



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

Psh. No.563/23

Review Panel, appointed by the President of the Procurement Review Body (PRB), Pursuant to the article 105, article 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 Vjosa Gradinaj - President, Agon Ramadani - Referent and Vedat Poterqoi – member, deciding according to the complaint of the Economic operator (EO) “Ex Fis” SHPK, against the Decision related to the procurement activity: “SUPPLY OF FUEL FOR BOILERS - MAZUT (Fuel Oil 1.0%)” with procurement no: KEK-23-6766-1-1-1, initiated by KOSOVA ENERGY CORPORATION sh.a in its capacity as Contracting Authority (CA), on the 20/10/2023, has issued this:

DECISION

1. **Approved**, as partly grounded the complaint of the EO “Ex Fis” SHPK with no. 610/2023 submitted to the Procurement Review Body on the 10.08.2023 with protocol number 563/23 for the procurement activity with title: “SUPPLY OF FUEL FOR BOILERS - MAZUT (Fuel Oil 1.0%)” with procurement no: KEK-23-6766-1-1-1, initiated by KOSOVA ENERGY CORPORATION sh.a in its capacity as Contracting Authority (CA).
2. Cancelled the Notice on the Decision of the Contracting Authority dated 01.08.2023, related to the procurement activity with the data as in point 1 of the provision, while the procurement activity is returned to Revaluation.
3. Obligated the Contracting Authority - Municipality of Rahovec to implement this decision, as well as within ten (10) days after the acceptance of the decision, to send to PRB the notification regarding the actions taken for its implementation, all this under the warning that in case of non-implementation of this decision, PRB will take measures against the Contracting Authority in accordance with Article 131 of the LPP.
4. The return of the complaint’s fee in the deposited amount is allowed, so that the complaining economic operator is obliged to submit a request for the return of the appeal fee within the period of sixty (60) days after the acceptance of this decision in accordance with Article 31 paragraph 6

of the Work Regulations of PRB, under the warning that if the request is not submitted within the deadline, the deposit will be confiscated and all deposited funds will go to the budget of the Republic of Kosovo.

REASONING

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Kosova Energy Corporation sh.a, in the capacity of the Contracting Authority, dated 05.07.2023 submitted the Contract Notice - B05, for the procurement activity with title: "SUPPLY OF FUEL FOR BOILERS - MAZUT (Fuel Oil 1.0%)" with procurement no: KEK-23-6766-1-1-1.

On the 01.08.2023, the CA published B58-Notice on the Decision of the Contracting Authority with which decision it rewarded with contract economic operator "Patroni".

On the 04.08.2023, the complaining economic operator "Ex Fis" Sh.P.K. has submitted a request for reconsideration against the Notice on Decision B58 of the Contracting Authority. Consequently, on the 07.08.2023, the Contracting Authority made a decision through which it rejected as unfounded the request for reconsideration of the complaining economic operator.

The complaining economic operator dated 10.08.2023 against the decision of the Contracting Authority submitted to the PRB the complaint no. 2023/0563.

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 subsection 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 claims of the complaining economic operator are presented through the complaint as follows:

The first claim (I) - *"Remarks on the list of supplies made in recent years (2019, 2020, 2021): The contract presented between EO Patroni SOE, ETI shpk, EKO CLEAN shpk, Carbon Petrol and Oil Petrol start and end on the same dates, which in these cases for private operators is impossible and unreasonable and creates the suspicion of a fictitious document, add here the fact that the date 01.01. it is a holiday, that is, the first day of the year. Also, the duration of the contracts presented in this list does not coincide with the duration of the presented contracts. So the CA by not clarifying and verifying these contracts but taking them for granted has acted contrary to LPP article 72 and Regulation no. 01/2022 article 38 par. 38.3, 38.4 and 38.5".*

The second claim (II) - *"The evaluation report on page no. 11 shows that the suitability requirements as required in TDS article 6.4 points 2 and 3 have been met by the EO*

recommended for the contract dated 24.07.2023 and dated 25.07.2023, the date when PPO Ymer Dragusha signed and approved the evaluation report and the recommendation of the evaluation committee certifying that the EO recommended for the contract has fulfilled all the requirements of the TD. While based on the evidence submitted by KEC Sh.A. it appears that CA sent EO Patroni 01.08.2023 to submit these testimonies, while based on the originals of these documents it appears that these documents were issued on the 01.08.2023 and apparently they were submitted on this same date to the CA".

