



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

Psh. No.508/23

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) composed of: Vedat Poterqoi - President, Vjosa Gradinaj Mexhuani - Member, Agon Ramadani - member, deciding according to the complaint of the Economic Operator (EO) “Astraplan” SH.P.K., regarding with the procurement activity: “Construction of the facility of the Music School in Mitrovica - Co-financing with DEMOS” with procurement no:642-23-3698-5-1-1, initiated by the contracting authority (CA) – Municipality of Mitrovica, on the 25/10/2023, has issued this:

DECISION

1. **Approved**, as grounded the complaint of the “Astraplan” SH.P.K submitted to the Procurement Review Body on the 21.07.2023 (with protocol number 508/23) for the procurement activity with title: “Construction of the facility of the Music School in Mitrovica - Co-financing with DEMOS” with procurement no:642-23-3698-5-1-1, initiated by the contracting authority (CA) – Municipality of Mitrovica.
2. Cancel the notification for cancellation of the procurement activity and recommend that the case should return for re-evaluation.
3. It is allowed the return of the deposited amount when the complaint is submitted, and the complaining economic operator is obliged, in accordance with Article 31 point 6 of the PRB's Work Regulations, within a period of sixty (60) days to make a request for the return of the complaint insurance, 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 17.04.23, Mitrovica Municipal Assembly, in the capacity of the Contracting Authority, has published the contract notice for the procurement activity with title: “Construction of the facility of the Music School in Mitrovica - Co-financing with DEMOS” with procurement no:642-23-3698-5-1-1. Meanwhile, on the 04.07.2023, the notice on the CA's decision was published.

EO "Astraplan" SH.P.K on the 10.07.2023 has submitted a request for reconsideration to the CA. CA- Municipal Assembly of Mitrovica by decision has rejected the request for reconsideration of EO "Astraplan" SH.P.K. related to the procurement activity: “Construction of the facility of the Music School in Mitrovica - Co-financing with DEMOS” with procurement no:642-23-3698-5-1-1, initiated by the Contracting Authority.

In the decision, the CA requested that the notification on the decision for award of the CA, remain in force related to the procurement activity: Construction of the facility of the Music School in Mitrovica - Co-financing with DEMOS” with procurement no:642-23-3698-5-1-1.

Dissatisfied with the decision of the CA, the complaining EO "Astraplan" SH.P.K. on the 21.07.2023 submitted a complaint to PRB, with protocol number 508/23, 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: 550,000.00 €.

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 the sense of Article 113 of the cited Law, make the initial review of the dossier and the complaining claims, in relation to the procurement activity described above. In this regard, on the 03.08.2023, 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 "Astraplan" SH.P.K.

I. Approved, as grounded the complaint of the “Astraplan” SH.P.K submitted to the Procurement Review Body on the 21.07.2023 (with protocol number 508/23) for the procurement activity with title: “Construction of the facility of the Music School in Mitrovica -

Co-financing with DEMOS” with procurement no:642-23-3698-5-1-1, initiated by the contracting authority (CA) – Municipality of Mitrovica.

II. Cancel the notification for cancellation of the procurement activity and recommend that the case should return for re-evaluation.

RESPONSE TO THE COMPLAINING CLAIMS OF THE COMPLAINING EO

Introductory clarification: The contracting authority MUNICIPAL ASSEMBLY OF MITROVICA has initiated a procurement activity entitled: “Construction of the facility of the Music School in Mitrovica - Co-financing with DEMOS with no. of procurement: 642-23-3698-5-1-1/642/23/003/511, during this activity he implemented the procedure of open (new tender - the type of contract is work, large value, the criterion for awarding the contract is the responsible tender with the lowest price and the estimated value of the contract is 550,000.00 € and the two offers as the recommended EO for the contract and the complaining EO have exceeding the estimated value of the contract, but this remains at the responsibility and discretion of the CA to provide the means in question.

The main complaining claim is against the proposal on the Decision of the Contracting Authority, CA has recommended for contracts EO: "Termomontimi" Sh.P.K - Prishtine.

