



Republika e Kosovës
Republika Kosova – Republic of Kosovo
ORGANI SHQYRTUES I PROKURIMIT
TELO ZA RAZMATRANJE NABAVKE
PROCUREMENT REVIEW BODY

Psh. No.964/23

The Review Panel, appointed by the President of PRB, based on Article 105, 106, and 117 of the Law on Public Procurement of the Republic of Kosova (LPP) in the composition of Isa Hasani - President, Vedat Poterqoi – member, Vjosa Gradinaj Mexhuani - member, deciding according to the complaint of EO “N.T.P "Hajdini Comerc” against the Decision on contract award or a design competition of the Central Procurement Agency in the capacity of the Contracting Authority (CA) related to the procurement activity “Supply of food items” with procurement number UA/2016-23-9179-1 -1-1, on the 15/03/2024 has issued this:

DECISION

1. Approved as grounded the complaint of EO “N.T.P "Hajdini Comerc” with no. 2023/964, against the decision of the contracting authority, related to the procurement activity entitled "Supply of food items", for lot 3 and lot 5, procurement activity: UA/2016-23-9179-1-1-1, initiated by the Contracting Authority (CA) - Central Procurement Agency.
2. Cancelled the "Notice on the Decision of the Contracting Authority", dated 16.11.2023, for contract award related to the procurement activity entitled "Supply of food items", for lot 3 and lot 5, of the procurement: UA/2016-23 -9179-1-1-1, initiated by the Contracting Authority (CA) - Central Procurement Agency and the matter is returned to Re-evaluation.
3. Since the complaint of the complaining EO is approved as grounded, the complaint's fee is returned to the amount deposited when the complaint was submitted. The complaining EO is obliged to, in accordance with Article 31 point 6 of the Rules of Procedure of the PRB, within a period of sixty (60) days, make a request for the return of the insurance of the complaint, otherwise the deposit will be confiscated, and these funds will go to the Budget of the Republic of Kosov.

REASONING

- Procedural facts and circumstances –

On the 29.08.2023 CA has published the Preliminary Notice, while on dt. 13.09.2023 published the Contract Notice, the procurement activity was divided into a total of 7 lots, and there was no restriction regarding the reward of the lots.

On the 24.10.2023, the bids were opened and the following economic operators had applied for the complaining lots; A total of 3 EOs had offered for lot 3, while 3 economic operators had offered for lot 5, the complaining EO also applied for both lots.

On the 16.11.2023 CA- Central Procurement Agency, has published the notice on the decision of the CA where for contract Lot 3 it has recommended the Group of Economic Operators Dauti Komerc SH.P.K.; Dauti Komerc AD Saraj Skopje, Gërlica, 70000, Ferizaj, Kosovo, the value of the offer is 555,205.00 € and for lot 5 in the amount of 886,902.00 €.

On the 16.11.2023, the complaining EO submits a request for access to Public documents, which it carries out in the authority on 17.11.2023, receiving the documentation according to the request by USB,

On the 21.11.2023 the complaining EO submits a Request for Reconsideration, while on the 23.11.2023 the CA issues a decision on the rejection of the request for re-examination as unfounded, justifying its decision for all the claims of the complaining EO.

On the 01.12.2023, the EO, dissatisfied with the response of the CA, submits a complaint to the Procurement Review Body (PRB).

Contracting Authority - Central Procurement Agency. during this activity, he applied the open procedure, large value, type of contract, supply, the estimated total value of the contract: 6,830,000.00 €, while the estimated value for the lots against which the complaint has been submitted, for lot 3, is 660,000.00 € and the estimated value for lot 5 is 1,050,000.00 €

-On the stage of preliminary review-

The Review Panel has concluded that the complaint contains all the elements defined through Article 111 of the LPP and as such was submitted within the legal term in accordance with Article 109 paragraph 1 of the LPP after the preliminary procedure for resolving disputes in the sense of Article 108/A of the LPP, from the economic operator who is an interested party according to article 4 paragraph 1 sub-paragraph 26 of the LPP. In this way, the Review Panel has concluded that it is competent to review this complaint according to Article 105 of the LPP and there is no procedural obstacle to proceed with reviewing the complaint in a meritorious manner.

- Administration and evaluation of evidence -

Based on the actions described above, the PRB has appointed the Review Panel and has also appointed the review expert, as provided by Article 111, paragraph 5 of the LPP, with the duty that the same in the sense of Article 113 of the cited Law, to do the initial review of the dossier and complaining claims, in relation to the procurement activity described above.

Complaining claims to the Economic Operator N.T.P "HAJDINI COMERC 2023/0964 as follows:

The Contracting Authority, CENTRAL PROCUREMENT AGENCY, did not handle the request for reconsideration in accordance with the legal requirements, because it did not handle our complaints regarding the declarations for the establishment of the group, as per article 71, paragraph 2 of the LPP, because CA did not offer a counter-argument, but in a comprehensive way it was justified by playing the role of the advocate of the company that proposed to award with the contract.

In fact, CA does not take as a basis the interpretation of the KRPP, dated 22.11.2022, question 18, regarding technical and professional capacities, where, among other things, regarding the establishment of the group in a clear and with legal support interprets similar situations: It would be considered unacceptable if the economic operator with its branches individually submit tenders in a procurement activity aimed at awarding a public contract, because such participation would harm competition, in fact would create unfair competition.

