*”, paragraph 2 of the Decision of Council of Ministers No. 575, dated 10.7.2013, notes that: “*The feasibility study shall provide detailed information on its summarized report, identifying the main characteristics of the project, based on a technical, economic and financial analysis, as well as on an analysis of its environmental and social impact, analyzing also whether the project drafted as a concession/PPP is economically more favorable compared to the alternative traditional procurement*”, which means that the contracting Authority is legal obliged to analyze and present several solutions or options in order to reduce the social impact of a PPP project;

In addition, referring to the contract signed between the parties, paragraph 15 shows that the concessionary party has the right to select and recruit staff at its full discretion, while the Contracting Authority commits to offering alternative employment opportunities, or to meet the obligations provided by the Labor Code in case of cuts, if unable to offer such opportunities. Further, Annex 5 of the *Recruitment Plan* contract, the concessionary is expected to employ 380 employees out of 504 working for the moment for the laboratories in the first year of the contract.

Experts opinion on the project social impact:

Referring to the feasibility study and the contract sign between the parties, the contracting authority has failed to deliver on its commitment to reduce the social impact of this project. In implementing this project, the Contracting Authority could very well consider employing the existing staff on behalf of the concessionary for a period of 1 to 3 years, followed by drafting an alternative employment plan. A similar practice was followed by the University Hospital Mother Teresa in the case of privatization of the Food and Laundry Service in 2006-2007, where the studies conducted required as a contracting obligation the employment of the existing staff for a period of no less than 1 year, even though the contract signed at that time was 4 years.

- 4) Referring to the Feasibility Study, all the international references taken as an example include: the United Kingdom, Germany, Rumania, or India, where similar PPP projects have been chosen for one or several University hospitals, while the PPP for laboratories in Albania is about 18 laboratories of University Hospitals or regional hospitals, which represents about 75% of the entire network of Public Laboratories.

Experts opinion about international reference:

Referring to the international practices, I think that it would be mature (controlled level of risk) to implement laboratory PPP project for one or several university and regional hospitals in order to first check its performance (success or failure), so that any potential failure of the PPP would not lead to the failure of 75 % of the market of Public laboratories, which would be a health catastrophe.

3) THE DECISION OF THE CONTRACTING AUTHORITY TO DRAFT THE DOCUMENTS FOR THE COMPETITIVE PROCEDURES, INCLUDING THE DRAFTING OF TERMS OF REFERENCE AND SPECIAL QUALIFICATION CRITERIA;

Upon order no. 417, dated 2.10.2015 of the Minister of Health “*On the establishment of a concession/Public Private Partnership award commission for offering laboratory services to university, regional, and local hospitals of Saranda and Lushnje*”, the concession/PPP Commission was established, consisting of one Chairperson and 6 members.

The Commission decided that the tender Procedure to be applied would be “Open procedure above the high monetary limit” and would be published on international newspapers and on the Public Procurement Agency portal.

With the assistance of the IFC consultant, the Concession/PPP Commission also drafted the tender documents and set the qualification criteria, the methodology, and point-based ranking criteria.

The Qualification Criteria included mainly:

- 1) General Qualification Criteria, which provide general information on the competing operators or consortium of operators;
- 2) Special Qualification Criteria, which consisted mainly of:
 - a) Technical Criteria;
 - b) Financial Criteria;

Regarding the General and Special Qualification Criteria, the standard tender documents show that the Concession/PPP Commission would evaluate the participating operators/consortium by simply qualifying or disqualifying them.

The economic operators/consortium that would meet the general and special qualification criteria only would be further evaluated using an evaluation methodology as follows:

EVALUATION CRITERIA AND RANKING METHODOLOGY

1. Co-central laboratory network (hub and spoke), and Laboratory Information System and Logistics System	10 points
2. Project Implementation Plan and Reinvestment	15 points
3. Human Recourses and Training Plan	10 points
4. Layout of Objects and Equipment, maintenance approach, and replacement strategy during the contract term	10 points
5. Quality management plan and testing methodology	15 points.
	TOTAL 60

POINTS FOR THE FINANCIAL OFFER

The financial offer is evaluated by up to 40 points, where the largest discount for tests gets maximum points.

Final points. The result of the technical offer in points is added to the points for the financial offer, resulting to the total number of points, up to 100 points.

