



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

Psh. No.790/23

The Review Panel, appointed by the President of the Public Procurement Review Body (PRB), based on Article 105, 106 and 117 of the Law on Public Procurement of Kosova (Law No. 04/L-042, supplemented and amended by Law 04/L-237, Law 05/L-068, and Law 05/L-092), composed of: Vedat Poterqoi - President, Isa Hasani - Member and Vjosa Gradinaj Mexhuani - Member, deciding according to the complaint submitted by the Economic Operator (EO) "Mobelland" SH.P.K., regarding the procurement activity entitled: "Supply and assembly of supplementary inventory for schools" with procurement no: "208Udheheqesi-23-1024-1-1-1", initiated by the Contracting Authority (CA) - Ministry of Education, on the 29.12.2023 has issued this:

DECISION

- I. **Approved, as partly grounded** the complaint of the EO "Mobelland" SH.P.K submitted to the Procurement Review Body on the 13.10.2023 (with protocol number 790/23) for the procurement activity entitled: "Supply and assembly of supplementary inventory for schools" with no. of procurement: "208Udheheqesi-23-1024-1-1-1", initiated by the Contracting Authority (CA) - Ministry of Education.
- II. Cancelled the decision of the Contracting Authority, and the case is returned for re-evaluation.
- III. It is allowed to return the complaint's fee to the amount deposited at the time of filing the complaint. The complaining economic operator is obliged, in accordance with Article 31 point 6 of the PRB work regulation, within sixty (60) days to make a request for the return of the complaint insurance, otherwise the deposit will be confiscated and these funds will be transferred to The budget of the Republic of Kosova.

REASONING

- Procedural facts and circumstances -

On the 21.02.2023, the Ministry of Education, in the capacity of the Contracting Authority, published the contract notice for the procurement activity with title: "Supply and assembly of supplementary inventory for schools" with no. of procurement: 208Udheheqesi-23-1024-1-1-1.

EO "Mobelland" SH.P.K. on the 01.10.2023 submitted a request for reconsideration to the CA. On the 03.10.2023, the CA - Ministry of Education, by decision, rejected the requests for reconsideration as unfounded.

Dissatisfied with the CA's decision, the complaining EO "Mobelland" SH.P.K. on the 13.10.2023 submitted a complaint to PRB, with protocol number 790/23, against the decision of the Contracting Authority regarding the procurement activity described above.

The contracting authority has implemented an open procedure, type of contract: Supply, estimated value of the contract: 350,000.00 €.

The EO's complaint was made in accordance with Article 109.1 of the LPP, according to which any interested party can submit a complaint to the PRB against any decision taken by the CA. Since the EO has also applied for reconsideration, it means that its actions also refer to Article 108/A of the cited Law. Therefore, the PRB considers that the Complaint fulfills the prerequisites in terms of the provisions now cited and the same falls under its competences in terms of Article 105 of the LPP.

- Evaluation and administration of evidence -

Based on the actions described above, the PRB has engaged the evaluation expert in accordance with Article 111, paragraph 5 of the LPP, with the duty that the same, in accordance with Article 113 of the cited Law, conducts the initial review of the file and complaints, in relation to the procurement activity described above. In this regard, on the 28.10.2023, the review expert submitted the evaluation report with the following recommendations:

Based on the aforementioned clarifications, the review expert proposes to the review panel that the complaint of EO "Mobelland" SH.P.K.

I. The complaint of the economic operator "Mobelland" SH.P.K., submitted to the Procurement Review Body on the 13.10.2023 (with protocol number 790/23) for the procurement activity entitled: "Supply and assembly of supplementary inventory for schools" with no. of procurement: "208Udheheqesi-23-1024-1-1-1", initiated by the Contracting Authority (CA) - Ministry of Education.

II. The decision of the Contracting Authority remains in force.

RESPONSE TO THE COMPLAINING CLAIMS OF THE COMPLAINING EO

Introductory note:

The complaining EO dated 01.10.2023 submitted the request for reconsideration to the CA. On the 03.10.2023, the CA made a decision to reject the request for reconsideration.