So, in the specific case, the Group of EO "Dauti Komerc" shpk with headquarters in Ferizaj and "Dauti Komerc" SH.A. based in Skopje, has not fulfilled the technical and professional capacities of article 69, paragraph 8 of the LPP, because it relies on the capacity of the company - Dairy "Abrazen" LLC, but that Dairy "Abrazen" LLC has participated in Group with "FANEXT" shpk & "ABRAZEN" LLC in the same tender, respectively in Lot 3: Supply of milk and milk products.

Evidence 1: AUV License document and other documents in the name of ABRAZEN LLC

In relation to this, if we refer to the provisions of article 71, paragraph 2 of the LPP and the interpretation of the KRPP, it is evident that for the same Lot 3, Dairy "Abrazen" LLC, is a direct participant of GOE "FANEXT" shpk & "ABRAZEN" LLC and Indirekt of GOE "Dauti Komerc" shpk with headquarters in Ferizaj and "Dauti Komerc" SH, therefore, referring to the interpretation of the KRPP, this form of participation in both direct and indirect groups are considered unacceptable because it creates unfair competition, moreover, it is a violation of the provisions of article 71 paragraph 2 of the LPP, because, if a tender is submitted by such a group, the group must, together with its tender, submit a statement signed by each of the members, confirming their participation in the group and that they do not participate in any other group participating in the same procurement procedures. All contracting authorities must include this condition in their tender dossiers. In case a member participates in several groups, each of the respective groups will be considered ineligible. In this case, the participation of the dairy company "Abrazen" LLC in both groups, either directly or indirectly, creates unfair competition and consequently, both GOEs should be eliminated because they are considered irresponsible!

However, the CA does not handle our claim raised in the request for reconsideration, in accordance with the provisions of the LPP and the interpretation of the PPRC, because the whole purpose of such an act as the request for reconsideration is intended to put the CA in a position to review their decisions, to correct them and to issue decisions based on merits and with legal support and legal interpretations, but that, in this case, the CA acted contrary to the provisions of article 87, paragraph 2, under paragraph 2.2 and 2.8 of the LPP, because it does not take as a basis the aforementioned high legal interpretation and, consequently, due to the improper treatment of our claims, it also violates the provisions of article 108/A par 8, under par 8.4, because it rejects the request without properly examining our claims, without examining the interpretation of the KRPP and without justifying them in legal terms.

The CA even exceeds its legal powers, because after the opening of the bids, at the request of the CA, it accepts a statement from "Dauti Komerc" Shpk, with which statement, the EO in question declares that, if we are declared the winner of this activity for Lot 3, we will supply products produced by the company "Abrazen" LLC. Moreover, this form of request made by the CA, after the opening of the offers, creates a dangerous precedent, because after the opening of the offers, the policies of the companies and their prices are revealed, which at this stage is unacceptable and has no right to request such documents.

Therefore, this action of the CA is in complete contradiction with the provisions of article 59, paragraph 2 and article 72, paragraph 3 of the LPP, because a document should not be accepted, the existence of which was not established before the submission of offers. Due to the fact that such declaration is dated 02.11.2023, while the opening was on 24.10.2023.

Evidence 2: Declaration for Lot 3, from Dauti Komerc shpk.

Second: The form of submission of the affidavit was not contested, but it was contested and is, because it is considered inappropriate because the affidavit contains information of erroneous or misleading content, due to the fact that each document submitted by EO or GOE, is directly related to the affidavit, and that in this particular case, the Affidavit is erroneous and misleading because it does not present a fair and true situation in relation to the provisions of Article 71, paragraph 2 and Article 26, paragraph 26.1, letter (b) of Regulation 01/2022, for the reason that for the same procurement activity, the two above mentioned groups have presented their offers directly and indirectly in connection with each other, creating unfair and unfair competition right in this procurement activity.

Third: Also GOE "Dauti Komerc" shpk with headquarters in Ferizaj and "Dauti Komerc" SH.A. based in Skopje has presented a License for cold storage, but this would only be valid in accordance with the requirements in the tender file, for products from Import presenting the external producer with ISO standards, the producer's License from the State where the Dairy operates and will to have a legal agreement between this Group and the Import Dairy. However, this cold warehouse does not meet or replace the tender requirement that requires a certified milk producer with ISO and License or Decision from AVUK. And that the CA has not been able to justify such a document with counter-arguments and evidence, except for the unreasonable justifications presented in the rejection of the request for reconsideration.

Also, the Request for Re-examination is also related to Lot 5: Supply of various food items since the partner presented in the offer "ABRAZEN" LLC also participates in the Group of the other bidder "FANEXT" shpk & "ABRAZEN" LLC which is to fulfill the condition to be eliminated in all Lots of this tender, because it has the same Title: Supply of food items and the same procurement number No: UA/2016-23-9179-1-1-1.

