



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

Psh. No.989/23

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 (Law no. 04/L-042, supplemented and amended by Law 04/L -237, Law 05/L-068, supplemented and Law 05/L-092) in the composition of Vedat Poterqoi - President, Vjosa Gradinaj Mexhuani and Isa Hasani - Member, deciding according to the complaint of EO "CTA" Sh.p.k, against the Decision to cancel the procurement procedure related to the procurement activity "The second phase of works in QTM, divided into three lots LOT 1 Heating, ventilation and water supply works LOT 2 Doors and windows work LOT 3 Tile painting works and facade" with procurement number 635-23-10151-5-1-1, initiated by the contracting authority (CA) - Municipality of Peja, on the 08/03/2024 has issued this:

DECISION

1. Cancelled entirely the procurement activity "The second phase of works in QTM, divided into three lots LOT 1 Heating, ventilation and water supply works LOT 2 Doors and windows work LOT 3 Tile painting works and facade" with procurement number 635-23-10151-5-1-1, initiated by the contracting authority (CA) - Municipality of Peja.
2. The decision to cancel the procurement activity remains in force, as in point I of the provision.
3. The return of the deposited amount is allowed when the complaint is submitted, and the complaining economic operator is obliged to, in accordance with article 31 point 6 of the PRB work regulations, within a period of sixty (60) days, make a request for the return of the insurance complaint, otherwise the deposit will be confiscated and these funds will go to the Budget of the Republic of Kosova.

REASONING

- Procedural facts and circumstances -

On the 21.09.2023, the Municipality of Peja, in the capacity of the Contracting Authority, has published the Contract Notice B05 related to the procurement activity "The second phase of works in QTM, divided into three lots LOT 1 Heating, ventilation and water supply work LOT 2 Work of Doors and Windows LOT 3 Tile and facade painting works", with procurement number 635-23-10151-5-1-1.

The contracting authority has implemented an open procedure, type of contract: work, estimated value of the contract: 613,712.66 € Total value of 3 Lots. LOT 1 Work of heating, ventilation and water supply Value: 344.885.76 Euro, LOT 2 Work of doors and windows Value: 79.465.00 Euro, LOT 3 Work of painting tiles and facade Value: 189.361.90 Euro.

On the 28.11.2023 "CTA" SH.P.K submitted a request for reconsideration against the aforementioned decision of CA. On the 30.11.2023, the Contracting Authority rejected the request for reconsideration as unfounded.

On the 07.12.2023, PRB received the complaint from EO "CTA" SH.P.K with no. 989/23 related to the activity "Second phase of works in QTM, divided into three lots LOT 1 Heating, ventilation and water supply works LOT 2 Doors and windows work LOT 3 Tiles and facade painting works", with procurement number 635-23-10151-5-1-1.

-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.

The response of the CA to the request for reconsideration of the complaining EO "CTA" SH.P.K: "The CA after analyzing your request for Re-examination based on your request on the electronic platform dated: 28.11.2023, has been treated with care of your request, and has come to the conclusion that the same is unfounded. We inform you that your complaining claims are unfounded since we as CA have acted in accordance with the LPP, since a technical error occurred in the pre-calculation of position A. 6 Foam for fixing with assembly of Quantity no value has been set at all and is an irreparable error in this process, as well as you, in your offer submitted on 01.11.2023, in advance, the pre-calculation in this position of the unit, Price with VAT, set the price, while for the total value, you did not set a price at all, which is in opposition to the LPP. Therefore, we as CA inform you that your complaint claims are unfounded, and we

have acted in accordance with the LPP and the Rules. Based on what was said above, the Responsible Procurement Official has decided as in the provision.

The claims of the Complaining Economic Operator EO "CTA" SH.P.K are presented as follows:

The complainant claims that: "The main complaining claims are against the cancellation of the procurement activity, respectively against the cancellation of "LOT 1 Heating, ventilation and water supply work" after the publication of B58 Notice on the decision of the contracting authority. The complaining economic operator "CTA" Sh.p.k claims that the CA in violation of article 62 of the LPP, and article 43 of paragraph 5 of Regulation no. 001/2022, has canceled the procurement activity in violation of these provisions, as well as the complainant points out that this procurement activity is related to the execution of the works, the LPP allows the CA that if it has not foreseen the quantity, it must increase the quantities through the Annex to the contract up to 10% of the total value of the contract. Considering the precalculation position A .6 Foam for fixing with assembly costs four (4) euros, CA is very easy to correct this technical error of theirs based on the legal provisions. After the administration and examination of the case documents against the complaining claims, the complaining economic operator claims that the CA has acted in violation of articles 7, 59, 60 and 62 of the LPP and article 43. par 5 of Regulation no. 001/2022.