Insurance of the Bid

Upon submission of the Bid, the Bidders also submit Bid Insurance (2% of the estimated value of the Project, specified under paragraph 1.17.) in the amount of 260,119,320 ALL (two hundred and sixty million and one hundred nineteen thousand and three hundred and twenty), which can be converted into Euros, using the ALL – EUR exchange rate published by the Bank of Albania on the date the contract notice is published.

The Value of the Contract (Project) calculated based on the financial support for the contract term: 13,005,966,000 ALL (thirteen billion and five million and nine hundred and sixty-six thousand) (without VAT)

Bidder selection criteria

The winning bidder is selected among the Qualified Bidders, applying the relevant evaluation criteria and ranking methodology, as specified under Annex 11 (Evaluation criteria and Ranking Methodology).

Together with the tender documents, the participating economic operators were also provided with full technical information about the laboratories, their technical conditions, number of employees, medical equipment and their technical status, and they were also made available a list of the laboratory tests and the respective costs, which represents the package of laboratory services to be provided by the bidder.

The competition procedure was planned for 15 February 2017, but due to some modification of the documents, the offer submission deadline and the opening of the offers was postponed to 27 February, at 15:00, MD.

(see SDCP document and Contract Notice in the electronic system – Ministry of Health)

Experts opinion on the drafting of the standard tender documents:

A review of the standard tender documents shows that the Concession/PPP Commission referred to Law 125/2013 “On concessions and Public Private Partnership”, Law no. 9643 “On Public Procurement”, Decision of Council of Ministers no. 575, dated 10.07.2013 “On the Approval of the Rules for Evaluation and Award of Concessions/Public Private Partnerships” and Decision of Council of Ministers no. 914, dated 29.12.2014 “On the Approval of Public Procurement Rules” in setting the general qualification criteria, special qualification criteria, and selection criteria for the winning offer.

4) ANALYSIS OF THE DECISION-MAKING OF THE CONTRACTING AUTHORITY IN RELATION TO THE SELECTION OF THE WINNERS AND OPERATORS/CONSORTIUM FOR THE CONCESSIONARY PROCEDURE; (SUMMARY REPORT OF THE CONCESSION/PPP AWARD COMMISSION)

A review of the decision-making process of the contracting authority on selecting the winner of the concessionary procedure shows that:

On 27.02.2017, at 15.00, the offers for the “*Concession/Public Private Partnership for provision of laboratory services to university, regional, and local hospitals of Saranda and Lushnja*” were opened.

There were 9 economic operators and consortia participating in concessionary procedure, including 4 operators who did not submit any qualification documents, one economic operator, whose offer was not read, and 4 other operators, who submitted an offer and supportive documents.

Having reviewed the documents submitted by the participating economic operators and consortia, participating in this procedure, the Concession/PPP Commission decided:

Disqualify the economic operators below;

1. *American Hospital – Incomplete documentation, its offer was not read, regardless a request for interventions in the Public Procurement Agency.*
2. *Montal - No financial offer and qualification documents*
3. *Genius – Incomplete qualification documents*
4. *Fedos – No financial offer and qualification documents*
5. *Biometric Albania - No financial offer and qualification documents*
6. *Krijon Shpk. – No financial offer and qualification documents*

Qualify the consortia below:

CEO 1.Acibadem Saglik Hizmetleri ve Ticaret A.S (%51) & 2.Acibadem Labmed Saglik Hizmetleri A.S (%49); (Turkey)	CEO 1. Intermedica center Sh.p.k (%66) & 2. Bioiatriki (Biomedicine) Sh.a (%34) Greece	CEO 1. Labopharma Sh.p.k (%41.7) & 2. Exalab France (%25) & 3. AB Laboratory Solutions B.V (%33.3) Netherland
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In addition, having reviewed the technical and financial proposal of the three above mentioned consortia of economic operators, the Concession/PPP Commission decided to evaluate them as follows:

- 1) *CEO Labopharma Sh.p.k (%41.7) & Exalab France (%25) & AB Laboratory Solutions B.V (%33.3) Netherland offer: 10.7% discount 98.14 points;*
- 2) *CEO Intermedica center Sh.p.k (%66) & Bioiatriki (Biomedicine) Sh.a (%34) offer: 5.700% discount 77.02 points;*
- 3) *CEO Acibadem Saglik Hizmetleri ve Ticaret A.S (%51) & Acibadem Labmed Saglik Hizmetleri A.S (%49); offer: 4.80% discount 65.19 points.*

Referring to the decision-making of the Contracting Authority, it turns out that the IFC consultant of the Contracting Authority did not agree with its decision to qualify CEO “Labopharma Sh.p.k & Exalab & AB Laboratory Solutions B.V”, a consortium, which was qualified and evaluated with the maximum number of points by the Concession/PPP Commission.