Complaining claim 1

- The complaining EO claims that the CA with the decision dated 25.09.2023 has acted contrary to the provisions of the LPP, since it has recommended for the contract an EO which does not meet the requirements of the tender file, namely the requirement of technical and professional capacity related to the diploma of the project manager.

Circumstances of the case - the following are the facts and procedural circumstances relevant to this complaining claim.

- *CA in the tender dossier for the request for technical and professional capacity, has defined the request: "1. Project manager; it is required to be a graduated engineer of wood technology or a master's degree or a graduated engineer of architecture or a master's degree in architecture with five years of work experience in the same or similar field. To be reflected with the list of projects and CV 2. Graduated Mechanical Engineer, or Master of Mechanical Engineering - (one), with three years of work experience in the same or similar field. To be reflected with the list of projects and CV." As documentary evidence for the fulfillment of the request, the following was requested: "Evidence 1-2. For the Project manager and the professional staff, submit the relevant notarized diplomas. If the diploma is issued by another country, it must be notified by MESTI. Copy of contracts or pre-contracts on the employment relationship, list of projects managed and their CV, reference letter in the required field issued by employers after graduation.*

- *The EO recommended in the offer has submitted the document - "Declaration for the project manager", in which it is noted "For the tender entitled Supply and assembly of supplementary inventory for schools, with Procurement no.: 208 Leader-23-1024-1- 1-1 Internal number: 208 23 002111, we declare that the project manager will be Mr. Fitim Abdullahu, who graduated as a wood processing engineer.*

- The Diploma issued by the Agricultural University of Tirana has also been submitted, in which it is noted that Mr. Fitim Abdullahu began his studies in 2003 and completed them in 2009 at the Faculty of Forestry Sciences, in Wood Processing Engineering, in a timed form full. The copy of the diploma is notarized with number Lrp.1637/2020 dated 02.09.2020. Also attached is the decision dated 13.07.2010, of the Ministry of Education, Science and Technology, of the Republic of Kosovo, respectively of the National Commission for the recognition of diplomas, where it is noted that Mr. Fitim Abdullahu is recognized with the university degree Integrated Diploma of the second level in Wood Processing Engineering, obtained at the Agricultural University of Tirana.

- Meanwhile, in relation to request 2 of the technical and professional capacity, the Diploma issued by the University of Prishtina, Faculty of Machinery, has been submitted, in which it is noted that Mr. Avdi Fangu has completed his studies and received the title of Graduated

Mechanical Engineer. Along with the diploma, the certification of the notarized copy with number Lrp 3498/2023 was submitted.

Answer to the complaining claim 1

The reviewing expert first clarifies that the complaining EO mistakenly refers to the ED staff as the project manager, since according to the statement of the recommended EO, Mr. Fitim Abdullahu has been declared as the project manager in this activity. While in relation to completing the request for a diploma for the project manager, in accordance with the above clarifications, it is evident that the recommended EO has submitted the evidence in accordance with the request of the CA for the project manager. Also, the claim for request 2 (Mechanical Engineer) does not stand either, since the diploma was submitted together with the notarized copy for the mechanical engineer, Mr. Avdi Fangu. Therefore, according to the above clarifications, the recommended EO has submitted documentary evidence regarding the educational qualification in accordance with the requirements of the tender file, regarding the technical and professional capacity, and therefore the complaining claim is unfounded.

Complaining claim 2

- The complaining EO claims that the CA with the decision dated 25.09.2023 acted in violation of Article 61 of the LPP and Article 41 of the Regulation on Public Procurement (hereinafter RrPP) since the recommended EO offered at abnormally low prices.

Circumstances of the case - the following are the facts and procedural circumstances relevant to this appeal claim.

- According to the minutes of the opening of bids and the evaluation report, the following EOs submitted bids in this activity:

1. EO "Mobelland" SHPK, with a bid price of 164,105.00 euros.
2. EO N.T.SH. Dolphin; PRIME CORPORATION L.L.C.; Erzeni shpk: with an offer price of 214,400.00 euros.
3. EO NTP Blendi O.P.: with a bid price of 197,733.00 euros.
4. GOE WOOD CORPORATION L.L.C.; SEDEF AHSAP: with an offer price of 196,094.76 euros
5. EO "art & design" LLC: with a bid price of 326,213.00 euros.
6. EO "GRANITI SH.P.K.": with a bid price of 106,962.28 euros.

