



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

Psh. No.670/23

The Procurement Review Body through the Review Panel composed of Vjosa Gradinaj Mexhuani-President, Agon Ramadani-Referent and Vedat Poterqoi-Member deciding on the economic operator's complaint “Foleja Motors L.L.C”, dated 08.09.2023 against the Notice on the Decision of the Contracting Authority - Central Procurement Agency dated 25.08.2023 regarding the procurement activity with title: “Supply of cars for the institutions of the Republic of Kosova” with procurement no: UA/2016-23-5626-1-1-1, on the basis of article 105 in relation to article 106 and article 117 of the LPP, after consideration in the session without the presence of the parties, on the 27.10.2023, has issued this:

DECISION

1. **Approved**, as partly grounded the complaint of the EO “Foleja Motors L.L.C” submitted on the 08.09.2023, protocol no.670/23, and the Decision of the CA dated 25.08.2023 is annulled, while the procurement activity "Supply of vehicles for the institutions of the Republic of Kosova", with procurement number UA/2016-23-5626-1-1-1, is returned to **Re-evaluation**.
2. The return of funds deposited in the name of the complaint's fee is allowed, while the complainant has the right to submit a request for the return of funds within 60 days from the day of acceptance of the decision, otherwise the funds are confiscated and transferred to the Budget of the Republic of Kosova.

REASONING

- Procedural facts and circumstances –

The Central Procurement Agency in the capacity of the Contracting Authority dated 13.06.2023 has published the Notice for Contract B05 related to the procurement activity entitled "Supply of vehicles for the institutions of the Republic of Kosova" with no. of procurement UA/2016-23-5626-1-1-1. This procurement activity was developed through an open procedure with the type of contract for supply and with an estimated contract value of 6,900,000.00 €.

On the 25.08.2023, the Contracting Authority published the Notice on Decision B58 as well as the standard letter for the eliminated tenderer through which the offer of the complainant was eliminated as irresponsible with the following reasoning: "You have bid under the business name Auto Shtepia Siqani Sh .P.K. and all the documents are with this name as well as sealed with this name while with no. of your business in the ARBK appears as a business with a different name, i.e. a business with the name Auto Shtëfia Siqani Sh.P.K. does not appear in ARBK".

On the 29.08.2023, the complaining economic operator submitted a request for reconsideration against the Notice on Decision B58 of the Contracting Authority. Consequently, on 01.09.2023, the Contracting Authority made a decision through which it rejected as completely unfounded the request for reconsideration of the complaining economic operator.

On the 09.08.2023, EO Foleja Motors LLC, in its capacity as a complainant, attacked the Decision of the CA dated 01.09.2023, by which the complainant was eliminated from the procurement activity, described as follows: Supply of vehicles to institutions of the Republic of Kosovo, with procurement number UA/2016-23-5626-1-1-1.

During the preliminary review of the complaint, the Review Panel found that the complaint contains all the elements defined through Article 111 of the LPP and as such was submitted within the legal deadline in accordance with Article 109 paragraph 1 of the LPP after the preliminary procedure for resolving disputes in meaning 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.

The Review Panel has also concluded that there are no circumstances of conflict of interest in the sense of Article 11 of Regulation no. 01/2020 of the Work of the Procurement Review Body related to article 4 paragraph 1 sub-paragraph 75 of the LPP.

The claims of the complaining economic operator are presented through the complaint as follows: *"The complainant, specifically his shareholders, for business purposes have decided to change the name of their company from Auto Shtëpia Siqani Sh.P.K. at Nest Motors LLC. As provided by law, this request to change the name was first submitted to ARBK. They have successfully completed such a change at ARBK on 23.05.2023. After the realization of this corporate change, the applicant had tried to register his name in E-Procurement, but this change was not possible since before that the change should be made at the Tax Administration of Kosovo - TAK. As is well known, this procedure before TAK is not completed quickly, so the applicant, since he was not able to change his name in E-Procurement even in the announced tender, applied with the name that is recorded in E-Procurement and other documents - in the name of Auto Shtepija Siqani Sh.P.K. All this is because the name change has not been fully implemented in all state institutions. On 10.08.2023, the applicant successfully completes all procedures at TAK and consequently receives the new certificate. On the same date, i.e. 10.08.2023, the applicant also changed the name to E-Procurement, so now this is allowed by the system. Therefore, the applicant with full responsibility declares that in the E-Procurement*

system on 10.08.2023 he has also changed the name from Auto Shtëfia Siqani Sh.P.K. in Foleja Motors LLC".

