

PROCUREMENT REVIEW PANEL, appointed by the President Pursuant to the article 105 as well article 106 of the Law on Public Procurement of the Republic of Kosova no.04/L-042, amended and supplemented by Law No. 04/L-237, amended and supplemented Law no.05/L-068, amended and supplemented Law no.05/L-092, composed of: Mr. Nuhi Paçarizi – President, Mr. Blerim Dina – referent, Mr. Goran Milenković - member, deciding on the complaint lodged by the Economic operator: “Albi Company” SH.P.K.- Rahovec, against the cancellation notice of the procurement activity with title: “Construction of the War Museum- Lubeniq Village Chamber”, with procurement no: 207-18-6182-5-2-1, initiated by the Contracting authority/Ministry of Culture, on the 11.06.2020 has issued this:

DECISION

I. APPROVED, as partly grounded the complaint of the Economic operator: “Albi Company” SH.P.K - Rahovec, regarding with the procurement activity with title: “Construction of the War Museum- Lubeniq Village Chamber”, with procurement no: 207-18-6182-5-2-1, initiated by the Contracting authority/Ministry of Culture.

II. VERIFIED the cancellation notice of the procurement activity with title: “Construction of the War Museum- Lubeniq Village Chamber”, with procurement no: 207-18-6182-5-2-1, initiated by the Contracting authority/Ministry of Culture.

III. Contracting authority within 10 days must inform in written the Review panel for all actions taken regarding with this procurement activity and other parties in the procedure.

IV. Non-compliance with this decision obliges the Review Panel conform with the legal provisions of article 131 of the Law for Public Procurement of Kosova No.04 / L-042, amended and supplemented by Law No. 04/L-237, Law no.05/L-068, Law no.05/L-092, to take action against the Contracting Authority.

V. Since the complaint of the complaining economic operator “Albi Company” SH.P.K - Rahovec, is approved as partly grounded, it is returned the insurance fee of the complaint in the amount deposited when filing a complaint.

VI. Obligated complaining economic operator that conform article 31 point 6 of the Rules of Procedure of the PRB, within sixty (60) days is obliged to request to take back the funds, otherwise these funds will be confiscated and will pass to the budget of the Republic of Kosova.

REASONING

Complaining economic operator: “Albi Company” SH.P.K - Rahovec, as a dissatisfied party has filed a complaint in the PRB, on the 20.04.2020 with no. 258/20, against the notification for cancellation of the procurement activity with title: “Construction of the War Museum-Lubeniq Village Chamber” with procurement no. 207-18-6182-5-2-1, initiated by the contracting authority (CA) - “Ministry of Culture” (MCYS), claiming that:

- The contracting authority has acted in contradiction with article: 8, and 62 of the Law on Public Procurement of the Republic of Kosova, and
- Articles 8 and 44.7 of the ROGPP

Procurement Review Body confirms article 113 and 114 of the LPP on the 23.04.2020, has authorized the professional procurement expert to review the validity of all claims of the complaining party.

The professional procurement expert in the report of the 12.05.2020, regarding the complaining claim of the complaining EO explains as follows:

Answer to Claim no.1; The first claim of the complaining EO is that we as EO on the 08/04/2020 have made a request for reconsideration to the CA MCYS about the decision on the cancellation of the tender procedure which is contrary to the decision of the review panel of the PRB with no. 188/19 dated 19/06/2019. CA MCYS in contradiction with article 108 / A has not returned a response regarding this request for reviewing.

Review expert based on article 108 / A Preliminary settlement of disputes paragraph 12 where it says:

12. Objections and decisions adopted in accordance with paragraphs 8 and 10 of this Article, must be reasoned and communicated in writing, in accordance with this law, to the complainant and all interested parties, if any.

Therefore review expert based on the above mentioned explanations explains that CA in this case has acted contrary to article 108 / A of the LPP as has not returned a response to the complaining EO about the request for reviewing, and as such this complaining claim is grounded.

Answer to Claim no.2; The other claim of the complaining EO is that according to the decision of the PRB no. decision 188/19 ascertains again that decision no. 738/18 is valid since according to decision 738/18 it was found irresponsible EO NNP TONI, Malisheva.