The third claim (III) - *"PPO has taken for granted the document of EO Patroni issued by the Commercial Court with no. GJA. no. 4574-23 dt. 01.08.2023, without analyzing and verifying whether the document meets the requirements of the TD defined in TDS article 6.4 point 3. If we analyze this document, it proves that the Commercial Court has issued guarantees only for paragraph 4 under paragraph 4.1 and 4.2 of article 65 and does not provide any evidence or guarantee for the requirements of paragraph 3 of article 65, as is also required in TDS article 6.4 point 3".*

Claim four (IV) - *"Through the TD it is required that the potential winner must have the technical capacity to supply 250 tons for 5 days, in emergency cases 500 tons." In the offer documents that EO Patroni does not appear any document with which EO proves its transport capacity".*

The fifth claim (V) - *"In annex 1 of the TD, it is requested that the EO, through a statement, declares about the country of origin of the fuel oil and the producer. While in the last paragraph of Annex 1 CA has specified that the tenderer must comply with all the specifications noted in this list. Any unmet requirement will eliminate the tender for the entire lot. Please check that your tender meets each of the technical specifications described above. Based on the access we have had to the documents of this tender as well as the offer of EO Patroni, we have not come across that EO has submitted this statement, or any other equivalent evidence that will fulfill this request of TD. While in our request for reconsideration through the decision dt. 04.08.2023 regarding this point, the CA replied that the EO proposed for the contract in its offer submitted a document with physico-chemical analysis in which the place and origin of the fuel-Mazut is understood. The document referred to by the CA does not meet the request of the CA because this document is a Quality Certificate issued by the laboratory MAKINSPECT doo in Skopje for the EO Patroni that proves only the methods used for the analysis of a quantity of 25,719 kg (or 26,930 liters) of fuel oil that EO Patroni bought and loaded at HELPE lonia, Thessaloniki. In this certificate, neither the seller nor the producer of fuel oil is mentioned. As such, this certificate does not even guarantee the quality of the goods offered by EO Patroni according to the requirements of TD annex 1, second table, because this certificate refers to a certain amount of purchased fuel oil (amount of 26,930 liras) that EO Patroni has purchase dt. 19.07.2023 and destined it to another place and not for KEC sha. When it is taken into account that the EO Patroni has not submitted the Declaration at all to prove the country of origin of the Fuel Oil and the producer or even any other equivalent evidence such as authorization or agreement with any producer that would fulfill the requirement of the declaration, it is completely clear that the recommended EO did not I can also present a valid certificate on the quality of the product*

which meets the technical requirements of annex 1. So this certificate cannot be taken as an equivalent document for the declaration on the country of origin of the fuel oil and the manufacturer, but it cannot be taken as a valid document to prove the characteristics of the goods according to annex 1 tab. 2".

The sixth claim (VI) - *"Based on the financial offer of EO Patroni, there is a very large difference in the premium price between our offer and the offer of the EO recommended for the contract. Based on the facts that we submitted in our offer, which proves that EX FIS is the only operator authorized by the OKTA Refinery in Skopje, we declare with full responsibility that the price offered in EO Patroni is abnormally low".*

Referring to the claims as above, the complaining economic operator considers that the Contracting Authority has acted in violation of Article 1, Article 7, Article 24 par. 2, article 56 par.1.1 and 1.2, article 59 par. 3 and 4, article 65 par 3.1 and 3.6 and par 4.1 to 4.11, article 69 par 2.1 as well as article 72 of the LPP.

Relying on article 111 paragraph 5 related to articles 113 and 114 of the LPP, the Review Panel in PRB dated 11.08.2023 has authorized the review expert to do the initial review of the dossier and the complaining claims of the complaining economic operator. On 18.08.2023, the Review Expert's Report was received where it was recommended that the complaint of the complaining EO be rejected and the decision of the CA remain in force.

- Administration and evaluation of evidence -

In order to fully prove the factual situation, the review panel administered as evidence the report of the review expert, the opinions of the parties regarding the report of the expert, the submissions and documents of the complaining economic operator, the statements of the parties and the expert in the main review, letters and documents of the contracting authority, the relevant documents related to the procurement activity as well as all the evidence that has been proposed by the procedural parties.