-Administration and evaluation of evidence-

Relying on article 111 paragraph 5 related to articles 113 and 114 of the LPP, the Review Panel dated 07.12.2023 has authorized the review expert to conduct the initial review of the file and claims according to complaint no. 989/23, while on 15.12.2023 the review expert's report with no. 2023/0989 with the following recommendations: "Based on the aforementioned clarifications, the review expert proposes to the review panel that the complaint of the complaining EO be rejected as unfounded and that the decision of the CA on the cancellation of the procurement activity remain in force".

Regarding the claims of "CTA" SH.P.K, the review expert through report no. 2023/0989, has assessed as follows:

Introductory clarification: The examining expert first clarifies that the CA, through form B58 of the Notice on the decision of the contracting authority, the Municipality of Peja dated: 13.11.2023, has recommended the complaining economic operator "CTA" for the contract for "LOT 1 Work of heating, ventilation and water supply" Sh.p.k (complainant). After the publication of this notice, the economic operator "Ejona" sh.p.k submits a request for reconsideration dated 20.11.2023, with the claim that the EO recommended for the contract has offered zero price for item/position A.6 - New social housing, and zero upfront pricing is prohibited under the LPP and no upfront value is allowed. CA- Municipality of Peja approves as partially based the request for reconsideration of the economic operator "Ejona" sh.p.k. and re-evaluates the matter. After the reassessment, the CA on 24.11.2023 cancels the procurement activity, namely Lot 1, on the grounds that: "This procurement activity is canceled due to errors that occurred during the preparation of the tender specifications, the errors are irreparable at this stage, therefore the only option is to correct the technical specifications of the tender by the

requesting unit and re-announce the tender with accelerated procedures as provided by the LPP". Based on the case documents, the complainant's claims and the justification for the cancellation of the procurement activity, the review expert assesses that the errors that occurred in the pre-measurement and pre-calculation cannot at this stage be avoided / improved. Yes also, the complaining EO states in the complaint that "Our company, in the case of bidding, has noticed that in the pre-calculated position A.6 Foam for fixing with assembly, the quantity has not been decided at all, the quantity (how many pieces) are needed, therefore we have only decided the price per unit while in the total value we have not set the price for the reason that the quantity has not been set by the CA and we have not been able to set the total value in this position, before the error lies with the CA who have not set the quantity in position A.6 ". Since the complaining EO states that he "noticed" that the quantity of position A6 was not set, he was able to make a request for clarifications of the tender in order to improve the pre-measure regarding position A6 of the pre-measure and not until the cancellation of the pre-measure. this procurement activity. Therefore, at this stage, this error cannot be improved in advance, while the evaluation and comparison of tenders is impossible to be done in accordance with Article 59 of the LPP, and for this reason, the expert considers that the decision of the CA to cancel this tender should be confirmed. procedure. Therefore, in support of what was described above, the clarifications and evidence attached above, the review expert proposes to confirm the decision of the CA that this procurement activity is canceled due to errors in the pre-measurement and pre-calculation of the contracting authority, the complaint of the complaining economic operator is rejected as unfounded. While the contracting authority, during the re-announcement of this procurement activity, should take into account Article 17.12 of Regulation No. 001_2022 on public procurement, determines: "...Each sentence in the tender file will be well compiled, since the tender dossier is the material basic, based on which the economic operators will create their tenders. The tender file will be prepared in such a way that - as a rule of principle - there is no need for additional clarifying information".

The expertise's report has been duly accepted by all procedural parties. CA has agreed with the recommendations of the review expert's report, while EO has not agreed with the review expert's report.