Review expert based on the decision of the RP with no. 188/19 and dated 19/06/2019 clarifies that in this decision it is stated quote: Review panel clarifies that for the same procurement activity against the contract award notice the same EO Albi Company has lodged a complaint in the PRB on the 17/12/2018 with procurement no. 738/18, where recommended for contract was NNP TONI, Malisheva, which was in the decision with no. 738/18 and dt. 13/02/2019, EO Albi Company the complaint was approved while EO recommended for contract NNP TONI, Malisheva was declared irresponsible by the

review panel and the case was returned for re-evaluation. Therefore, based on the explanations given above, it appears that this complaining claim is grounded.

Answer to Claim no. 3; The other claim of the complaining EO is that according to the decision of the PRB no. 188/19 of the 19/06/2019 it is re-ascertained that the annulment of the tender procedure is contrary to article 62 of the LPP and 44.7, 44.8 of the ROGPP. Review expert explains that on the 19.06.2019 review panel issues decision no. 188/19 where it returns the case for re-evaluation, while CA MCYS since this date when the decision in question was issued has not taken any steps to re-evaluate this AP for a long period of time, where then on 07.04. 2020 uploads on the e-procurement platform, the Notice on the Decision of the CA. Review expert explains that CA in this case has exceeded any legal deadline for re-evaluation of this procurement activity, also with the same reason Cancels the activity in question quote: Ministry of Culture, Youth and Sports cancels the procurement activity referring to the Law of Public Procurement in Kosovo with procurement no. 04 / 1-042 On public procurement of the Republic of Kosovo, amended and supplemented by law no. 04 / 1-237, law no. 05 / 1-068 and law no. 05 / 1-092, Article 9, and the Rules of the Public Procurement Operational Guideline, Article 8 paragraph 8.7, the procurement office and the authorized commission for re-evaluation requested confirmation from the finance office the availability of funds. The finance office confirmed that the activity is not included in the 2019 Budget Law. The Commission authorized for re-evaluation in the absence of funds recommends that the Notice of Cancellation of the procurement activity dated 11.04.2019 remain in force after ascertaining the factual situation.

Further the review expert based on article 62 of the LPP clarifies that article 62 Completion of the procurement activity paragraph 2 and article paragraphs 2.1 and 2.2 of the LPP says:

2. Contracting authorities may terminate that procurement activity which will not result in the award of the contract only for one of the reasons:

- all responsive tenders contain prices that exceed the budget of the contracting authority for the procurement activity; or

2.2. prior to the opening of tenders, the cessation of the procurement activity has become necessary due to objective events that can be demonstrated and / or reasons that are beyond the control of the contracting authority and that cannot be foreseen at the time of initiating the procurement activity but this must be done at least three (3) days before the opening of tenders.

Also the following articles of ROGPP explain very clearly the reasons for the cancellation of the procurement activity.

44.7 The procurement procedure after the opening of bids must be canceled for one of the following reasons:

- (i) no tender has been submitted within the specified deadline;
- (ii) none of the received tenders is responsive;
- (iii) number of EO responsible for public framework contract with more than one EO - is less than 3;
- (iv) there are no requests to participate in restricted or competitive negotiated procedures that have been submitted within the specified time limit;
- (v) number of qualified candidates in proc. limited / competitive with negotiations is less than 3;
- (vi) there are no projects submitted within the specified deadline;
- (vii) none of the projects accepted in the design contest are eligible;

- (viii) if ordered by the Procurement Review Body;
- (ix) a breach of the law has occurred or will occur and cannot be remedied or prevented through an amendment;
- (x) if the CA during the preparation and conduct of the procedure has erroneously used the option for the respective procedure and which error with the verification of the PPRC is irreparable; or
- (xi) if a technical error has occurred on the electronic procurement platform from any unforeseen situation and out of the control of the CA and which error is irreparable according to verification and ascertainment by the PPRC.

44.8 The procurement procedure after the opening of bids may be canceled for the following reason:

- (i) all responsive tenders contain prices that exceed the budget of the CA.