Regarding the first complaining claim (I) *in the review expert's report, it is defined as follows: "Based on the criteria of the tender file, the Contracting Authority did not specify how many contracts the bidding operators should have, but only that they should have completed projects within the last three years. The recommended economic operator Patroni ShPK has presented the list of contracts and signed contracts in the bid file. The list of contracts consists of a total of eight (8) contracts. As for the claim that the contracts have ended before their expiration date, we clarify that the contracts based on the LPP and RRPP end at the moment when the quantities of supplies are reached or the value of the contract is reached, regardless of the date until which the contracts have a deadline. The same applies to contracts related to the sector and from the private sector. Based on the request of the CA mentioned in the tender file, the list of contracts meets the required criteria, I am once again emphasizing request 1, namely the list of similar supplies (derivatives) of the economic operator carried out, specifying the products supplied, the amount of the contract, date and recipients. Based on this, the list of contracts contains precisely the type of supplies, the product of the supply, the amount of the contract, the date and the recipient. Therefore, I find that the appeal claim at this point is unfounded".*

Regarding the second claim (II) in the review expert's report, it is defined as follows: "As for doubts about the authenticity of documents, contracts, this is not within the powers of the review expert, but is the responsibility of the contracting authority".

Regarding the third claim (III) in the report of the review expert, it is defined as follows: "Certificate from the Court and tax certification are required only for the winning economic operator in the case of the announcement of the procurement result in cases where the issuance of documents and certificates that referred to above is impossible for objective reasons or when the documents do not cover all the cases for which the testimony was issued, an affidavit from the tenderer can be accepted as sufficient evidence, it must be taken into account that the economic operator in the offer has also submitted the statement under oath, regardless of this, the economic operator together with the offer submitted the tax certificate and the certificate from the court (issued by e-Kosova in the name of the owner according to the business certificate) as well as the declaration under oath in accordance with article 65 of the LPP. Based on the RRPP article 25 point 25.9, the deadline for submitting the mentioned documentation is not more than five (5) days from receiving the notice of the contracting authority for the intention of awarding the contract. According to the letter (e-mail) dated 01.08.2023, the contracting authority has requested the economic operator to bring the documents (tax certificate, court certificate and tender insurance) physically to the KEK offices. Based on the request of the CA, the recommended economic operator figures that he has brought the required documents to the CA within the legal deadlines set in accordance with the request. CA has made the publication of the announcement on the decision in accordance with the documents presented in the offer regarding the tax certification and the court certificate since the owner has proven that there is no criminal or civil offense against him. Also, during the request for the CA to bring the documents according to the request dated 01.08.2023, the same has also sent the court certificate in the name of the company, which proves that it does not have any legal prohibition against the company in question. Regarding the evaluation report approved by the ZPP, it can be considered a procedural error, but it does not contain a material change defined by article 59 par.4. Notwithstanding the foregoing, the contracting authority may consider a tender as responsive if: (i) it contains only errors or ambiguities which can be corrected without changing the material condition or aspect of the tender in question. Based on this, I consider the appeal claim to be partially founded. But we must emphasize that the recommended EO responded when the CA requested the document in question".

Regarding claim four (IV) of the complainant in the review expert's report, it is defined as follows: "The contracting authority in the tender file and in the technical specification did not require that the economic operators in the bidding prove the capacity of the machinery for carrying fuel oil, but also in relation to the CA's request, the recommended economic operator has submitted a written statement regarding the fulfillment of the conditions and requirements arising from annex no. 1 of the TD, as well as certified and signed the technical specification. Bearing this in mind, I consider that the economic operator at this point meets the criteria required in the tender file and the appeal claim is unfounded. As for the point of the claim that

the CA had to ask for clarification on this point, I find that this issue belongs to the contracting authority to decide for clarification or not regarding its requirements, but it is worth noting that the CA in the tender file does not he asked for the Machinery for the transportation of Fuel Oil".

Regarding the fifth claim (V) *in the review expert's report, it is defined as follows: "In the tender file in annex no. 1, the contracting authority has stated that the EO through a statement must declare regarding the country of origin of the fuel oil and The manufacturer. The recommended economic operator has submitted two (2) written statements. In these statements, the text does not show the origin of the supplied fuel oil, but in a certificate of quality document No. 219/2023/RE dated 19.07.2023 it is noted that the location (location) of loading is HELPE Thessaloniki and in principle it is also the place of origin or origin, also in this certificate the required product which is FUEL OIL as well as the place of destination Kosova is highlighted. It remains the responsibility of the contracting authority based on Article 59 of the LPP to evaluate, compare and examine the offers to decide on the acceptability or not of this document that has to do with fuel oil. The CA has assessed compliance with Article 59 and Article 7 of the LPP, taking into account that neither the complaining economic operator has submitted the statement about the origin of the fuel oil, while the recommended economic operator, as we highlighted above, has presented the quality certificate that also mentions the location. of Mazut. In the capacity of the reviewing expert, I consider this claim to be well-founded".*