The legal basis is the Declaration on the Establishment of the Group, in which it is stated that we will not submit an offer in the same procurement procedure, including the partner presented in the offer "ABRAZEN" LLC. Because the declaration on the establishment of the Group is closely related to the sworn statement, because they share the same title and number of the tender, and that, in this case, this statement does not represent a fair and true situation, because we are referring to the statement for the establishment of the group, letter (b) we quote: a statement signed by each member, confirming their participation in the group and that they are not participating individually and/or in any other group participating in the procedure the same procurement;

Therefore, in relation to this, the declaration under oath is the most crucial document with which EOs swear that they are suitable in accordance with Article 65 of the LPP, because they voluntarily accept the possibility of criminal and civil sanctions, fines and penalties, whether due to carelessness they submit any document or statement that contains erroneous or misleading content information, because each document submitted by EO or GOE is directly related to the affidavit, and that in this particular case the Affidavit is erroneous and fraudulent, then, based on this fact, we claim that the partner presented in the offer GOE "Dauti Komerc" shpk with headquarters in Ferizaj and "Dauti Komerc" SH.A and GOE "FANEXT" shpk & "ABRAZEN" LLC, should be eliminated in all Lots.

In fact, the reasoning of the CA, that it refers to examples, is extremely unacceptable and unreasonable, because the decision of the CA should not be based on examples, but should be based on legal provisions, in cases of decisions of competent institutions such as The PRB, in legal interpretations such as the Public Procurement Regulatory Commission, or in facts and evidence, and not in such examples, because this shows lack of professionalism, lack of increased care, lack of proper vigilance for reviewing the requests presented from Economic Operators.

Moreover, if we refer to the examples taken by the CA, they are very unreasonable and have no connection with the concrete case, especially the second example where the CA took the DELL Company as an example, by the way, the CA is justified in having according to our claims, if two companies offer products of the DELL company, they should both be eliminated, but the truth is different, because according to the concrete example, the DELL company is not itself a participant in the procurement activity, so we are dealing with a case completely different, because in this case GOE "Dauti Komerc" shpk with headquarters in Ferizaj and "Dauti Komerc" SH.A and GOE "FANEXT" shpk & "ABRAZEN" LLC, both groups are participants in this title of the procurement activity and that has the same procurement number.

Therefore, we rightfully oppose the decision of the CA to reject the request for reconsideration, because it was issued in violation of the Law, in violation of the interpretations of the KRPP, because it does not administer the evidence and, therefore, in its entirety, the Decision is unfair, tendentious and discriminatory towards our consortium.

However, as regards the Notice of the Decision of the CA on the result of the tender dated 16.11.2023, we firmly stand behind the request for reconsideration, due to the fact that the CA has not properly administered our claims regarding the evidence and facts that have been presented in request for reconsideration and, therefore, did not do equal treatment, but it is completely discriminatory towards our consortium in this procurement activity. Because, referring to Article 7, paragraphs 1, 2 and 4 of the LPP, among other things, guarantee equal and non-discriminatory treatment of economic operators in public procurement procedures, because the whole purpose of the above norm is to ensure equality in treatment of economic operators in a barbaric and non-discriminatory way, because CA applies double standards in this case.

We would like to point out that equality before the law is one of the fundamental rights guaranteed by Articles 3 and 24 of the Constitution. Furthermore, based on Article 21, paragraph 4 of the Constitution, this constitutional right is also enjoyed by legal entities, including companies.

Equality before the law, according to judicial interpretations, requires that persons (natural and legal) have the same treatment, when they are in the same circumstances - such as the economic operators in the present case.

However, at none of these moments was it acted in accordance with the legislation in force and, thus, the Economic Operator GOE "Dauti Komerc" shpk with headquarters in Ferizaj and "Dauti Komerc" SH.A, remained in the competition, in addition to being the most favored. And, consequently, the CA's decision to award the contract for Lot 3 and Lot 5, GOE "Dauti Komerc" shpk with headquarters in Ferizaj, is unacceptable and unstable, in violation of the law, in violation of the interpretations of the KRPP and "Dauti Komerc" JSC.

And as a conclusion, considering that we are a party with a material legal interest according to Article 4.1.26 of the LPP, because we are responsible according to the selection criteria and we have offered the lowest price, according to the evaluation criteria, then, based on the facts, arguments, justifications, material evidence, we ask the Procurement Review Body to issue after handling our complaint; meritorious decision to approve the well-founded COMPLAINT presented by GOE "HAJDINI COMERC" & "DRENA" SHPK.

- Administration and evaluation of evidence –

Relying on article 111 paragraph 5 related to articles 113 and 114 of the LPP, the Review Panel dated 13.12.2023 has authorized the review expert to conduct the initial review of the file and claims according to complaint no. 964/2023, while on 27.12.2023 the review expert's report was submitted with the following recommendations: Based on the above-mentioned facts, clarifications and other findings in this report, the review expert proposes to the review panel that the complaint of the complaining EO to be approved as well-founded, to cancel the contract

award notice and recommend that the matter be re-evaluated. EO agrees with the recommendation of the expert's report, while CA does not agree, as follows:

First, regarding the first claim and the expert's findings, we quote: "... I consider that it is in violation of Article 72 paragraph 3 of the LPP, due to the fact that it was created after the opening of the offers. "The provision of missing information or the provision of information will be applied only to documents whose existence is fixed, before the deadline for the submission of tenders, and can be objectively verified". Therefore, we estimate that the claim of the party in the complaint regarding this first point is sustainable".

