

Allegation of Improprieties in the Procurement and Installation of a Radar System at Pristina Airport (Case 217-04)

I. Introduction

1. When conducting investigations into alleged wrongdoings at the “Public Enterprise Airport Pristina” (PEAP) pursuant to UNMIK Executive Decision No. 2003/16, the Investigation Task Force (ITF) received an allegation of improprieties during the procurement process and installation of a new radar system at the Airport. The allegations contended that PEAP management, in particular the official of Pristina Airport, had unduly delayed the radar installation process and agreed to cover the costs for the extension of the interim solution for the radar system, thus incurring additional costs of €570,500.

II. Background Information

2. As a consequence of the implementation of Security Council Resolution No. 1244 (1999), UNMIK took over the administration of Pristina Airport. Effective 1 July 2002, the authority over civil aviation was passed from Pillar II to Pillar IV. At this point in time NATO had already advised UNMIK that by the end of July 2002, NATO would withdraw the Italian contingent that was running the Airport. As Kosovo is landlocked and transportation through Serbia is currently impeded, it was obvious from UNMIK’s point of view that the Airport had to be kept operational. It was also clear that the International Civil Aviation Organization (ICAO) would only approve operations at Pristina Airport if basic requirements of safety and control were met.
3. Therefore, at a NATO meeting in Berlin in late 2002, it was agreed that Iceland should be the lead nation for operations at PEAP. The interim period of NATO member states running Pristina Airport was fixed for 18 months until 1 April 2004. Accordingly, SRSG/UNMIK and KFOR signed an agreement covering KFOR operations at the Airport including fire brigade, security, safety and a radar system provided by the Italian Air Force (IAF).
4. In 2003 the Civil Aviation Regulatory Office (CARO) was created by UNMIK Regulation No. 2003/18 in close cooperation with the Technical Cooperation Bureau (TCB) within ICAO. CARO was tasked to cover – inter alia – specific projects where UNMIK/KTA intended to benefit from the knowledge and experience of ICAO. The radar procurement was one of these projects.
5. As NATO had agreed to run the operations at PEAP only until 1 April 2004, UNMIK CARO was compelled to look for an operational and technical replacement after 1 April

2004. One area concerned was the radar as it was foreseeable that the Italians would withdraw their personnel and equipment as of 1 April 2004. Consequently, UNMIK concluded a contract with ICAO on 4 April 2003 whereby ICAO undertook the procurement services for the purchase of surveillance radar equipment on behalf of UNMIK. ICAO was to be reimbursed with an amount equal to 4% of the contract sum.

6. As of 1 April 2004, the Airport was transferred from military to civil administration. Since CARO, the responsible body within UNMIK, was unable to monitor the air space of Kosovo in the way sovereign states monitor their air space, UNMIK and Iceland agreed that from 1 April 2004 onwards, the Icelandic Civil Aviation Administration (ICAA) would take over the functions of a sovereign state regarding Kosovo airspace and CARO would certify ICAA decisions on behalf of UNMIK. Subsequently, ICAA officials including Official 2 and Official 1 and a former official of Pillar IV, assumed advisory functions at Pristina Airport.

III. Applicable Law

PROVISIONAL CRIMINAL CODE OF KOSOVO (PCCK)

Article 233 - Irresponsible Economic Activity

- (1) A responsible person within a business organization or legal person who, by consciously violating the law or other provision relating to business activities, acts in an irresponsible way and thereby causes substantial material damage to the business organization or legal person shall be punished by a fine or by imprisonment up to three years.

Article 237 – Entering Into Harmful Contracts

- (1) A representative or an authorized person of a business organization or legal person which engages in an economic activity who enters into a contract that he or she knows to be harmful for the business organization or legal person, or enters into a contract contrary to his or her authorization and thereby causes damage to the business organization or legal person shall be punished by imprisonment of three months to three years.
- (2) When the perpetrator of the offence provided for in paragraph 1 of the present article accepts a bribe or causes damage exceeding 100,000 EUR, the perpetrator shall be punished by imprisonment of one to ten years.

UNMIK REGULATIONS

UNMIK Regulation No. 2001/27, dated 8 October 2001 – On Essential Labour Law in Kosovo – Section 11 – Termination of a Labour Contract:

- 11.3 Serious misconduct shall include the following:
- (a) unjustified refusal to perform the obligations set out in the labour contract;
 - (b) theft, destruction, damage or unauthorized use of the employer's assets;
 - (c) disclosure of business secrets;
 - (d) consumption of drugs or alcohol at work; and
 - (e) behaviour of such serious nature that it would be unreasonable to expect the employment relationship to continue.
- 11.4 Unsatisfactory performance shall include the following:
- (a) unjustified absence from work; and
 - (b) repeated mistakes not sufficient in themselves to justify a dismissal, but which given their frequency and seriousness disrupt the normal course of the employment relationship.