The review expert clarifies the complaining claim 1: After the administration and review of the case documents against the complaint claim, the economic operator "Astraplan SHPK" - Prishtina, as the complainant, claims that the CA has not implemented the LPP article 72 and the Guidelines for public procurement regarding TD where in Requirements of professional suitability, 7.1 & 7.2 Professional suitability: where requested in Request 1. Business Registration Certificate (ARBK) Request 2. VAT Registration Request 2, (3) The company must be certified with these standards

a)ISO9001 2015

b)ISO 45001 2018;

c) ISO 14001 - 2015,

d)ISO 3834 - 2 2006

Required documentary evidence: Evidence 2. Valid notarized certificates.

Based on Law No. 04/L-042 ON PUBLIC PROCUREMENT OF THE REPUBLIC OF KOSOVA, Amended and supplemented by Law No. 04/L-237, Law No. 05/L-068 and Law No. 05/L-092 conform, Article 72 Documentation and additional information, and based on GUIDELINES No. 001/2023 FOR PUBLIC PROCUREMENT paragraph 10. Clarification of tenders during the tender evaluation process of this guidelines clarifies:

The Problem	How to act?	Article of the LPP
Certificate missing ISO	Information may be requested	69

Based on the request for re-examination, which was made to the CA, the EN ISO 3834-2 certificate of EO U-Unique shpk, certificate no. FWM -23.04.255 is not notarized, while the request of CA Valid notarized certificates.

Based on LPP article 72 and Guidelines No. 001/2023 as well as the interpretation of PPRC in question no. 29 dated 22.06.2023, the review expert thinks that the complaining claim of the complaining EO is partially grounded.

The review expert clarifies the complaining claim 2: based on the claims of the complaining EO, in the list provided by the signed and sealed EO, he presented as a certified welder Mr. Arbër Morina, the contract with the leader of the Astraplan Shpk group, notarized in the position of Welder, occupational health and safety certificate, but the EN ISO 9606-1 certificate has not been presented, but the complaining EO in the request for reconsideration has also presented the EN ISO 9606- 1 for Mr. Arben Morina notarized with LRP- serial no. 15046/2022, and seeing that in the request for re-examination made to the CA dated: 10.07.2023 he provided the certificate according to the request of the TD and in accordance with article 72 paragraph 3 of the LPP; The provision of missing information or the provision of information will be applied only to documents whose existence is fixed, before the deadline for the submission of tenders, and can be verified objectively and Regulation No. 001. /2022 for Public Procurement as well as Article 38 Clarification of Tenders based on points: 38.1, 38.2, 38.3 and based on the above mentioned points and on the facts presented by the EO in the complaint made this complaining claim for the opinion of the expert is grounded.

The review expert clarifies complaint claim 3: after reviewing the complaint claim, the complaining EO presented Mr. Berat Domin, who graduated with the title: Professional Master in Energy Efficiency and has a Certificate, energy audit in buildings and public lighting, also has a cooperation agreement for this project between EO, U-Unique SH.P.K and Mr. Berat Domi, where in this agreement he has the position of Electrical Technician, the certificate for occupational safety and health, as well as the license of the company "NMA" Shpk, which has the right to exercise occupational safety and health from the Ministry of Health; which means that he managed to fulfill the requirement 3/evidence 3 in the Requirements on the technical and/or professional possibilities of the TDS, *clarification: based on article 5 point 4 of REGULATION (MEPTINIS) No. 05/2020 FOR THE SYSTEM OF ENERGY SERVICE PROVIDERS AND MINIMUM CRITERIA FOR ENERGY AUDIT, where it says: The Building Energy Auditor must meet the minimum requirements, as follows, to be certified: 4.1. Master's*