We believe that all parties, including PRB review experts, should take into account all articles and paragraphs of the LPP, where we quote article 72: Article 72 Documentation and additional information

1. When the information or documentation that must be submitted by the economic operators is or appears to be incomplete or wrong, or when specific documents are missing, the contracting authorities may ask the economic operators to submit, complete, clarify or complete the information or appropriate documentation within a certain time limit, provided that such requests are made in full accordance with the principles of equal treatment and transparency.
2. The contracting authority may invite economic operators to complete or clarify the certificates and documents presented in accordance with articles 65-71 of this law.
3. The provision of missing information or the provision of information will be applied only to documents whose existence is fixed, before the deadline for the submission of tenders, and can be objectively verified.

So in the offer there is documentation provided by the bidder for the products of the manufacturer Abrazen L.L.C (if the expert has also noticed them), but it was not clear to the evaluation committee the reason why the test results of the products of the aforementioned manufacturer were included in the offer , so the information was incomplete as well as the existence of documents of the results of the products of the manufacturer Abrazen L.L.C. were on offer. It is unacceptable for the CPA that the evaluation commissions are unlawfully prohibited from asking for additional clarifications in order to evaluate the accepted offers as best as possible.

We inform you once again that EO: Abrazen L.L.C was part of a group of EOs that was not recommended to be awarded a contract, while Group of Economic Operators Dauti Komerc SH.P.K.; Dauti Komerc AD Saraj Skopje, Gërllicë, 70000, Ferizaj, Kosovo, which has been recommended for the contract, has fulfilled the requirements of the tender file and contract notice with its own capacities, including the ISO standard that is in the name of Dauti Komerc AD Saraj Skopje and where dairy products are also mentioned.

CPA considers that the expertise is unfounded and unprofessional and at the same time stands behind its decision since the cheapest offer was awarded and that met all the requirements. A decision based on expertise, in addition to being illegal, would also cause damage to the state budget for over 120,000 €.

Evaluation of the review expert through report no. 2023/0964, of the complaining claims of the complaining EO, as follows;

The review expert clarifies that, based on the analysis of the facts/testimonies on the E-procurement platform and the complaint of the complaining EO, the fact that GOE Dauti Komerc" shpk with headquarters in Ferizaj and "Dauti Komerc" SHA recommended for the contract for lot 3 and lot 5 from CA, in addition to bidding as a group, the same has also attached documents such as; the business registration certificate, licenses from AUV, ISO standards, ISO 22000:2018 in the name of the business ABRAZEN" LLC and after the request for clarification they also submitted a written statement that it will be supplied only by the manufacturer ABRAZEN" LLC, and that this recently also offered as a member of the consortium GOE "FANEXT" shpk & "ABRAZEN" LLC, for the same procurement activity where GOE Dauti Komerc" shpk with headquarters in Ferizaj and "Dauti Komerc" SH.A. were recommended for the contract. This action of the group of GOE Dauti Komerc" shpk with headquarters in Ferizaj and "Dauti Komerc" SH. I consider that it is in violation of article 71 paragraph 2 of the LPP. Due to the fact that the manufacturer ABRAZEN LLC has offered one side as a member of the consortium, GOE "FANEXT" shpk & "ABRAZEN" LLC, while on the other hand, through licenses and ISO standards, it is also included in the group of EOs recommended for the contract for lot 3 and lot 5, which is Dauti Komerc" shpk with headquarters in Ferizaj and "Dauti Komerc" JSC. I quote paragraph 2 of article 71 of the LPP. "If a tender is submitted by such a group, the group must, together with its tender, submit a statement signed by each of the members, confirming their participation in the group and that they do not participate in any other group participating in the same procurement procedures. All contracting authorities must include this condition in their tender dossiers. In case a member participates in several groups, each of the respective groups will be considered ineligible.

In order to better clarify this dilemma, on 22.11.2022 the KRPP has published on its website legal interpretation no. 18 on how to act in these situations "According to article 87, paragraph 2, under paragraph 2.8 of Law No. 04/L-042 on Public Procurement, amended and supplemented by Law No. 04/L-237, Law No. 05/L-068 and Law No. 05/L-092, based on the question presented, KRPP offers the legal interpretation, as follows:

In accordance with paragraph 4 of article 59 of the LPP, an economic operator to be considered responsible by the contracting authority, must meet all the requirements set in the tender file and in the contract notice.

Paragraph 4 of Article 68 of the LPP related to the economic and financial situation, defines: "4. An economic operator can, when it is appropriate and for a special contract, rely on the capacities of other entities, regardless of the nature the legal ties it has with them. It must in this case prove to the contracting authority that it will have the necessary resources available, for example, by producing an undertaking from those entities for this purpose. Under the same conditions, a group of economic operators can rely on the capacities of participants in the group of other subjects". also,

Paragraph 8 of Article 69 of the LPP related to technical and/or professional skills, defines: "8. An economic operator can, when it is appropriate and for a special contract, rely on the capacities of other entities, without taking into account the legal nature of the ties it has with them. It must in this case prove to the contracting authority that it will have at its disposal the necessary resources for the execution of the contract, for example, by producing an enterprise from those entities in the country the resources of necessary at the disposal of the economic operator. Under the same conditions, a group of economic operators can rely on the skills of the participants in the group or on other subjects". while,

Paragraph 4 of Article 71 of the LPP regarding the Group of Economic Operators, defines: "4. If a tender is submitted by a group of economic operators, each member of the group is obliged to testify or confirm in accordance with Article 67 of this the law, that it is not exempted from participating in the procurement activity according to article 65 of this law. Any requirement imposed by a contracting authority according to articles 66.2, 68 and 69 of this law will be applied only to the group as a whole and not to the members individual of the group".