Thus, the IFC consultant has declared the following regarding the qualification of this CEO:

1. Issues of integrity regarding ABLs company, that is a member of CEO

The IFC consultant referred to two articles on Spanish newspapers, raising doubts *about the legal representative* of the shareholder of ABLs (Orinoco mining&resources B.V and a member of its board, ITPS company), who according to the press was subject to the criminal proceedings in Spain.

The IFC consultant noted that UBO (the ultimate beneficiary owner) of ABLs was not clear. It was not clear whether this was the Albanian company Pegasus sh.p.k, regardless of the documents they had submitted.

and

2. Issues regarding control between companies Exalab and Sealab, which commit to conducting the tests, whereby, according to IFC, Sealab is not controlled by Exalab, because it does not own more than 40% of the right to vote in this company, according to Article L 233-3 of the French Commercial Code, paragraph II.

Based on the above, the IFC recommended this CEO to be disqualified for the above reasons.

The Concession/PPP Commission did not take the IFC opinion into consideration regarding the disqualification of the “Labopharma Sh.p.k & Exalab & AB Laboratory Solutions B.V”, giving the following arguments:

- a) *Regarding the first reason, the Concession/PPP Commission argued that this member of CEO has not been sentenced by any final court decision, and we may therefore not stop him from participating in public tenders, as foreseen by article 45 of the Public Procurement Law. In addition, the Commission also observes that this legal representative was replaced on 16.03.2017 according to the documents submitted by this CEO.*
- b) *Regarding the second reason, the Commission argues that: Labexa Group has Sealab as its brunch, and according to the organization regulation of Labexa Group the latter exercises effective control over Sealab, where Labexa and Exalab are at the same time cross shareholders”*

Referring to these arguments, the Concession/PPP Commission decided to qualify CEO “Labopharma Sh.p.k & Exalab & AB Laboratory Solutions B.V”, and after such evaluation, this consortium was ranked first and declared the winner of the tender.

The expert’s opinion on the decision-making of the Contracting Authority:

Generally speaking, the Concession/PPP Commission has rightfully applied the procedures foreseen by the Concession Law, Public Procurement Law, Decision of Council of Ministers 575 (concessions) and Decision of Council of Ministers 914 (Procurement) in formal legal terms until the evaluation of CEO “Labopharma Sh.p.k & Exalab & AB Laboratory Solutions B.V”. It is worth mentioning the decision of the Concession/PPP Commission not to take into consideration the IFC opinion on disqualifying CEO “Labopharma Sh.p.k & Exalab & AB Laboratory Solutions B.V”, which is very controversial because:

- a) Regarding the first reason proposed by IFC on disqualifying CEO “Labopharma Sh.p.k & Exalab & AB Laboratory Solutions B.V”, the Concession/PPP Commission referred to article 45 of the Public Procurement Law, saying that they needed to have a final court decision in order to exclude a bidder from participating in public procurement procedures. In fact, the same Commission has specified in the competition procedure documents, Annex 12, **SELF-DECELERATION FOR FOREIGN BIDDERS** that: *“Foreign bidders must declare that they are no subject to criminal investigation for fraud, corruption, falsification, or money laundering on the date they submit the Offer and during the three (3) last years before*

submitting the Offer”; Referring to this provision of the tender documents, it is clear that everyone participating in this procedure was obliged to declare whether they were subject to any of the investigations mentioned under Annex 12 on the date they submitted the offer;

- b) On the other hand, even though the Concession/PPP Commission did have indications by the IFC consultant, contracted by the contracting Authority, it did not verify these indicators as foreseen by article 53/1 of the Public Procurement law, which provides that: *“The Contracting Authority, shall, when deemed reasonable, ask the bidders to provide clarifications on their bids, to ensure as a fair review, evaluation, and comparison these bids as possible. Without prejudice for the provisions under article 32 and 33 of this law, no changes should be requested, offered or allowed in the content of the bid, including changes to prices or changes aimed at turning an invalid offer into a valid one”*.

