



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

Psh. No.383/23

REVIEW PANEL, appointed by the President Pursuant to the article 105 as well article 106, and 117 of the Law on Public Procurement of the Republic of Kosova no.04/L-042, amended and supplemented by Law No. 04/L-237, Law no.05/L-068, and Law no.05/L-092, composed of: Vedat Poterqoi – President, Vjosa Gradinaj Mexhuani - member, Agon Ramadani - member, deciding according to the complaint submitted by the EO “Ideal Shala B.I.”, against the decision for contract award regarding with the procurement activity “Supply Of Parts For Toyota Land Cruiser 150 Vehicles” with procurement number 214-23-1737-1-1-1, initiated by the contracting authority (CA) – Kosova Police, on the 03/08/2023 has issued this:

DECISION

1. Refused as ungrounded the complaint to the EO “Ideal Shala B.I.”, with no.383/2023 of the 12.06.2023, regarding with the procurement activity: “Supply Of Parts For Toyota Land Cruiser 150 Vehicles” with procurement number 214-23-1737-1-1-1, initiated by the contracting authority (CA) – Kosova Police, as a party without material legal interest, in accordance with article 4 paragraph 1.26 of the LPP.
2. Since the complaint of the complaining economic operator: Ideal Shala B.I., is rejected as unfounded, the deposit is confiscated according to Article 31.5 of the Rules of Procedure of the Procurement Review Body no. 83/20, and these funds go to the Budget of the Republic of Kosova.

REASONING

- Procedural facts and circumstances -

The Kosovo Police in the capacity of the Contracting Authority on 07.03.2023 has presented the Contract Notice - B05, for the procurement activity: “Supply Of Parts For Toyota Land Cruiser 150 Vehicles” with procurement number 214-23-1737-1-1-1.

On the 23.05.2023 CA has published B58 Notice on the decision of the Contracting Authority.

On the 29.05.2023 EO Ideal Shala B.I submitted a request for reconsideration to the CA - Kosova Police. Whereas on the 01.06.2023, the CA – Kosova Police rejected as unfounded the request for reconsideration of the complaining economic operator.

The complaining economic operator, dissatisfied with the Decision of the CA, dated 12.06.2023, filed a complaint at the PRB, with protocol number 383/23.

The Contracting Authority has implemented an open procedure, type of contract - supply, estimated value of the contract 170,000.00 €.

On the occasion of the preliminary examination, the Review Panel concluded that the appeal in the present case was exercised in accordance with Article 109.1 of the LPP, according to which against any decision taken by the CA, any interested party can submit an appeal to the PRB only after leading a preliminary procedure for resolving the dispute in accordance with Article 108/A of this law. Since the applicant has the status of the interested party in the sense of Article 4, paragraph 1.26, and the complaint also contains the essential elements provided for in Article 111 of the cited Law, it means that the complaint fulfills the conditions foreseen in terms of the provisions of cited and falls under his powers in terms of Article 105 of the LPP.

-Administration and evaluation of evidence –

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, will do the initial review of the dossier and complaining claims, in relation to the procurement activity described as above above. In this regard, on the 29.06.2023, the review expert submitted the evaluation report with the following recommendations:

- to reject the complaint of the complaining EO as unfounded,
- remain in force the decision of the CA.

The expert's report cited above has been accepted by all parties. The CA agrees with the expert's opinion, while the Economic Operator has not given an opinion about the expert's report.

RESPONSE TO THE COMPLAINING CLAIMS OF THE COMPLAINING EO

The Review Expert finds that the requirement of the tender dossier and contract notice is: *“The economic operator must provide evidence that he has successfully completed contracts of the same or similar nature for the last 3 (three) years (from the date of publication to the contract notice) in the value of at least 200,000.00 €”*,

As documentary evidence is requested: *“The Economic Operator must provide the list of contracts completed during the last three years (from the date of publication of this notice for contracts) signed and sealed by the EO, certified by references or acceptance sheets in copy signed and sealed by the relevant Authority, which must indicate the number of the procurement*

or contract, the value of the contract, the date of signing the contract, and the place of realization in a minimum value of 200,000.00 €”;

Note: “No contract will be considered if there is no attached positive reference for the performance of supplies or reports of receipts of supplies when the supply is made for a public or private authority in Kosova or in another country, for proof, receipts must be submitted or references (the value of the supplies should be mentioned in the references) issued by such authority”.

Regarding the reference provided by the EO recommended for the contract issued by "EULEX", the reviewing expert clarifies that in this reference it is emphasized that "EULEX" cooperates with the Autotrade company since 2008, but other data such as the date of issue reference, the amount of the contract and the type of contract have not been highlighted, also the EO recommended for the contract has offered 3 contracts with "Eulex" which are one year. The offered contract is dated 14.06.2019 and hold the amount of 250,000.00 Euro, the other contract is dated 25.06.2020 and holds the amount of 280,000.00 Euros and the other contract dated 01.06.2022 and holds the amount of 280,000.00 Euros.