IV. Methodology

7. ITF Investigators collected and analyzed all relevant documents from PEAP and KTA and interviewed all relevant persons involved in the radar procurement pursuant to Executive Decision No. 2003/16.

V. Investigative Details

8. ICAO conducted a tendering exercise for the radar system on 25 June 2003 and subsequently held a technical meeting with potential bidders at Pristina Airport on 28 and 29 July 2003. Three companies submitted bids, namely Vendor 1, Vendor 2 and Vendor 3. ICAA Official 1 advised the ITF on 17 May 2005 that approximately 12 – 18 months is required to install and adjust a new radar system. As demanded by UNMIK, ICAO requested all bidders to detail the costs and availability of an interim solution until the new radar system is installed. Vendor 3 offered an interim solution for a period of 38 weeks starting with the entry into force of the contract at a price of €180,000, while Vendor 1 proposed leasing a mobile system for one (1) year at a cost of € 950.000. Vendor 2 did not provide any solution for an interim system due to a concentration on supplying and achieving operational status of the new system by 1 April 2004.
9. Consequently, Vendor 3 was awarded the contract and on 29 October 2003, ICAO on behalf of UNMIK and Vendor 3 concluded a contract stipulating an interim period of 38 weeks starting with the entry into force of the contract on 11 December 2003. Attachment II of the contract determined that Vendor 3 was to be paid €180,000 for the interim solution.

10. ITF Investigators established from paragraphs 4.1.7 and 9.1.1 of the “Contract No. 30618 for the Provision of a PSR and MSSR for UNMIK – Pristina Airport” concluded by ICAO on behalf of UNMIK and Vendor 3 that “the contractor shall guarantee full operational and technical performance of an interim radar system (at least at the same level as the one existing at Pristina Airport) during the whole implementation time of this contract so that the Pristina Airport will not suffer a lack of ATC services until the successful installation of the new radar system. In this connection, UNMIK/ICAO shall submit an application to the Italian Air Force Headquarters for an extension of the period of availability of the existing radar during the implementation time of the contract.”
11. Paragraph 9.1.1 determines that “The Contract Implementation shall not exceed thirty-eight (38) weeks from the date of coming into force of this Contract.” As the contract came into force on 11 December 2003 the interim solution was scheduled to end on 2 September 2004. Attachment II of the contract states that the cost for the contract implementation will be €180,000 or approximately € 20,000 per month.
12. ITF Investigators obtained the original technical specifications of the tender, which specified in paragraph 8.1. “the tenderer shall determine the best location for the radar and shelter within the Pristina Airport Terminal Area, in order to satisfy the technical and operational requirements requested in these specifications.”
13. All parties involved, including PEAP Official 2, ICAA official 2, ICAA Official 1, Vendor 3 Representative as well as FAX- correspondence from the Official of the Technical Co-operation Bureau, ICAO addressed to relevant UNMIK departments, dated 11 February 2004, confirmed that as early as January/February 2004, deliberations had started to relocate the radar site from the Pristina Terminal Area to the nearby Golesh Mountain, granting much wider visibility and coverage of Western Kosovo territory. ICAA Official 2 stated that the coverage of Western Kosovo was essential under safety considerations. In 1999, an UNHCR plane had crashed into the mountains surrounding Pristina as radar coverage at that time was insufficient. ICAA Official 2 stressed the need for air safety as per the ICAO requirements.
14. When asked why they had not introduced these deliberations of better safety and wider coverage at an earlier stage, the PEAP Official 2, as well as ICAA Official 1 and Official 2 stated that ICAO drew up the specifications and they were not involved in this process. ITF did not find any countervailing evidence as ICAA Official 2 became involved in the process only in January 2004 and both PEAP Official 2 and ICAA Official 1 are not radar experts. It was precisely for this reason that ICAO – the experts in the field of air safety – were contracted by UNMIK to draw up the specifications and conduct of the radar procurement.
15. When ICAO was asked by ICAA and PEAP whether it was possible to amend the specifications in light of ICAA Official 2’s recommendations, ICAO responded that it was possible. However, ICAO made it clear from the beginning and throughout the

entire installation process (Fax from 11 February 2004 to UNMIK representatives) that the relocation of the radar site would delay the installation of the radar and consequently lead to additional costs, as the interim solution would most likely have to be extended.