In accordance with the aforementioned provisions, in the event that an economic operator which operates with its branches in several other countries (states), can rely on the capacities of its branches to fulfill the requirements related to the economic and financial situation or related to technical and/or professional skills by tendering the relevant evidence and for this purpose the same cannot be disqualified because he did not participate as a group of economic operators.

It would be considered unacceptable if the economic operator with its branches individually submit tenders in a procurement activity aimed at awarding a public contract, because such participation would harm competition, in fact it would create unfair competition.

Always in accordance with the provisions cited above, it is the right of any Economic Operator who cannot fulfill alone the requirements set forth in the Tender File and in the Contract Notice regarding the economic and financial situation or regarding the technical skills and/or or professional, rely on the capacities of another entity (s), or participate in a group of economic operators (consortium). The difference lies only in the responsibility. In the case of support, the economic operator who relies on the capacities of other entities is responsible for the execution of the contract, while in the case of the Group of Economic Operators, the group is individually and jointly responsible for the execution of the contract.

CA in the tender dossier, the second requirement of professional suitability had requested: Requirement 2: The economic operator must be accredited by an independent institution according to ISO standards, ISO 22000:2018 - Food safety management systems, or equivalent or more advanced . For Lot 1 and 2 - for meat; for Lot 3 - for milk; for Lot 4 and 5 - for food products; for Lot 6 and Lot 7 - for grain products or for the bakery industry. Evidence documents for professional suitability Evidence 2: Certificate that complies with ISO 22000:2018 standards; or equivalent or more advanced certificate.

Requirement 3 to the technical and professional capacity of the tender file is; Requirement 3: All food products of animal origin must originate from an enterprise approved (licensed) by the AUV (local products from licensed or approved slaughterhouses/dairies or approved Meat

Production Factories) (products from Import from cold storage entities and adequate approved means of transport) - REQUIRED ONLY FOR Lots 1, 2 and 3. Whereas the evidence required in the tender file is; Evidence documents for technical and/or professional capabilities Evidence 3: As evidence of approval License or Decision on Approval issued by AUV for all meat/milk business enterprises, - - REQUIRED ONLY FOR Lots 1, 2 and 3. Group of Economic Operators recommended for contract for lot 3 and lot 5 "Dauti Komerc" shpk with headquarters in Ferizaj and "Dauti Komerc" JSC, in order to fulfill the requirements of the aforementioned file, he submitted the following documents with an offer; 1. Certificate of business registration of EO "ABRAZEN" LLC 2. The decision for approval by the Food and Veterinary Agency (AUV) with protocol no. 2440/1 page 2 dated 30.03.2018, this decision issued on behalf of the business "ABRAZEN" LLC; 3. The reports of testing, control and food quality, issued by the Agricultural Institute of Kosovo, and these tests were in the name of the business "ABRAZEN" LLC; 4. ISO 22000:2018 certificate on behalf of the business "ABRAZEN" LLC;

The submission of the aforementioned documents in its offer by the EO group recommended for tender for lots 3 and 5 proves the fact that the EO group in question did not meet the requirements of technical and professional capacity, but also attached the EO documents. ABRAZEN" LLC in their offer. EO "ABRAZEN" LLC; has also offered as a member of the consortium to GOE "FANEXT" shpk & "ABRAZEN" LLC for the same procurement activity lot 3 courses, the EO group recommended for the contract for lot 3 and lot 5 "Dauti Komerc" shpk with headquarters in Ferizaj and "Dauti Komerc" JSC has given you the above-mentioned documents. I consider that this action made the two groups of economic operators irresponsible, such as the one recommended for the contract for lot 3 and 5 "Dauti Komerc" shpk with headquarters in Ferizaj and "Dauti Komerc" SH.A. as well as the group of other operators, which includes the economic operator "ABRAZEN" LLC, because the bidding in this way made the competition unfair and contradicts article 71 paragraph 2 of the LPP and the legal interpretation given by the PPRC to question 18.

Further, the reviewing expert clarifies that CA with dt. 02.11.2023 through the E-procurement platform had sent the request for additional clarifications to the EO group recommended for the contract for lot 3 and 5 with the following text; In order to evaluate your tender properly, we ask that you provide clarification of your tender. In your offer, you have attached documentation from the manufacturer Abrazen LLC - "VITA". To clarify your offer for Lot 3 we ask you to clarify through a statement that if you are awarded the contract you will supply the products of the manufacturer Abrazen L.L.C. So offer us a statement which will be part of the contract that will oblige you to deliver only products of the manufacturer Abrazen L.L.C. during the duration of this contract. Or if the attachment of the documents of the manufacturer Abrazen LLC had a different purpose for you, then please let us know.

Based on the minutes of the opening of bids, the opening was made on dt. 24.10.2023 at 13:30, whereas in the offer submitted, by the EO group recommended for the contract, the statement was not part of the offer, the document or statement given by the EO group recommended for the contract was uploaded to the platform -procurement with the date 02.11.2023, as well as the declaration itself has the same date as the one uploaded on the e-procurement platform, i.e.