From a legal point of view, the Concession/PPP Commission could continue with qualifying CEO “Labopharma Sh.p.k & Exalab & AB Laboratory Solutions B.V” only after having verified the indications and facts, and clarifying the situation of integrity of one member of this consortium.

- c) The Concession/PPP Commission has also clarified in its explanation for not taking into consideration the opinion of the consultant that the legal representative of the member of the consortium of “ABLS” companies was replaced on 16.03.2017 based on the documents submitted by this CEO.

In fact, this act has no effects on the decision-making of the Commission, because Annex 12 clearly specifies as a reference date the Offer submission date and a timeframe of a three (3) last years before the submissions of the Offers, so there have been legal consequences in terms of the operator’s integrity evaluation, therefore, any acts or decisions taken after the date on which the offer was submitted have no legal consequences and cannot be taken into consideration.

Referring to the above, the legal expert agrees with the IFC consultant on disqualifying the CEO “Labopharma Sh.p.k & Exalab & AB Laboratory Solutions B.V”, because one of the members of this Consortium (ABLS company) does not meet the integrity criterion.

5) CERTAIN SPECIFIC ASPECTS REGARDING NEGOTIATIONS OF THE CONCESSIONARY AGREEMENT;

A review of the procedure followed by the contracting Authority, the Ministry of Health, until the concessionary agreement was signed, shows some aspects:

- a) The timeframe of the agreement negotiations.

As it can be seen from above, we observe that the qualification of the economic operators was published on the data room of the Public Procurement Agency on 20 March 2017. The public Private Partnership contract for the provision of the health laboratory services is, on the other hand, signed on 10 April 2019. This means that it took more than two years for the parties to negotiate this agreement (*see contract no. 1924/2, dated 10.04.2019, pg. 1 – MoH*);

Experts opinion on the negotiation timeframe:

Legally speaking, there is no deadline regarding time needed for negotiating Concessions/PPP contracts with the Winner. However, in this concrete procedure, the contracting Authority has published calendar, specifying concrete stages and deadlines for each of these stages, and has specified May 2017 as the month on which the contract would be signed in its feasibility study. Being that the notification of qualification of the operators was made on 20 March 2017, the fact that the

contract negotiation period was longer than 2 years indicate that the parties have had difficulties in drafting and agreeing on the concessionary/PPP agreement.

- b) Replacement of a member of the consortium selected as the winner by the Contracting Authority:

During the negotiation of the contract, one of the members of the consortium selected as the winner by the Contracting Authority, that is “AB Laboratory Solutions B.V”, which was contested by the IFC consultant on Integrity issues, asked to leave the consortium.

This request was not approved by the Concession/PPP Award Commission (*summarized report of the the Concession/PPP Award Commission*).

Experts opinion on the replacement of the member of consortium selected as the winner.

Article 74, paragraph 5 of the Decision of the Council of Ministers no. 914, dated 29.12.2014 “On Approval of Public Procurement Rules”, as amended, provides that: “*In case of bankruptcy of the representative of the economic operators consortium or in any other circumstances, which disrupt its activity during the execution of the contract, the Contracting Authority may continue the contract with another economic operator, member of the consortium, provided that it possess the legal, economic, financial, and technical capacities to execute the contract. Otherwise, the Contracting Authority shall terminate the contract. If such circumstances occur to the other economic operator, then the obligations of the bankrupt economic operator may be taken over by its representative or by any other member of the consortium, provided that it meets the requirements*”.

Referring to this legal provision, the Contracting Authority could have allowed the departure of a member of the winning consortium if the other members of this CEO, that is “Labopharma Sh.p.k & Exalab” met the technical, economic, and legal requirements as per the needs of the Contracting Authority, in order to ensure the successful executions of the contract.