Further review expert based on the decision of the review panel no. 188/19 of the 20.05.2019 clarifies that in the above mentioned decision of the review panel regarding this point it is stated quote: Review panel clarifies that article 62. of the LPP, and article 44.7 and 8 of the ROGPP for Public Procurement (ROGPP) does not provides that a procurement activity to be canceled before the contract award notice, with the reason that the CA has canceled, because this reason if it would exist would be considered before the start of the initiation of the procurement activity.

Also the review panel clarifies in the above decision mentioned that CA has previously stated that they are for the cancellation of this PA, but the PRB has not taken into account this issue, because it is the responsibility of the contracting authority to provide funds for projects which have started and of course the same projects must be completed, because they cannot bear the consequences Economic Operators for mismanagement and professional irresponsibility of responsible officials of contracting authorities.

Also in the last paragraph of the decision of the RP with no.188/19 LPP explain quote: Review panel from the above data comes to conclusion that cancellation of the procurement activity in question is done in violation with article 62 of the LPP and and article 44 of the RRUOPP, and that in the procurement activity in question CA has not respected article 10 of the LPP.

Therefore based on the above mentioned explanations the review expert concludes that CA MCYS has canceled the activity in question contrary to article 62 of the LPP, article 44.7 and 44.8 of the ROGPP also in contradiction with the decision of the review panel no. . 188/19 dated. 05/20/2019. Therefore review expert recommends CA that during the review of the Budget to take into account the provision of funds for this project and to continue with other steps in this procurement activity. Based on what was said above, it appears that this complaining claim is valid.

Answer to Claim no. 4; The other claim of the complaining EO is that according to the decision of the PRB no. 188/19 of the 19/06/2019 is ascertained based on article 9 of the LPP, clearly given explanations that at the beginning of the procurement activity in question by the responsible officials is signed the statement of needs of the availability of funds confirms article 9 of the LPP, also according to article 8 of the RRUOPP, the statement of needs and determination of the availability of funds, clarifies that CA will initiate a procurement activity only after have conducted a formal needs assessment etc.

Review expert clarifies that stands the fact that CA at the beginning of the activity in question by the responsible officials has signed the Statement of Needs and Determination of Availability of funds in accordance with article 9 of the LPP, where in this article it is stated:

9.1 Before commencing any procurement activity, the CAO of the contracting authority shall ensure that a formal needs assessment is made and that the results of this assessment are formally recorded in writing and stored in the contracting authority's documentation.

Further review expert explains that this procurement activity has been delayed due to complaints therefore CA should have taken into account the provision of funds for this PA in 2019, but also in the current year 2020, and not to plan new projects without providing tools for projects that are still in process. Therefore the review expert comes to the conclusion that as a consequence of poor management and lack of planning of this PA in the budget of 2019 and 2020 by the CA has resulted to have successive complaints by the EO. Therefore, based on the above explanations, it appears that this complaining claim is grounded.

Opinion of the professional expert: Based on the above clarifications, review expert proposes the review panel that the complaint of the complaining EO to be approved as grounded, to cancel the notification for cancellation of the Procurement Activity and recommends that the case be returned for re-evaluation.

Procurement review body has notified the parties on the: 12.05.2020 with the expertise's report.

The Economic Operator, on the 13.05.2020, through memo, has notified the PRB that agrees with the opinion of the professional expert.

The hearing session was held on: 11.06.2020, without the presence of the parties conform article 24.1 of the Regulation of the PRB, where the case files were reviewed by checking and analyzing the documentation for the procurement procedure which consists of: authorization of initiating the procurement activity, contract notice, minutes on the opening of bids, decision on the establishment of the bid evaluation commission, bid evaluation report, notice of cancellation of the procurement activity, complaint of the economic operator, report of the professional expert procurement, and all memos of the parties to the proceedings.