02.11.2023. From this, it can be understood that this document did not exist before the opening of bids, but was created after the request for additional clarifications. The statement given by the EO group recommended for the contract dated 02.11.2023, that if they are declared the winner for lot 3, they will only supply products produced by the company "ABRAZEN" LLC, I consider that it is in violation of article 72 paragraph 3 of the LPP, due to the fact that it was created after the opening of offers. "The provision of missing information or the provision of information will be applied only to documents whose existence is fixed, before the deadline for the submission of tenders, and can be objectively verified.

Regarding the second and third claims. The Reviewing Expert clarifies that, based on the analysis of the facts/witnesses on the E-procurement platform, the EO group recommended for the contract lot 3 and lot 5 has also submitted the decision issued by the Food and Veterinary Agency with protocol number 4826 pages. 2 dated 01.10.2012 through which the request of EO Dauti Komerc shpk for cold storage was approved. Request 3 of the tender file for technical and professional capacity was; Requirement 3: All food products of animal origin must originate from an enterprise approved (licensed) by the AUV (local products from licensed or approved slaughterhouses/dairies or approved Meat Production Factories) (products from Import from cold storage entities and approved adequate means of transport) - required only for Lot 1, 2 and 3. While the evidence required in the tender dossier is.

From the request of the tender dossier it is noted that it is requested that the EO must first be licensed and then also possess cold storage and transport vehicles. The EO group recommended on behalf of the member of the consortium Dauti Komerc shpk has attached the certificate of cold storage, ISO 22000:2018 in the name of "Dauti Komerc" SH with headquarters in Skopje, the Decision for registration issued by the Food Agency and Veterinary, on behalf of "Dauti Komerc" shpk with headquarters in Ferizaj, but not the licenses and ISO on behalf of the other member "Dauti Komerc" shpk with headquarters in Ferizaj. Licenses and ISO 22000:2018 the EO group recommended for the contract for lots 3 and 5 has presented the economic operator Abrazen LLC, which is part of the economic group for the same procurement activity lot 3. The group of economic operators, where they did part economic operator Abrazen LLC, is composed of companies; GOE "FANEXT" shpk & "ABRAZEN" LLC and the same by the evaluation committee has been assessed as unsuccessful for lot 3 Therefore, I consider that the inclusion of the economic operator "ABRAZEN" LLC, also in GOE "FANEXT" shpk & "ABRAZEN" LLC, and at the same time the submission of documents such as License and ISO 22000:2018 from the EO group recommended for the contract for lots 3 and 5 in their offer for the same procurement activity, of the business "ABRAZEN" LLC, made both groups of economic operators, including EO "ABRAZEN" LLC, unacceptable, as it creates unfair competition and it is contrary to article 71 paragraph 2 of the LPP. ISO proof submitted by the EO group recommended for the contract for lot 3 and 5 but which is in the name of the business "ABRAZEN" LLC.

In conclusion, CA - respectively ZPP in the answer given dt. 23.11.2023 where he rejected as unfounded the complaint of the complaining EO, among other things he also received some examples of if; "offer in a procurement activity two EOs, let's say with products of the manufacturer DELL, then both EOs should be eliminated since the manufacturer DELL

participates indirectly in the two offers". Also, the CA in the rationale of its decision has mentioned the fact that the group of EOs recommended for the contract for lots 3 and 5 EO "ABRAZEN" LLC is NOT a part.

The Review Expert clarifies that the rationale given by the CA is contrary to Article 25 point b, Article 25.7 of the Public Procurement Regulation No. 001/22, Selection criteria for the reason that these selection criteria are requirements that an EO must fulfill in order to be considered qualified for awarding a public contract. It is also contrary to Article 26 point d and Articles 26.5 and 26.6 of the Public Procurement Regulation No. 001/22 because it is required that; point d of article 26 "Submits a statement signed by each of the members, confirming their participation in the group and that they are not participating individually and/or in other groups in the same procurement procedure, article 26.5 "Each member of the group individually I have to submit the Business Registration Certificate. Any requirement imposed by a contracting authority under article 66.2 (Authorization/License), article 68 of the LPP, economic and financial condition and article 69 of the LPP, technical and/or professional ability, will be applied only to the group as a whole and not to individual members of the group. While article 26.6 "Certificates for quality assurance, are mentioned in article 70 of the LPP and are intended to certify the compliance of the economic operator with a certain number of standards for quality assurance. If the Contracting Authority requires certificates drawn up by independent bodies that carry out certification activities to prove that the economic operator fulfills certain standards for quality assurance that are based on Kosovar, European or international standards, each member of the group will testify that they meet them relevant standards".

This is due to the fact that in this particular case, we are not dealing with the fact that two EOs have offered the same products, as described by the CA in the reasonableness of its decision to reject the request for re-examination as unfounded. However, we are dealing with the fact that the manufacturer "ABRAZEN" LLC submitted a double offer for the same procurement activity. So EO "ABRAZEN" LLC as a producer on the one hand entered as a member of the consortium, while the group of EO recommended for the contract was included indirectly through the provision of documents such as; Certificate of business registration of EO "ABRAZEN" LLC; The decision for approval by the Food and Veterinary Agency (AUV) with no. protocol 2440/1 page 2 dated 30.03.2018, this decision issued on behalf of the business "ABRAZEN" LLC; The reports of testing, control and quality of food, issued by the Agricultural Institute of Kosovo, these tests were also in the name of the business "ABRAZEN" LLC; ISO 22000:2018 certificate on behalf of the business "ABRAZEN" LLC. These documents provided as minimum selection criteria in the tender file. Therefore, I estimate that this made the competition unfair and contradicts article 71 paragraph 2 of the LPP as well as the legal interpretation of the PPRC in question 18.