The Review Panel has assessed that the conditions have been met to decide on this case without a hearing in the sense of Article 24 paragraph 1 of the Rules of Procedure of the PRB, taking into account that the claims of the parties and their submissions, the evidence as well as the review expert's report provide sufficient data to decide on the merits of the case.

- Findings of the Review Panel -

The review panel independently and objectively, conscientiously and professionally evaluated all the evidence of the case. The argumentation in the expert's report is quite detailed, understandable and fully based on the relevant documents that refer to the procurement activity. After examining and analyzing the documents of the case, the review panel clarified that the procurement activity was canceled due to errors that occurred due to the fault of the CA during the preparation of the TD, specifically in the pre-measurement and pre-calculation.

The review panel, in accordance with the opinion given by the review expert, assesses that the errors that occurred in the pre-measurement and pre-calculation cannot be avoided / improved at this stage. The review panel clarifies that the CA did not set the quantity in position A.6", which is also asserted by the Appellant in the complaint submitted to the PRB, therefore the review panel assesses that since the complaining EO mentions that it "noticed" that position A6 was not the quantity has been decided, it was possible to make a request for clarifications of the tender in order to improve the pre-measure regarding position A6 of the pre-measure and not until the cancellation of this procurement activity. Therefore, at this stage, this mistake cannot be improved in advance, while the evaluation and comparison of tenders is impossible to be done in accordance with Article 59 of the LPP, and for the reasons mentioned above, it considers that the decision of the CA for cancellation of this procedure.

On the basis of the clarifications given by the review expert, the review panel assesses that the decision of the CA after the reevaluation of this activity to cancel the procurement procedure should be confirmed due to errors in the pre-measurement and pre-calculation of the contracting authority.

Therefore, the review panel, based on this detailed information and also based on the expertise report of the review expert, was convinced that this procurement activity should be canceled in its entirety and the decision of the CA for cancellation should remain in force. Because the review panel cannot compel the CA to continue with a procurement activity which has violations and may present inequality between the parties and may present difficulties during the execution of the contract. Therefore, the Panel considers it reasonable that in the case of a meritorious decision in this legal-administrative matter, it recognizes your right to return the appeal fee. 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 do not constitute a sufficient basis for the procurement activity to be re-evaluated again because, this contradicts the scope of the LPP and the argumentative basis of the appeal claims and assertions of the CA, which the Panel according to its independent assessment in terms of article 104 in relation to article 105 of the LPP. The return of this activity to Reassessment, considering the nature of this activity as well as the call from the requesting unit (from a professional point of view), the panel, according to its independent judgment, considers that it is not in harmony with Article 1, of the LPP, according to which, the purpose of this The law is, among other things, cited: "... 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 basis of factual for such decisions, not to be influenced by personal interests, to be characterized by non-discrimination and a high degree of transparency, and to be in accordance with the procedural and essential requirements of this law". It should also be noted that the expert's report is not binding on the review panel and each such report is evaluated and analyzed in the general context of the documents of the case, the statements of the parties, their acts and actions, naturally taking into account the nature of the violations. eventual in relation to the purpose and return of a procurement activity. Therefore, the fact that in which cases and for what, the Review Panel if it supports any report or any recommendation of the expertise, belongs to the independent and professional judgment of the

panel as addressed to such powers according to Article 105 of the LPP. 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 procurement activity must be canceled in its entirety.

At the end of all this, the Panel decided as in the enacting clause of this decision, based on its conviction and independent judgment that it has applied the appropriate solution in this case, while obliging the contracting authority that during the re-announcement of this procurement activity it must have considering Article 17.12 of Regulation No. 001/2022 on public procurement, which states: "...Each sentence in the tender file will be well compiled, since the tender file is the basic material, on the basis of which the economic operators will create their own tenders".

- Conclusion -

The review panel considers that the decision approved in this case is based on the administration of all the evidence available in this case and that in making decisions it always takes into account articles 1 and 6 of the LPP, where the purpose of this law is to ensure the most efficient, transparent and fair way of using public funds, public resources as well as all other funds and resources of the contracting authorities.

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

President of the Review Panel

Mr.Vedat Poterqoi

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 – **MUNICIPALITY OF PEJA;**

1x1 EO – CTA " Sh.p.k.;

1x1 Archive of the PRB;

1x1 For publication on the website of the PRB.