*degree (at least 300 ECTS points or equivalent according to previous education programs) in a construction discipline or in science/engineering such as: architecture, construction, mechanical and electrical engineering, which derives from Law No. 06/L-079 For energy efficiency], therefore CA - Evaluation Commission - PPO did not act in full compliance with Article 59 par. 4 of the LPP, where it says: *The contracting authority will consider a tender as responsible only if the tender in question is in compliance with all the requirements set forth in the contract notice and in the tender file*", as well as Article 7 par. 2 of the LPP, I am quoting: *"The contracting authority will not execute any aspect of the procurement activity in a way that reduces or eliminates competition between economic operators or that discriminates to the detriment or benefit of one or more operators economic\ because the complaining EO managed to fulfill this request of the TDS, therefore, in the opinion of the review expert, this claim is grounded.**

The review expert clarifies complaint claim 4: As for the technician under point j) One (1) worker for the installation of heating and cooling And we have presented 2 technicians ÇlirimTahiri heating technician and Valon Gjyrevci heating and air conditioning technician, and you say no it is according to the request of DT, we have no comment (if you are heated, does it mean that you are heated, the air conditioning means heating and cooling in itself) !!!!!!!!!!!!!!!

The examining expert clarifies the complaining claim 4: after examining the complaining claim, the complaining EO presented Mr. Valon Gjyrevci, who graduated from the high school "Shtefan Gjeçovi" in Pristina, in the field of Machinery, profile: Installer. heating, air conditioning, notarized at the notary with LRP-No. Ord. 4507/2023 dated 12.04.2023, as well as cooperation agreement with the member of GOE "U-Unique" Shpk, related to this procurement activity with title and number notarized with LRP. no. 6261/2023 dated 08.05.2023, which means that I managed to fulfill the request5/evidence5 in the Requests on the technical and/or professional opportunities of the TDS, CA - Evaluation Commission - PPO did not act in full compliance with the article 56 par. 3 of the LPP, where it says: *"The tenderer, during open procedures, or the candidate, during restricted procedures and competitive procedures with negotiations, shall not be disqualified or excluded from such procedures on the basis of any requirement or criterion that is not specified in the contract notice and in the tender dossier"*, therefore, in the opinion of the review expert, **this claim is grounded.**

The review expert clarifies the complaining claim 5: Request 7]. *c) Certificate of the protective and anti-scratch layer for the structural facade [the object is with a Structural Facade - quality and safety against scratches is needed].*

First of all, we inform you that the Fundermax facade is also a structural facade, all (95%) of the elements used in this facade are elements that were also used in glass facades, the structural facade is not only a glass facade that you have highlighted in your answer. Additional clarification: the CA did not require that they have a certain resistance with exact numbers, so every profile has a certain scratch resistance, as well as glass has its own resistance, anchors, connectors, etc., all of them these are elements of the facade and Termomontimi shpk has not attached any certificate or catalog for these, the CA is continuously making heavy discriminations during the assessment, this does not comply with the basic principles of the LPP that must be applied during the assessment.

The review expert clarifies the complaining claim 5: after reviewing the complaining claim, the complaining EO presented certificates from the FundermaxGmbH Manufacturer 9300 StVeit/Glan Austria, but the CA - the evaluation commission, did not clarify the statement of the evaluation commission, it says, I quote: " Certificate for structural facade is missing. Wrong certificates were submitted for a material that was not requested" also in the standard letter it is the same as the PPO in rejecting the request for reconsideration of the complaining EO, they did not explain and argue why these certificates are wrong and where they differ from EO recommended for awarding the contract, which is the material requested by CA, for which position of pre-measurement and pre-calculation the facade was requested - this certificate, so in other words CA - the evaluation commission and ZPP have not clarified or argued the elimination of the complaining EO without specifying why these certificates are not acceptable, but have only given a description that: *"the certificates are wrong for a material that was not requested" after specifying and arguing with concrete facts/evidence (based on pre-measurement and pre-calculation: "Supply, transport and work of the facade "DEMIT" d=10 cm with pressed Styrofoam N4 where as final work is "plastic facade", so it did not require "structural glass facade")* despite the fact that the complaining EO has brought the certificate for quality and safety against scratches - Declared Performance, the protective and anti-scratch layer (the manufacturer Fundermax GmbH is a world leader for structural facades), the EO recommended for awarding the contract has also brought certificates for aluminum, but not for structural facades, therefore I consider that CA - PPO did not act with article 59.2 and 72 of the LPP, as well as with article 7 par. 2 of the LPP, I am quoting: *The contracting authority will not execute any aspect of the procurement activity in a way that reduces or eliminates competition between economic operators or that discriminates to the detriment or benefit of one or more economic operators" as well as CA - Evaluation Commission- PPO, in this particular case, did not act in full compliance with Article 59 par. 4 of the LPP, where it says: "The contracting authority will consider a tender as responsible only if the tender in question is in compliance with all the requirements set forth in the contract notice and in the tender dossier", therefore in the opinion of to the review expert, this claim is grounded.*