7. GOE "IBM LLC".; Majlinda Bajraktari B.I.: with an offer price of 176,424.00 euros.

- According to the notice on the decision of the CA published on 12.05.2023, EO Graniti Sh.p.k. has been recommended for remuneration with a contract.

- On the 17.05.2023, EO "Mobelland" Sh.p.k. (the complaining EO), as a party dissatisfied with the decision of the CA, submitted a request for reconsideration, which was rejected by the Decision of the CA dated 18.05.2023. The complaining EO dated 29.05.2023 filed a complaint with the PRB, with protocol number 312/23, against the decision of the CA regarding the procurement activity described above.
- The PRB Review Panel, through decision number: 312/23 dated 07.06.2023, approved the complaint of the complaining EO as well-founded and obliged the CA to re-evaluate the offers.
- CA dated 02.08.2023, requested additional clarifications from the EO recommended for the contract, seeking explanations regarding the abnormally low price.
- The complaining EO dated 03.08.2023 uploaded the clarification where it described the breakdown of the bid price for the 19 positions.
- On the 25.09.2023, the CA has published the notice on the decision of the CA where it has recommended EO Graniti Sh.p.k.
- Again, the complaining EO as a party dissatisfied with the decision of the CA submitted a request for reconsideration dated 01.10.2023, which was rejected by the Decision of the CA dated 03.10.2023. In the justification of the rejection of this claim, the CA specified: "[...] EO GRANITI SH.P.K, through the e-procurement platform, has sent a detailed explanation for each advance position clarifying each offer price and elaborated Price of Raw Material, Miscellaneous Factory Expenses, Factory Production Workers, Tax, Shipping (counting complete shipment) and profit. In the aforementioned clarification, the same has shown that the price he offered is the market price and the interest margin is 20% (so the profit according to this offer is 20%), stressing that they also signed the statement under oath CA- MASHTI, based on the reasoning of EO GRANITI SH.P.K.- Shirokë, I will apply Article 29.4 of the Public Procurement Regulation, requesting from the economic operator recommended for the award of the contract, a higher percentage of the insurance of the execution of the contract, as a guarantee for its fulfillment. It is worth noting that in this procedure of the procurement during the re-evaluation of the tender, we had only two responsive offers, since the other bidders did not extend the validity period of the tender's insurance tender.

Answer to the complaining claim 2

- The expert clarifies that in relation to the abnormally low prices found according to the criteria of Article 41.3 of the RrPP, CA has implemented the inter partes procedure with the recommended EO. Regarding the decision of the CA after receiving the clarifications (breakdown of prices), article 41.10 of the RrPP stipulates that the CA after receiving the clarifications from the EO regarding the abnormally low prices, if the clarification is sufficient, treats the tender the same as other tenders, while if the clarification is not enough, it rejects the tender. In this sense, it is at the discretion of the CA to decide based on the clarifications received and in this case the CA is convinced that according to the clarifications regarding the prices, it will treat the offer of the recommended EO as an offer with reliable prices. Moreover, the Expert clarifies that the complaining EO, apart from the assertions, has not submitted any supporting

evidence that can argue the complaining claim that the recommended EO's offer prices are not reliable. Therefore, the CA has acted in accordance with articles 1 and 6 of the LPP and article 41 of the RrPP, therefore the appeal claim at this point is unfounded.

- Findings of the Review Panel -

The review panel independently and objectively, conscientiously and professionally evaluated all the evidence of the case. In this way, it was found that in connection with the procurement activity "Supply and assembly of supplementary inventory for schools" with procurement number 208 Udhehekesi-23-1024-1-1-1, there was a decision issued by PRB with number 2023 /0312 dated 07.06.2023 The review panel assesses that some complaints presented by the complaining party are claims that have been reviewed by this review panel and for these claims the panel in decision 2023/0312.