16. PEAP Official 2, who was responsible for the radar project on behalf of PEAP management, as well as ICAA Official 1 and Official 2, confirmed that they were aware of potential additional costs. However, ICAA Official 1 and Official 2 emphasized that for safety reasons, this was the preferable solution. Moreover, ICAA Official 2 questioned whether the interim period of 38 weeks originally negotiated by ICAO was sufficiently protecting the needs of UNMIK as, in his view, the installation of a new radar system takes from twelve to eighteen months normally.
17. As a consequence of the envisaged change of the location site, in March 2004, PEAP/ICAA mandated three companies, Vendor 3, Vendor 4 and Vendor 5, to conduct feasibility studies regarding the radar site at Golesh Mountain declared that the relocation would be possible but would cause additional costs of approx. €2.5 million. Vendor 5 and Vendor 4 listed the advantages and inconvenience of each solution - the principal advantage of the site at Golesh Mountain was the wider visibility, but the main disadvantage was the fact that this site was not easily accessible in winter and would not cover the immediate approach of airplanes to Pristina Airport below 500 feet.
18. At this point, the civil works for the radar installation at the Terminal site had come to a halt due to the uncertainty of the radar location. Vendor 3 Representative stated that correspondence had been sent from ICAO to Vendor 3 requesting Vendor 3 not to proceed with any civil works for the radar installation at Pristina Airport until further notice was received from ICAO. This information is confirmed in an e-mail from an ICAO Staff Member dated 23 March 2004 addressed to UNMIK and Airport representatives.
19. ICAA Official 1 told ITF Investigators that ICAO was exerting considerable pressure on ICAA and PEAP management to abstain from the Golesh Mountain radar site location. He/she stated that ICAO was trying to avoid conflicts with Serbia, as the Golesh location would allow scrutiny of Serbian territory. Given the political situation in Kosovo/Serbia, this would have created additional tension, which ICAO attempted to avoid.
20. On 24 June 2004, the then UNMIK Pillar IV Senior Official, sent a letter to an Official of the Technical Co-operation Bureau, ICAO, confirming that the radar should be located at the Airport site as originally suggested by the supplier Vendor 3. On 6 July 2004, PEAP Official 2 sent an e-mail on behalf of ICAA and Airport Management to ICAO, ICAA, Vendor 3, UNMIK – CARO about the final decision of the location of the new radar. Referring to the e-mail it was agreed that the radar site location should

be at the Terminal site as ICAO had requested “an approach radar” covering the immediate approach of aircraft to Pristina Airport. It was also agreed that the Airport should procure a secondary radar, with narrower coverage, and position it at Golesh Mountain. Such action addressed the ICAA’s safety concern that better coverage for the western sector of Pristina Airport was required.

21. ICAA Official 2 told ITF Investigators that this secondary radar was easily installed and that it was also able to provide the entire Airport with sufficient radar coverage for a limited interim period – thereby easing the pressure on the Airport regarding the extension of the interim solution. However, during the procurement for the secondary radar, PEAP management discovered that the three companies that submitted bids were in fact all subsidiaries of one and the same company. Therefore, this tender had to be re-issued in August 2004, thus adding to the delay of the radar solution.
22. ITF Investigators were able to establish from the parties concerned – except Vendor 3 – that a failed Factory Acceptance Test (FAT) by Vendor 3 in May 2004 added to the delay. However, according to all persons involved in this process, Vendor 3 was able to conduct a successful FAT in July 2004. The indications as to how much of the delay was attributable to Vendor 3 vary from no time at all to two months at the most. Moreover, it has to be taken into account that the delay of the FAT occurred during the exact time period when civil works for the radar at Pristina Airport had been put on hold anyway due to the uncertainty as to the radar location.
23. PEAP Steering Committee meeting minutes of 23 September 2004 and e-mail correspondence from ICAO dated 15 September 2004 show that Airport management was trying to find a solution for the delay of the installation of the radar system caused by the feasibility studies on the radar location and the failed FAT test. ICAA Official 1 and ICAA Official 2 stated that PEAP Official 2 – when launching the tender for the secondary radar – was still confident a timely solution would be found, thus avoiding an extension of the Italian KFOR radar beyond September 2004.
24. However, since the expiration date of the interim solution was fast approaching and the secondary radar was not ready due to the delayed procurement process, PEAP, ICAA and Vendor 3 agreed to extend the interim solution deadline. Vendor 3 then demanded a monthly rental fee of €101,500 instead of the original €20,000 per month. Vendor 3 provided a breakdown of its costs and referred to the fact that since 1 April 2004 – when the Italian Air Force had left Pristina Airport – Vendor 3 had to provide for personnel and maintenance of the radar.
25. ITF Investigators found that the monthly rental rate for the radar of €20,000 was an unusually reasonable rate mainly due to the fact that Vendor 3 had benefited from its links to the Italian Air Force to be able to offer a cheap interim solution in order to bolster its bid. In fact, Vendor 1, the only competitor who offered an interim solution as well, gave the price of their interim solution at €950,000 for a one-year-period. Furthermore, ITF Investigators obtained correspondence from ICAO to PEAP

management, dated 24 September 2004, stating that €95,000 was a fair market price for an interim radar.