Moreover, the CA itself has requested additional clarifications, precisely for the documents submitted by EO Abrazen LLC - "VITA" from the group of EOs recommended for the contract as follows; In your offer, you have attached documentation of the manufacturer Abrazen LLC - "VITA". To clarify your offer for Lot 3, we ask you to clarify through a statement that if you are awarded a contract, you will supply the products of the manufacturer Abrazen L.L.C. So offer us

a statement which will be part of the contract that will oblige you during the duration of this contract to deliver only products of the manufacturer Abrazen L.L.C. Or if the attachment of the documents of the manufacturer Abrazen LLC had a different purpose for you then you please clarify us.

AK, dated 02.11.2023, received a response from the recommended EO group, a statement and the one after the opening of bids through which the recommended EO group promises to supply only products to EO "ABRAZEN" LLC, but had not given any clarification of what was the purpose of attaching the documents of EO "ABRAZEN" LLC to their offer as; Certificate of business registration of EO "ABRAZEN" LLC; The decision for approval by the Food and Veterinary Agency (AUV) with no. protocol 2440/1 page 2 dated 30.03.2018, this decision issued on behalf of the business "ABRAZEN" LLC; The reports of testing, control and quality of food, issued by the Agricultural Institute of Kosovo, these tests were also in the name of the business "ABRAZEN" LLC; ISO 22000:2018 certificate on behalf of the business "ABRAZEN" LLC. It should also be noted that the group of EOs recommended for the contract, in the offer submitted on 24.10.2023, in order to fulfill the second request of the tender file to the requirements of professional suitability, submitted ISO 22000:2018 on behalf of "Dauti Komerc" SH with headquarters in Skopje, and ISO 22000:2018 on behalf of " ABRAZEN" LLC. Therefore, he had not submitted ISO 22000:2018 on behalf of the other member of the Dauti Komerc" shpk with headquarters in Ferizaj, as required by Article 26.6 of the Public Procurement Regulation No. 001/22"Quality assurance certificates are mentioned in Article 70 of the LPP and are aimed at certifying the economic operator's compliance with a certain number of quality assurance standards. If the Contracting Authority requires certificates drawn up by independent bodies that carry out certification activities to prove that the economic operator fulfills certain standards for quality assurance that are based on Kosovar, European or international standards, each member of the group will testify that they meet them relevant standards".

Regardless, that CA had not received any answer as to what purpose, the documents of the manufacturer "ABRAZEN" LLC were included in the offer of the EO group recommended for the contract. Likewise, the statement given by the EO group recommended for the contract, that if they are declared the winner, they will only supply products from the manufacturer "ABRAZEN" LLC, was after the opening of the offers and in violation of paragraph 3 of article 72 of the LPP. "The provision of missing information or the provision of information will be applied only to documents whose existence is fixed, before the deadline for the submission of tenders, and can be objectively verified". Against this, CA - respectively the bid evaluation commission - ZPP, has recommended for the contract the group of EO "Dauti Komerc" shpk with headquarters in Ferizaj and "Dauti Komerc" SH, in which case I consider that they have acted in the contrary to articles; 60, and 59 paragraph 4 of the LPP,

The contracting authority will consider a tender as responsive only if the tender in question is in compliance with all the requirements set forth in the contract notice and in the tender file". Therefore, from the above findings, the claim of the party in the complaint is sustainable.

Based on the above-mentioned clarifications, the review expert proposes to the review panel that the complaint of the complaining EO be approved as grounded, the contract award notice be canceled and recommends that the matter be reassessed.

Findings of the Review Panel -

The Work Regulations of the Public Review Body, which is published on the PRB website, with Article 20, paragraph 2 of the Regulations, defines the requirements for the Contracting Authority and the Economic Operator, that all information and notifications must be submitted and communicated through the public communication platform, if this is possible.

Based on the papers of this case, the Panel considers that regarding the issue in the present case, there is no need to convene a hearing with the parties, in the sense of Article 24 paragraph 1 of the Rules of Procedure of the PRB, taking into account the fact that the claims of the parties and their submissions, evidence as well as the review expert's report provide sufficient data to decide on the merits.

The review panel assesses that the Report of the review expert, drawn up at the request of the Panel regarding the dispute in this matter of the public procurement activity, contains the essential elements of such a document as provided by the provision of article 113 related to article 114 of the LPP, according to who is required by the expert to review all procurement documentation, including all appeal claims and provide the Panel and all disputing parties with an independent and professional assessment of the procurement activity and the validity of the complaining claims.

However, it should be emphasized the legal fact that the expert's report is not binding on the Review Panel and that each such report is evaluated and/or analyzed in the general context of the case documents, asserted facts and other eventual evidence, taking into account the nature of eventual violations, the flow, nature and purpose of the procurement activity, therefore the fact that in which cases and for what, the Panel relies or not, the expert's report and/or any of the recommendations, belongs to its independent and professional judgment/ thanks, just as these responsibilities are addressed in terms of article 98, 99 related to article 105 of the Public Procurement Law.