Regarding the sixth claim (VI) *in the review expert's report, it is defined as follows: "In the tender file published in e-procurement by the CA, the contract notice as well as the Declaration of needs and the determination of the availability of budget planning funds is 4,200,000.00 euros. While the offer of the recommended economic operator is 4,699,058.45 euros, 367,322.20 euros lower than the second offer (of EO Ex Fis) and given the planning of the contracting authority, the offer of the recommended economic operator cannot be considered in this case as a price ab-normarily low and the appellant's claim to this effect is unfounded. Based on RRPP No. 001/2022 Article 41 point 41.3 under points (i), (ii) and (iii) it is mentioned: i.) the price offered is more than 30% lower than the average price of responsible tenders ; ii.) the price offered is more than 10% lower than the price or costs of the second lowest tender; iii.) at least 3 (three) tenders have been submitted. And based on this, in neither variant is it proven in any calculation that the offer is at an abnormally low price".*

On 04.10.2023, the main review session was held where the representatives of the procedural parties and the review expert were present.

The representative of the complaining party *during the main review has briefly stated that he stands behind the complaining claims, adding that he does not agree with the recommendations of the reviewing expert. Further during the session, he also added that "in the TDS Annex -1 CA requested that the EO through a statement should declare the country of origin of the fuel oil and the producer. The Certificate of Quality document as well as Annex 1 of the tender file sealed and signed by the recommended EO do not meet the requirements of the tender file to show and guarantee the quality that the goods offered meet the minimum requirements of this annex. Also, the Certificate of Quality document shows only the point where the load inspection was done, which is HELPE Ionia Thessaloniki, so we are quoting Location of loading / inspection (location*

of loading inspection) and not the country of origin and the fuel oil producer. That this certificate cannot be considered valid for this tender is proven by the fact that this certificate does not refer to the requirements of this annex and this tender, but refers to a certain amount of fuel oil (amount of 26,930 liras) purchased somewhere in a country not identified by EO Patroni on the 19.07.2023 and destined for another place not specified in this document. Therefore, in order to be a valid certificate to meet the technical requirements of fuel oil according to Annex-1 of the DT, the EO must bring a valid certificate from a certain manufacturer confirmed by an independent licensed laboratory, which certifies the manufacturer, the country of origin as well as the technical characteristics of the goods offered".

The representative of the contracting authority during the main review stated that he stands behind the announcement on the decision dated 01.08.2023 and requested that the complaint be rejected as unfounded. He further stated that "the EO proposed for the contract in its offer has also submitted a document with physical-chemical analysis in which the country and origin of the fuel-Mazut is understood" As for the statement required for the participating EO regarding the country of origin and the Producer, neither the Complaining EO has brought the same due to the importance of this activity, we as CA have taken for granted that both offers respecting Article 7 of LPP, and in this case the recommended EO has submitted sufficient evidence for us and also has a cheaper price than the complaining bidder, about 367, 322.20 euros.

The review expert during the main examination has declared that he stands behind the findings and recommendations recorded in the examining expert's report. However, he further added that "I wanted to clarify since we were released only on claim no. 5 that the EO mentioned which was based on expertise was a technical error. The complaining claim was that the country of origin of the fuel oil is not known, and I elaborated on that and reflected it in the expertise that the recommended EO has two statements, it has proof that it will fulfill the supply and during its analysis I found a certificate of analysis laboratory tests done at MAK inspect in Macedonia, which shows the location of the fuel oil that is in Thessaloniki with destination Kosova and contains test values according to the required technical specification, and this has made me understand that the country of origin is in Thessaloniki, Greece, but that no manufacturer's authorization was requested in the tender file". In the wake of this statement, the review panel has submitted to the review expert the following question "does he consider fulfilled the request established by the CA in annex 1 through which he asked the EO to submit a statement regarding the country of origin of the fuel oil and the producer "? The expert answers that "EO has submitted two statements, but the country of origin is not written in them, which was a complaint claim, whereas in the laboratory report, which is in compliance with the values required in the technical specification, it is stated that the tested fuel oil is from Thessaloniki and I understood that the place of origin is in Thessaloniki". Further, the review panel posed the following additional question: "Are you sure who the manufacturer is?" In this case, the expert answers that "no, I am not sure who the manufacturer is, no authorization was requested from the manufacturer".