Relying on article 111 paragraph 5 related to articles 113 and 114 of the LPP, the Review Panel dated 14.09.2023 has authorized the review expert to conduct the initial review of the file and the complaining claims of the complaining economic operator. On 25.09.2023, the Review Expert's Report was received with the following recommendations: "the review expert proposes to the review panel that the complaint of the complaining EO be rejected as unfounded and the decision of the CA remains in force".

The panel found in advance that the expert report contains the essential elements as required by article 113, paragraph 3 of the LPP and the same has been accepted by both parties, as required by article 115 of the LPP in relation to article 20 of the cited Regulation. In addition, it is established that the parties are mutually informed regarding the documents of this matter, in accordance with paragraph 2, of Article 20 of this Regulation, therefore there are conditions for the Panel to decide in a meritorious manner regarding the complaint.

-Administration and evaluation of evidence -

The panel concluded that there are no elements for the prevention of conflict of interest, as required by Article 11 of the Regulation on the Work of the PRB, therefore it further analyzed all the documents of this subject, including all acts and actions of the parties and considered that there is a need to assign public session with parties (held on 19.10.2023) as provided by paragraph 2 of article 24 of the cited Regulation. The Review Panel further concluded that the CA has applied an open procedure procurement activity, the estimated value of which is €6,900,000.00 (as provided for in Article 9, paragraph 1, related to Article 15, paragraph 2, of the LPP) and took into administration all the papers of this case, the expertise report, the facts, the evidence, the complaint statements, analyzing and evaluating them in summary as following this reasoning.

The CA has eliminated the complainant from this procurement activity due to the fact that, quoted "... this EO is considered as a disinterested party in this procurement procedure since the CA-AQP has not accepted an offer from the EO: Foleja Motors and no document was signed or sealed with this name of EO even though the Business Certificate of EO: Foleja Motors uploaded in the request for reconsideration is dated 23.05.2023 while the procurement activity was published on 13.06. 2023". And that, quoted: "...in the evaluation of the offers, Regulation No. 001/2022 on Public Procurement, article 3.16".

Meanwhile, the Appellant has attacked the decision cited above from the aspects since it does not contain the essential elements of the decision as provided by the provision of Article 48, 1 of the LPP, since it does not provide the reasons which were as stated decisive factors during the evaluation of the evidence regarding the fact that what are the effects of changing the name of a legal entity. The complainant further emphasized that the CA cited Article 3.16 of Regulation No. 001/2022 on Public Procurement, but did not give reasons in which aspects this provision was not implemented, stressing that in analogous (similar) situations, other contracting authorities acted differently, because it requested clarifications. Moreover, for the complainant, it

is considered paradoxical and inexplicable to designate the applicant as "Party without interest", therefore he requested that the contested decision in this legal-administrative matter be annulled.

In the context of the actions and statements of the parties, the Panel considers (of course from his/her point of view) that the contentious issue in the present case mainly refers to the status of the complainant, respectively the fact whether the complainant has the status of the interested party as defined by the provision of the article 105, paragraph 1, related to article 4, paragraph 1.26 of the LPP. In fact, the status of the party represents a substantial issue in this appeal process, as long as it is a necessary condition (presumption) of a procedural nature on which the right to participate or not in a legal-administrative matter depends, implying public procurement as such, in view of the basic principles of the legislation. With the intention that the subject matter has been analyzed fairly and objectively, the Panel took into consideration, in addition to the assertions of the parties, among others, Article 3.16 of Regulation No. 001/2022 on Public Procurement, some of the relevant provisions of the Law on Commercial Companies, alongside those of LPP.

In this case, paragraph 3.16. of the cited Regulation, contains the rule as follows, cited: "All Economic Operators who are registered and are active on the electronic procurement platform, for any change of business data in the Business Registration Agency (ARBK) and Administration Tax (ATK), which as a consequence has a change/change of name, (name of the fiscal number/business, (identification number for the needs of the tax system, business charter or (reorganization, status transformations, termination of the business) are obliged to immediately update the data on the electronic procurement platform. The data is updated in accordance with the PPRC instructions, through the help desk or the guide published on the electronic procurement website".