The review expert clarifies the complaining claim 6: EO EBK SHPK NPN, UNIVERS-MI AND I&B-GROUP SHPK as well as EO Consortium • AdnanBislimi B.I.; N.N.SH. WORLD MEDIUM; N.N. Buy TERM; LIMITPROJECT SH.P.K. These two groups of EOs DO NOT FULFILL THE REQUIREMENTS OF THE TENDER DOSSIER AND THE CONTRACT NOTICE AND THEY ARE NOT RESPONSIVE.

The reviewing expert clarifies complaint claim 6: after reviewing the complaint claim, and assuming as a basis that these 2 (two) groups of economic operators have not continued with complaints to the PRB, i.e. they have agreed with the standard letters of elimination accepted by CA, as the complaining EO has not raised any claims against these EO groups, then they have not been addressed by the review expert.

The reviewing expert clarifies that based on the analysis of the facts/evidence documented in the e-procurement electronic platform, the flow and analysis of the procurement procedure, the CA - the evaluation commission, ZPP, has not respected article 7, 56, 59, and 72 of the LPP, therefore,

it is the responsibility and at the discretion of the Contracting Authority, respectively the evaluation commission - PPO, that the evaluation, examination and comparison process is done in full harmony with the legal provisions of the LPP, in this activity procurement, in order to respect the selection requirements, the technical specifications Annex 1 in the tender dossier as well as to respect the award criteria.

The review expert explains that the 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, as provided in Article 6 of the LPP, the contracting authority Article 1 of the LPP should also be taken into consideration, as it is known that the purpose of this law is to ensure the most efficient, transparent and fair way of using public funds and resources.

- Finding of the Review Panel -

The Review Panel concluded that there are no elements to prevent the conflict of interest, as required in the sense of Article 11 of the Regulation on the Work of PRB, therefore it analyzed all the documents of this subject, including all acts and actions of the parties and considered that there is no need to convene a public hearing with the parties because there is sufficient evidence to decide according to paragraph 1, article 24 of the cited Regulation. In this case, the panel took into consideration all the complaint statements, acts and actions of the CA and the expert's report.

In fact (of course, regardless of the recommendations) the Panel notes that the procurement procedure that was applied in this case is presented in detail in the review expert's expertise report, explaining all the stages of the process and the actions taken by the parties in the comparative context with the acts in force, especially with the Public Procurement Rules.

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 and in the review expert's report, explanations were given regarding the complaining statements. The panel notes that the reasons given in the expert's report are professional and well argued with material evidence, without the need to describe them again. Therefore, the Panel supports the explanations of the reviewing expert who explained in his expert report, as well as supports the expert's recommendation that the matter be re-evaluated and the evaluation of the offers be made in accordance with Article 59 and 72 of the LPP, and that clarifications be requested according to the expert.

- Conclusion -

Based on the above, the Review Panel considers that the CA has acted contrary to the provisions of Article 59, 60 and 72 of the LPP, cited in the Complaint. 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 a contested legal 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 public officials, 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, to 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 – **MUNICIPAL ASSEMBLY OF MITROVICA;**
1x1 EO – **Astraplan SH.P.K;**
1x1 Archive of the PRB;
1x1 For publication on the website of the PRB.