Review panel after reviewing the case files, reviewing the complaining claims of the complaining EO, findings, concrete analysis and recommendations of the review expert the statement of the parties in the procedure, discussions and screening of evidence in full during the main review session, clarifies that the complaint was filed against the notification for cancellation The first claim of the complaining EO is that we as EO on the 08/04/2020 have made a request for reviewing at the CA-MCYS about the decision on the cancellation of the tender procedure which is contrary to the decision of the review panel of the PRB with no. 188/19 dated 19/06/2019. Review panel ascertains that CA-MCYS in contradiction with article 108 / A has not returned a response regarding the request for reviewing which states:

12. Objections and decisions adopted in accordance with paragraphs 8 and 10 of this Article, must be reasoned and communicated in writing, in accordance with this law, to the complainant and all interested parties, if any.

The other claim of the complaining EO is that according to the decision of the PRB no. decision 188/19 ascertains again that decision no. 738/18 is valid since according to decision 738/18 it was found irresponsible EO NNP TONI, Malisheva. Review panel clarifies that in the above mentioned decision EO "Toni Malisheva" has been declared irresponsible therefore this complaining claim is grounded.

The other claim of the complaining EO is that according to the decision of the PRB no. 188/19 of the 19/06/2019 it is re-ascertained that the annulment of the tender procedure is contrary to article 62 of the LPP and 44.7, 44.8 of the ROGPP.

Review panel clarifies that on the 19.06.2019 review panel has issued decision no. 188/19 and returned the case for re-evaluation, while CA MCYS on the 07.04.2020 uploads on the e-procurement platform, the notice for cancellation.

Review panel ascertains that CA- Ministry of Culture, Youth and Sports cancels the procurement activity referring to the Law on Public Procurement in Kosovo with procurement no. 04 / I-042, on public procurement of the Republic of Kosovo, amended and supplemented by law no. 04 / I-237, law no. 05 / I-068 and law no. 05 / I-092, Article 9, and the Rules of the Public Procurement Operational Guideline, Article 8 paragraph 8.7, the procurement office and the authorized commission for re-evaluation requested confirmation from the finance office the availability of funds.

The finance office confirmed that the activity is not included in the 2019 Budget Law. The Commission authorized for re-evaluation in the absence of funds recommends that the Notice of Cancellation of the procurement activity dated 11.04.2019 remain in force after ascertaining the factual situation.

Review panel ascertains that the PRB on the 21 of May 2020 through email has communicated with the procurement office in MCYS from whom it has requested evidence regarding the reason for the cancellation of the procurement activity and the same through a written memo dated 23 May 2020, have clarified that according to the decision of the Prime Minister dated 11.12.2018 for budget cuts / savings, the project for the procurement activity is on the list of cut projects.

Review panel clarifies that also CA has sent through written memo the official correspondence with the Budget and Finance Division that the capital project for the Construction of the War Museum-Lubeniq Village Chamber with budget code 15774 which has not been budgeted with the budget of the fiscal year 2019 as well as the same is not part of the 2020 budget according to the budget law on budget allocations Law no. 07 / L-001. Through the email dated 26 May 2020, has notified the PRB: "Dear Hello, Attached find the Budget Law 2020-2022. Project code 15774- Construction of the War Museum-Chamber in the village of Lubeniq is not included in 2020 budget. Respectfully! Taibe Selmani, Head of Budget and Finance / MCYS".

Review panel ascertains that considering the fact that CA has provided sufficient evidence that for this procurement activity there are no budget funds for the realization of the project and CA can not ensure that the procurement activity can be completed, review panel ascertains that the cancellation of the activity. Procurement should be done as its realization at this stage is not possible.

Review panel conform article 117 of the LPP, and based on the evidence presented above decided as in the provision of this decision.

Legal advice:

Aggrieved party can not appeal against this decision, but it can file charges for damage compensation within 30 days, after the receipt of this decision with the lawsuit In the Basic Court In Prishtina at the Department for Administrative Affairs.

President of the Review Panel

Mr. Nuhi PAÇARIZI

Decision to be submitted to:

1x1 CA – Ministry of Culture

1x1 EO – “Albi Company” SH.P.K.- Rahovec,

1x1 Archive of the PRB

1x1 For publication on the website of the PRB.