In the following, the review panel also posed questions to the representative of the contracting authority formulated as follows "what is the country of origin and the manufacturer for the

recommended EO"? The CA representative responded as follows The complaining EO declares that OKTA is the manufacturer and at the same time declares that the OKTA company is mentioned in the document submitted by the EO recommended for the contract. The complaining EO declares that it has not submitted the declaration for the country of origin and the manufacturer, but has submitted an authorization issued by OKTA that if we rely on this authorization in the last paragraph, it is stated that the contract is not exclusively related to Okta and we do not carry out the transport at KEK we do not guarantee the quality and quantity delivered by EX FIS shpk. CA thinks that the supply should be made by OKTA as it is mentioned in the document submitted with physical and chemical analysis by EO recommended for the contract.

Findings of the Review Panel -

The review panel independently, objectively and with professional care has administered and evaluated all the evidence in the papers of this case and considers that the CA did not act in full harmony with the provision of Article 59 of the LPP, as long as it did not use or implemented in time and during the course of the activity his powers in view of paragraph 2, of the cited provision according to which The CA may, in writing, require a tenderer to provide a written clarification on any aspect of his tender, in order to examine, evaluate or compare the tenders. From the point of view of the Panel and in terms of the researches of the review expert, it can be concluded that, in fact, the additional information was necessary for the sake of the value of the tender, the importance and the purpose of the procurement to indisputably prove the facts regarding the manufacturer's statement and the origin of the article on the part of the economic operators, as they create an essential impact on this procurement activity to achieve the goal of meeting needs. And in addition to this, the Panel considers that in the re-evaluation process, the CA is required to verify the document presented by the recommended EO because it contains or does not contain clear data and/or information on the origin and producer of the fuel oil, always starting from the fact that it was not controversial for the parties in the procedure that both EOs participating in this activity (meaning: the recommended EO and the Complaining EO) did not present such a statement, while as such a criterion "contestable statement" was not established in within the qualifying criteria but it was requested in annex 1 of the TD.

In this case, the panel found that the lack of this statement in relation to its inherent effects were considered by the CA as a "minor deviation" in the sense of article 59.4 related to articles 8 and 9 of the LPP, however according to its independent judgment and in view of the provisions of article 1 and 6 of the LPP, the Panel assesses that in this case the CA is obliged to apply article 52 and 72 of the LPP to request additional information from the EO regarding the origin and fuel oil producer, since the article in this case expresses and defines the purpose of procurement and the use of public funds in this case. In fact, the Panel considers that the lack of accurate data regarding the cited documents, both of the complainant and of the recommended economic operator, undoubtedly puts each Panel in a dilemma as to whether the contested decision should remain in force, as long as all this information gap could be covered within an effective time.

It should also be added that when dealing with claim no. 6 through the analysis of the expert's report and the declaration of the representative of the contracting authority in the main review

session, the Review Panel has found that the estimated value for this procurement activity is 4,200,000.00 euros. Both economic operators that have bid in this procurement activity have substantially exceeded the estimated value. Therefore, in the case of the re-evaluation of the offers in this procurement activity, the CA must confirm whether the recommended economic operator really possesses the capacities to proceed further with the procurement activity due to the amounts offered by the respective tenderers, in the sense of Article 1 and 6 of the LPP. Through article 1 of the LPP it is determined that: *“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...”*. Through article 6 of the LPP it is determined that *"All contracting authorities are obliged to ensure that public funds and public resources are used in the most economical way, simultaneously taking into consideration the purpose and subject of the procurement"* while in relation to other claims the review panel supports the review expert's report.

Finally, the Review Panel, based on the above, emphasizes that the CA, in order to correctly and fairly validate the offers, must request additional clarifications from the bidders in terms of Article 72 of the LPP in relation to Article 38 paragraph 38.1 of the RRPP. Through Article 72 of the LPP it is determined that "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". While through article 38 paragraph 38.1 of the RRPP it is determined that "In order to facilitate the examination, evaluation and comparison of tenders, the CA may request from each tenderer individually for clarification of his/her tender. KRPP has approved a standard form B47 for clarifications to be used by CA "Request for clarification of the tender". Requests for clarification and answers are made through the electronic platform.

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.

For point I and II of the decision, it was decided based on article 117 of the LPP in relation to article 29 and paragraph 31 of the PRB Work Regulations. For point III of the decision, it was decided based on article 131 of the LPP in relation to article 29 paragraph 3 of the PRB Work Regulations. For point IV of the decision, it was decided based on article 31, paragraph 4 and paragraph 6 of the Rules of Procedure of the PRB in relation to article 118 of the LPP.

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 –**KOSOVA ENERGY CORPORATION sh.a.;**

1x1 EO – **“Ex Fis”;**

1x1 Archive of the PRB;

1x1 For publication on the website of the PRB.