The panel assesses that the review expert's report has dealt with the claims of the complaining Economic Operator in a professional and objective manner, the report is based entirely on the relevant documents that refer to the procurement activity. The findings in the expert's report can be confirmed through the tender file as well as the documents with which the tenderers have offered. The Review Panel regarding the claims of the complaining economic operator has given full confidence to the expert's report, according to which the complaining claims of the complaining Economic Operator have been evaluated as well-founded.

The review panel independently and objectively, conscientiously and professionally evaluated all the evidence of the case. In this way, it was found that the Contracting Authority did not act in accordance with the legal provisions for public procurement and the requirements of the tender file related to the procurement activity entitled "Supply of food items", for lot 3 and lot 5 of the

procurement activity: UA/ 2016-23-9179-1-1-1. The review panel assesses that the report of the review expert has handled in a professional and objective manner the claims of the complaining economic operator N.T.P "Hajdini Comerc" and the argumentation in the report of the expert is quite detailed, understandable and based entirely on the relevant documents that refer to the activity of procurement. The findings in the expert's report can be confirmed through the tender file as well as the documents with which the tenderers have bid. Consequently, the Review Panel regarding the claims of the complaining economic operator has given full confidence to the expert's report. In this way, it has been found that the claims of the complaining economic operator N.T.P "Hajdini Comerc" are founded.

The review panel after the administration and assessment of the evidence, the complete ascertainment of the factual situation, relying on the LPP as applicable material law, after reviewing the appeal claims, taking into account all the documents of the case and the recommendations of the review expert, has found that the complaint of the Economic Operator is approved as well-founded. Consequently, the Review Panel has decided regarding the procurement activity with the title related to the procurement activity with the title "Supply of food items", for lot 3 and lot 5 of the procurement activity: UA/2016-23-9179-1-1-1. cancel the contract award notice and return the matter to Reevaluation.

The Review Panel, taking into account the description, the aforementioned facts, the complaint of the complaining economic operator, the case documentation, after analyzing them, evaluates the operator's complaint as well-founded, recommending that the procurement activity of "Supply of food items", for lot 3 and lot 5, to be returned to the Reassessment and the contracting authority, to act to avoid all legal violations, namely the complaint claims of EO "Hajdini Comerc" assessed as grounded/sustainable according to the review expert's report, findings which are supported by the Review Panel, with the legal provisions of the LPP, the requirements of the tender dossier and contract notice.

Based on the above, the review panel considers that the CA did not act in accordance with the provisions of article 60 and 59 paragraph 4, article 71 paragraph 2 of the LPP, as well as article 25 point b, article 25.7, 26 point d and articles 26.5 and 26.6, of the Regulation on public procurement No. 001/22, and the Contracting Authority is obliged to eliminate all these found legal violations in the Revaluation process. The Review Panel considers that the actions and acts of the CA, and the evaluations of the review expert regarding the fulfillment or not of the conditions described above and the complaint statements in this case constitute a sufficient basis for the procurement activity to be re-evaluated because otherwise it will conflict with the scope of the LPP and the argumentative basis of the appeal claims, which the Panel evaluates according to its independent assessment in terms of Article 104 in relation to Article 105 of the LPP.

The return of the procurement activity based on legal contentious re-evaluation, is in harmony with Article 1, of the LPP, according to which, the purpose of this Law is, among others, citing: "To ensure the integrity and responsibility of public officials, civil servants and other persons who perform or are involved in a procurement activity, requiring that the decisions of such individuals and the legal and factual basis for such decisions, are not influenced by personal

interests, are characterized by non-discrimination and with a degree of above transparency and to be in accordance with the procedural and essential requirements of this law".

The review panel, based on the fact of the approval of the EO complaint, decided to return the complaint fee to the amount deposited by the complaining economic operator based on Article 31 par. 4 of the PRB Work Regulations.

The review panel emphasizes that in accordance with articles 1 and 6 of the LPP, that contracting authorities exercise their institutional independence in the public procurement process, but it remains within the competences and responsibilities of this body to examine complaints and legality in the procurement process according to article 24, paragraph 2 of the LPP cited "The contracting authority is responsible for ensuring that all procurement activities of such contracting authority are executed in full compliance with this law".

The Review Panel has decided in accordance with the legal powers in the sense of Article 104 paragraph 1 in relation to Article 103, Article 105 and Article 117 of the LPP for the implementation of the procurement review procedure in a fast, fair, non-discriminatory manner, in order to legal and effective resolution of the case. Therefore, the Review Panel based its findings on the relevant provisions of the LPP, which foresee and regulate such situations, which may appear during a procurement activity.

From what was said above, it was decided as in the provision of this decision.

President of the Review Panel

Mr.Isa Hasani

Legal advice:

An appeal is not allowed against this decision,
but the dissatisfied party can appeal to the Commercial Court,
within 30 days from the date of acceptance of this decision.

Decision to be submitted to:

1x1 CA – **Central Procurement Agency**;
1x1 EO – **N.T.P "HAJDINI COMERC "**;
1x1 Archive of the PRB;

1x1 For publication on the website of the PRB.