26. PEAP management and ICAA then tried to lower the monthly rate quoting a draft memo from Representative of Vendor 5, Vendor 5, dated 15 September 2004, and referring to the lower rate of €20,000. However, Vendor 3 continued to refer to the reasons for the costs incurred since the departure of the Italian KFOR operating the radar and the unusually low price. The parties then agreed on a monthly rate of €81,500 scheduled to be paid for seven months from 15 October 2004 until 15 May 2005 for a total of €570,500. The first two weeks of October 2004 were to be provided free of charge by Vendor 3. 15 May 2005 was set as the final implementation date.
27. All parties interviewed by ITF Investigators stated that this agreement was – at least to a large extent – based on the fact that PEAP/ICAA exclusively relied on the interim radar to continue services at the Airport. PEAP Official 2 relied exclusively on the interim solution and only took measures to ensure an alternative option for the radar system in August 2004 when the interim solution was due to expire on 12 September 2004. Moreover, PEAP Official 2 – in conjunction with ICAA Official 1 and ICAA Official 2, pushed for an alternative radar location, thereby aggravating the time constraints regarding the interim solution.
28. All relevant parties interviewed by ITF Investigators stated that until February 2005 no payments were made by PEAP. PEAP Official 3 did not see any justification for the payment because, from his/her point of view: a) the extension of the rental of the interim system is considered to be an amendment to the original contract and should be signed the same way; b) the price level agreed upon for the extension of the rental is outrageous, compared to the price for the period of thirty-eight (38) weeks; c) as of 11 February 2005, she had not seen the new contract. Vendor 3 then threatened PEAP that unless payments were made, they would turn off the radar. Under pressure from Vendor 3, on 10 February 2005, an agreement was signed that stated: *“The delay is accepted due to the fact of delayed decision on Radar Site Location and severe weather conditions at Pristina Airport.”*
29. ICAA Official 1 and ICAA Official 2 stated that even though Vendor 3 might have been responsible for up to two months of the delay, ICAA, as well as PEAP, were compelled to sign this agreement. This resulted from the fact that Vendor 3 threatened to turn the radar off and would not accept any weaker wording in the agreement given the fact that no money had been transferred to Vendor 3 for the interim solution. Vendor 3 Representative told ITF Investigators that the wording “severe weather conditions” was meant to express the hardship of building the civil works for the radar at Pristina Airport in winter times rather than in spring or summer.
30. Consequently, PEAP Official 1, in his capacity as “A” signatory, authorised the payments on 11 February 2005 for the following invoices: No. 40002, period 1 October – 31 October 2004; No. 40003, period 1 November – 30 November 2004; No. 40005,

period 1 December – 31 December 2004; and No. 50002 – period 1 January – 31 January 2005 in the sum of €326.000. The remaining invoices for the months of February, March, April and May 2005 are still outstanding.

VI. Findings

31. The ITF found that the delay incurred by the search for a new radar location can be explained by safety concerns as specified by Official 1 and Official 2 of ICAA.
32. The ITF found that the price negotiated by PEAP Official 2, ICAA Official 1 and ICAA Official 2 for the extension of the interim solution was a reasonable market price – as stated by ICAO.
33. The ITF found that PEAP Official 2 did not approach Vendor 3 in a timely manner to ask for an extension of the interim solution of the radar, nor did he/she attempt to find an alternative solution for the Vendor 3 radar when he/she saw that the procurement of the secondary radar would be delayed.

VII. Conclusions

34. The ITF concludes that PEAP Official 2 did not violate any pertinent Rules or Regulations as to his/her failure to improve PEAP's negotiation position, nor does his/her failure to act amount to "irresponsible economic activity" or "entering into a harmful contract" under PCCK.
35. The ITF concludes that PEAP Official 2's failure to exhaust all possible means to find an alternative option for the interim solution of the radar constitutes a "repeated mistake" under section 11.4 of UNMIK Regulation No. 2001/27 in the context of the findings and conclusions of previous investigations conducted by the ITF, most notably in Case No. 352/04, issued to the SRSG/UNMIK on 05 January 2005.

VIII. Recommendations

36. As a result of this investigation, ITF recommends the following:

Recommendation 1:

The ITF recommends that UNMIK Pillar IV take into account the above findings and conclusions when taking appropriate action against PEAP Official 2 according to ITF report 352/04 submitted to the SRSG on 05 January 2005 and any other report submitted by the ITF (IV/04/217/01).

Recommendation 2:

The ITF recommends that UNMIK Pillar IV advise all senior POE managers that, during the establishment of the terms of contracts, the need for the inclusion of specific terms to enable contract extensions be given careful consideration, particularly in the case of interim solution contracts for equipment purchases and/or replacement (IV/04/217/02).