It is quite clear and non-controversial, that according to the rule as above, the economic operators who appear on the electronic procurement platform, the eventual changes regarding the data of the business entity, be it a change of name, fiscal number, business statute or extinction , are obliged to update them immediately on the electronic procurement platform. In terms of general knowledge, such a platform (not only for procurement) means an innovative communication mechanism, which contains various information, has data evidence, enables the effective delivery of other applications and, of course, the correction of data means the transfer of information in time. However, care should be taken at least for the following things:

- a. the transfer of information in time (as stated: immediately) does not deprive any subject (physical and/or legal) of a right which is guaranteed by the legislation in force;
- b. the expression "immediately update them" is not specified, so it cannot be used for the absolute elimination of any EO from a procurement process;
- c. the quoted paragraph contains expressions and notions, which are special compared to each other both in terms of meaning and the legal effects they produce. Therefore (of course according to the Panel's opinion) changing the name of a business entity does not negate its existence or legal subjectivity. Likewise, the statute is a legal/organic act of an entity, the change of which also does not deny the existence of legal subjectivity. However, the extinction of the business

(despite the fact that it is included in the sentence) means the fact that the legal entity (entity) ceases to exist (although extinction is a process). Therefore, according to the independent judgment of this Panel, any business entity that applies for eventual changes of name, fiscal number and/or statute, continues the continuity of legal subjectivity and as a result, all rights and obligations from any eventual contractual relationship are attributed to the same.

Based on the above opinion of this Panel, it results that the complainant has the status of a party in this administrative legal matter, respectively in this procurement activity, and should not be treated as a disinterested party. The fact that CA has not accepted an offer or a document stamped with the name Foleja Motors LLC does not deny the existence of the existing entity, therefore it does not mean the party without interest. Moreover, in the sense of Article 7 of this Regulation, in connection with Article 10 and 11 of the LPP, in many cases significant information which is classified as secret is not made public, perhaps more importantly than the trade name and the changes of cited. On the other hand, the PRBO does not interpret other Laws that refer to a different scope, but it is a well-known fact that the eventual actions cited above are undoubtedly subject to an administrative process before the Business Registration Agency, which leads the way and the registration procedure and maintains the register of business entities, according to Article 15 in relation to Article 17 of the Law on Commercial Companies. In the decision of the CA it is also stated that "The Business Certificate of EO: Foleja Motors uploaded in the request for reconsideration is dated 23.05.2023, while the procurement activity was published on 13.06.2023". However, the fact cannot be denied that in this procurement activity EO Auto Shtësia Siqani LLC has applied, i/which has entered into the process of changing the name, the effects of which action do not create as a consequence the denial or extinction of the subjectivity of the complainant. In the Standard Letter for the eliminated tenderer dated 25.08.2023, it is stated, quoted: "Your tender has been rejected for all the parts/lots that you have offered for the reason: You have offered under the business name Auto Shtëtia Siqani SHPK and all the documents are with this name as well as stamped with this name while with no. of your business in the ARBK, the business under a different name appears (so the business with the name Auto Shtëfia Siqani Shpk does not appear in the ARBK). However, the term disinterested party, according to the meaning given to it by CA mainly in the context of Article 3.16 of the Regulation on Public Procurement, does not deny the continuity of the legal subjectivity of the party and is not in harmony with paragraph 1.26. of article 4, of the LPP, according to which the interested party is "the person who can prove a material interest from the result of the procurement activity implemented by the contracting authority..." In the Report of the review expert, three findings should be distinguished, as follows :

1. The complaining EO has an open account on the e-procurement platform under the name Foleja Motors LLC, while in this procurement activity it has submitted all the evidence under the trade name Auto Shtëtia Siqani... The complaining EO has been provided with the certificate of re of ARBK, where it changes its trade name and takes the name Foleja Motors LLC

2. "...the publication date of the contract notice for this procurement activity is 13.06.2023, which results that the complaining EO was equipped with the new certificate under the name Foleja Motors, while it was equipped with the VAT certificate with the date 10.08.2023

3. "with the fact that the complaining EO has submitted the business certificate under the name of Auto Shtëfia Siqani, the CA has not considered it reasonable to ask for clarifications regarding this issue and at the same time the reviewing expert assesses that it has rightly eliminated it because in this case the request for clarifications and completion of the documentation means a material change in the offer and falls in line with Article 59 of the LPP".