Therefore, referring to article 104.1, of the LPP, according to which it is required that the review procedure be implemented in a fast, legal and effective manner and also analyzing in their entirety the documents of this subject in the context of this procurement process , the panel did not consider it necessary to elaborate again in detail and unnecessarily in this case each appeal claim, as long as they are specifically singled out especially in the contested decision of the contracting authority. Among other things, in the contested decision of the contracting authority.

The panel in support of the preliminary decision of the PRB and related to the complaining assertions regarding the engaged engineers, the review expert has presented them in his expertise quite well and in a professional manner, and the review panel supports this reasonableness, and it is unnecessary to elaborate again it qualifies each and every one as unfounded claims. Whereas, as regards the complaining assertion against the recommended that it has abnormally low prices, the review panel does not support the reviewing expert because he did not provide any arguments in this regard, despite the fact that the complainant specifically mentioned them in his complaint and response in the report of the expertise, the allusion to these prices as prices which cannot even be realized. The panel has singled out this issue and cited that this was dealt with by the aforementioned preliminary decision of the review panel, obliging the CA to request additional clarifications regarding the prices presented in the offer. And for the review panel, there is no way to treat it differently except as a judged issue, in accordance with article 105, paragraph 2.16 of the LPP, quote: "In repeated cases with the same complaints, when the object of the dispute and the parties are the same, for cases that have been reviewed before, the chairman of the review panel must treat as a case judged "res judicata". Therefore, based on the fact that, apart from the fact that the offer is apparently lower than other offers and the estimated value for this activity is €350,000.00, the CA must set this value in accordance with the provisions in force as with the LPP as well as with the Public Procurement Regulation, after a market research, and if it is compared with the price offered by EO recommended for the contract of 106,962.28, then it is lower by more than 300% than the estimated value for this procurement activity. Whereas, if it is compared to the average of the offers of the other 6 participating bidders, then the offer of the recommended EO for the contract is about 100% lower. Further, it is compared to the second most responsive offer (subsequent) at that time The recommended EO for the contract is about 34% lower.

Bearing in mind article 7 of the LPP that all EOs should be treated equally and based on article 61 of the LPP, as well as the example given for the classification of abnormally low tenders in article 11 of Guideline No. 001/2023 for Public Procurement, as well as Article 41 of Regulation No. 001/2022 on public procurement, and in particular paragraph 41.1, quote "The concept of an abnormally low tender refers to tenders that for the contracting authority at first glance appear to be unreliable if compared to the object of the contract and accordingly , and which is likely to have a negative impact on contract implementation performance.

Based on the aforementioned clarifications and in support of the legal provisions, the review panel also concludes that the offer of the recommended EO for the contract is an abnormally low offer and should be rejected as an irresponsible offer for this activity of procurement.

- conclusion -

Based on the above, the Review Panel considers that the CA did not act in harmony with the provisions of Article 24.2, 59, 60 and 61 of the LPP. 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 again because in the opposite will contradict the scope of the LPP and the argumentative basis of the appeal claims, which the Panel evaluates according to its independent assessment in the sense of Article 104 in relation to Article 105 of the LPP. The return of a procurement activity based on legal dispute in re-evaluation is in harmony with article 1, of the LPP, according to which, the purpose of this Law is, among others, quoted: "...to ensure the integrity and responsibility of officials public, civil servants and other persons who perform or are involved in a procurement activity, requesting 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 high degree of transparency and be in accordance with the procedural and essential requirements of this law".

Regarding Article 105, taking into account the requirement of Article 104, paragraph 1, of the cited Law according to which, quoted: "The procurement review procedure will be implemented and carried out in a fast, fair and non-discriminatory manner, which aims at the fair, legal and effective resolution of the matter..." Therefore, the Review Panel based its findings on the relevant provisions of the LPP, which foresee and regulate such situations, which may arise during a procurement activity .

Therefore, from the above, the review panel in accordance with article 117 of the LPP 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 – **MINISTRY OF EDUCATION;**

1x1 EO – **“Mobelland” SH.P.K.;**

1x1 Archive of the PRB;

1x1 For publication on the website of the PRB.