- c) Required Insurance

Referring to Annex 16 of the Contract, the parties have specified the required Insurance, including:

1. DURING THE RENEWAL PHASE
 - a. Insurance of all risks of construction (checked by the relevant official), based on the full value of the contract, including:
 - b. Optional: Loss of profit, after Insurance of all contraction risk;
2. DURING ONGOING OPERATIONS
 - a. Insurance from fire and all other risks based on cost of replacement by new assets;
 - b. Insurance of Electronic Appliances;
 - c. Insurance for Termination of Business after a & b;
 - d. Insurance of Overall Public Liability;
 - e. Insurance for Professional Compensation/Misuse of Duty to protect the Private Service Provider and its employees, if insurance at reasonable premium is possible;
3. DURING ALL THE TIME
 - a. Any insurance required by the Applicable Law.

(see contract no. 1924/2, dated 10.04.2019, Annex 16 – MoH)

Experts opinion on the require insurance:

A review of Annex 16 shows that the contracting parties did not include “Insurance for Professional Responsibility”. Insurance for Professional Responsibility is offered to cover the insured entity in cases of damages caused to the health or property of the third parties in exercising his activity. Considering the nature of this concessionary project, which involves

professional risks against third parties, such insurance should have been already provided for in the feasibility study and later in the contract.

6) CHRONOLOGY OF ACTS BY THE CONTRACTING AUTHORITY:

1) On 2 October 2015, upon order no. 417, dated 2.10.2015 of the minister of Health, the concession/PPP award Commission was established for provision of laboratory services to university, regional, and local hospitals of Saranda and Lushnja;

2) The Contracting Authority engaged the International Financial Corporation (IFC) to offer advice in developing this health project as a Public Private Partnership (PPP).

3) In December 2015, a Feasibility Study was conducted;

4) On 22 December 2016, the procedure was announced, planned to be conducted on 15 February 2017. Following some changes in the procedure documents, the opening of the bids was postponed to 27 February 2017;

5) The main terms of the Contract included:

Scope of contract: Financing, design, renewal, furnishing, reorganization and functioning of a Concession/ Public Private Partnership for offering laboratory services to university hospitals, regional hospitals, and local hospitals of Saranda and Lushnja.

Form of Contract: Public Private Partnership for public services;

Source of Financing of the Project: State budget through hospitals subject to this contract;

Contract term, 10 years, starting from the Date on which these Services are Made Operational (specified on the Concessionary Agreement);

The value of the Contract, calculated based on the financial support for all the timeframe of the contract is 13,005,966,000 ALL (thirteen billion and five million and nine hundred and sixty six thousand) (without VAT);

6) On 27 February 2017, the offers submitted by the economic Operators were opened. There were nine economic operators and consortiums participating in total;

7) On 20 March 2017, the procedure was evaluated, with six economic operators being disqualified and three CEO being qualified, and this was followed by a point-based ranking process.

8) “Labopharma Sh.p.k & Exalab & AB Laboratory Solutions B.V” Consortium was announced as the Winner;

9) On 10 April 2019, contract no. 1924/2 was signed on: “Provision of medical laboratory services” between the Contracting Authority, Ministry of Health, and the Consortium of economic operators “Labopharma Sh.p.k & Exalab & AB Laboratory Solutions B.V”;

10) On 19 June 2019, the “LABORATORY NETWORKS” SH.P.K., was created as an Entity with Special Purposes, in order to implement the Concessionary Agreement.

FINAL CONCLUSIONS

Upon review of this case study, it is found that:

- 1) The Contracting Authority – the Ministry of Health, did not meet one of the essential conditions provided by the Law and Regulations on concessions/PPPs, namely: The legal obligation of comparing the PPP Model with the Public procurement to prove the cost effectiveness of the PPP project compared to the Public procurement, which would allow for the development of this Project;
- 2) The Contracting Authority has not published any reference for the financial analysis based on technical, quantitative, or statistical elements for the laboratory services as the basis for calculating the value of the Project in the amount of 13,005,966,000 lekë, without VAT;
- 3) The Implementation of the Laboratory Project for almost the entire Territory of the Republic of Albania carries an edit risk for the Public party, because in case of failure, this could lead to collapse of the Public laboratory system, which would be a health catastrophe;
- 4) The Contracting Authority has failed to deliver on its commitment to reduce the social impact of the project.
- 5) The Winner of the Project is selected in contradiction with the legal framework on concession/PPPs, the criteria published by The Contracting Authority, and without taking into consideration the Opinion of the IFC international expert;
- 6) The contract does not provide for one of the main insurances for projects of this nature, such as “Insurance of Professional Liability”.