Referring to the explanations, which this report contains, the Panel considers that the explanations given, classified as above in points 1 and 2, prove the continuity of the legal subjectivity of the complainant, without the need for them to be clarified again. But the panel assesses that the opinion of the expert is wrong that "the request for clarifications and completion of the documentation means a material change of the offer and is contrary to Article 59 of the LPP" because: a) neither in the context of the complaint statements nor the Decision of CA, it is not a matter of material change of the offer; b) the material change refers to article 27, 28 and 29 and 59 of the LPP; c) in this appeal process, the key issue has to do with whether or not the appellant is a disinterested party. However, the eventual request for additional clarifications is not related to the content of the offer (tender) but to the status of the Complainant as a party, and as a result, the norms of a material but procedural character are not applied.

Conclusion -

It is not disputed that the CA has eliminated the complainant from this procurement activity on the grounds that he is a disinterested party, since during the course of the procurement process the commercial name of the same has changed. This fact is not disputed neither by the examining expert nor by this Panel, but the elimination of the complainant for the reasons cited above, at least from the point of view of this Panel, is not in harmony with the LPP and the basic principles of the legislation regarding the status of the party. Therefore, the reasons contained in the contested decision are not relevant, stable and in full accordance with the LPP norms for the elimination of which the EO wants from a procurement activity and each entity of the state administration, which acts in the capacity of CA must be careful in the correct and fair specification of the status of a subject in the public procurement process, as long as the status of a party is subject to provisions with a binding (cogent) character, the observance of which simultaneously promotes the integrity of public procurement.

In this regard, the PRB dated 20.10.2023 addressed to the PPRC with the request for clarification as follows: *The requested clarification has to do with the procedure or method of updating data in the electronic procurement system by the Economic Operators who make changes in ARBK and TAK, or more precisely when and how they have the opportunity for EO to make the updates within the electronic procurement system. While on 23.10.2023 the following answer was received: "Regarding your letter below, paragraph 3.16, which you have referred to, is part of Article 3, Requirements for users of the electronic procurement system of Regulation No. 001/2022 for Public Procurement. In relation to this paragraph and the requested clarification,*

we inform you that the updating of data in the electronic procurement system is done by the Economic Operators themselves - through the "My data" menu within the economic operator's account. The update is done in accordance with the instructions in the instruction manual which you can find attached to this e-mail. The obligation to update the data according to paragraph 3.16 and the instructions as in the attached manual, can only be done if the data of the EO has been updated in advance in TAK, because the electronic procurement system communicates or exchanges data only with TAK."

Therefore, referring to the communications as above, it can be understood that even from a technical point of view, the name change in the e-procurement platform cannot be carried out without completing all the procedures within the competent authorities, so that the equipping of the complainant with the VAT certificate in the specific case may have influenced the delay of the name change since the date of its change in ARBK.

It should be explained in this case that the opinion of an expert does not create binding effects for the decision-making body and therefore the Panel has expressed its independent opinion in the sense of article 98, 99 in relation to article 104 of the LPP, as long as the probative values of a report result from administration, review and evaluation of all facts and evidence regarding the actions and flow of the procurement process and the requirements of the legislation, which the Panel evaluated on the basis of his/her independent judgment. However, the Panel obliges the CA to refer to the Public Procurement Regulatory Commission (PPRC) or any other entity with relevant competence during the reassessment procedures regarding the fact that the complainant has the status of a party or not and in the context of the circumstances described above. would have the right to continue participating in this procurement activity.

In this case and in the context of the nature of this matter, the Panel also explains that the public procurement system must improve its professional capacity in every aspect and prepare for the integration processes because the good practices and standards of international procurement, of course without pretending to be that the decisions of this Body are characterized by absolute professionalism. Therefore, the Panel considers that it has decided in the right and fair way, while the CA has the right to avoid in the process of re-evaluation all the defects found, of course according to its discretionary solutions. The Review Panel is always based on the fact that the 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 this procurement process.

Therefore, from the above, the review panel in accordance with article 117 of the LPP decided as in the enacting clause of this decision.

For point I of the decision, it was decided based on article 117 of the LPP in relation to article 29 of the PRB Work Regulations.

For point II of the decision, it was decided based on article 118 of the LPP in relation to article 31 paragraph 1 and 6 of the PRB Work Regulations.

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

President of the Review Panel

Mrs. Vjosa Gradinaj

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 – **FOLEJA MOTORS L.L.C;**

1x1 Archive of the PRB;

1x1 For publication on the website of the PRB.