The CA has asked the recommended EO for clarifications for the contract, where their answer was that: "... while the reference does not mention the amount as it is against the internal rules of privacy". The reviewing expert emphasizes that regardless of the rationale of the EO recommended for the contract, the CA in accordance with Article 72.3 of the LPP had to request clarifications from "Eulex" if they have concluded a contract of the nature of this procurement activity and to verify that what is the amount of the contract. Therefore, the claim of the complaining EO for the Eulex reference is partially grounded.

Response to "United Nations" reference

Regarding the United Nations reference, it is issued after the contract notice, and this contract has a contract number which does not belong to the contracts which are attached,

Regarding the reference provided by the EO recommended for the contract issued by the "UNITED NATIONS", the review expert clarifies that this reference was issued on the 22 of March 2023, but this date can be accepted because it is before the opening of bids , but in the reference it appears that the contract is from the period 2010 until now. Also, the contract number presented in the reference is not the same as the number presented in the contract.

Also, "UNMIK" presented the contract with EO "Auto trade sh.p.k", which is in the time period from October 14, 2018 to October 13, 2019.

the other contract is for the period from October 14, 2019 to October 13, 2020, and the next contract is from October 14, 2020 to October 13, 2021.

The Reviewing Expert points out that the Reference issued by the United Nations does not specify the amount required for the tender file. Also, the contracts of "UNMIK" are not all acceptable due to the fact that some are completed more than three years from the notification of the contract.

Therefore, the review expert estimates that the CA should, in accordance with article 59.2 and 72 of the LPP, seek clarifications from the institution that issued the reference and certify the amount of the contracts for a period of three years from the date of publication of the contract notice, with which this institution has signed the contracts which are attached to the offer of the recommended EO for the contract, therefore the claim of the complaining EO on this point is partially based.

Answer to the reference "Vitaminka"

Reference Vitaminka for which the complaining EO states that the date of the reference is after the date of the contract notice, and this contract has only services and no supplies, the reviewing expert points out that this reference, even though it is dated after the contract notice, is before the opening of the offers and this is acceptable because it can be verified as provided by the provision of article 72.3 of the LPP, while regarding this reference there are no supplies, the review expert clarifies that the request of the tender file is the same contract or similar, so since CA has used the conjunction OR then similar services are also acceptable. Consequently, the complaining claim at this point is unfounded.

Answer to the reference "Avis Budget" The reference "Avis Budget" where the complaining EO states that this reference is after the date of the contract notification, where according to the request of the CA it is invalid, this contract does not have supplies but maintenance, the reviewing expert clarifies that the reference was issued on dt. 07.04.2023 which is after the contract notice, but the reference is before the opening of the offers and can be objectively verified according to article 72.3 of the LPP, while in relation to the nature of the contract, the reviewing expert clarifies that the request for the tender file states that contracts of the same or similar nature, therefore due to the very fact that CA has also allowed similar contracts, the reference can be considered acceptable. Consequently, the complaining claim at this point is unfounded.

Answer to the reference "Hey Taxi Sh.p.k"

Reference "Hey Taxi Sh.p.k", the complaining EO states that it is after the contract notification and this contract does not have supplies but only services. The Reviewing Expert clarifies that this reference was issued on dt. 07.04.2023, which is after the date of the contract notification, but it is before the opening of offers and this can be verified in accordance with article 72.3 of the LPP. While in relation to the nature of the contract, the reviewing expert clarifies that the request of the tender file states that the contract is of the same or similar nature, therefore due to the very fact that the CA has also allowed similar contracts, also in the clarifications requested by the CA for the EO recommended for the contract, the same answers as follows: "... also with the contract we have, the supply of parts is done as needed and not only the regular servicing, but the supply as well as other repairs". Consequently, the complaining claim at this point is unfounded.

As for the category A price list, the CA has allocated 50% weighting, which means that these parts will be implemented 50% of this contract, where the recommended EO has offered a very high price compared to our price offer.

In relation to this complaint, the review expert explains that the CA has respected the provision of Article 61 of the LPP, and has asked for clarifications from the recommended EO for the contract where the same dated 11.05.2023 he replied to the CA, where he justified the prices, so the reviewing expert estimates that the claim of the complaining EO at this point is unfounded due to the fact that the CA was convinced by the answer given by the complaining EO. The claim of the complaining EO on this point is unfounded.

-The opinion of the review expert-

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.

The complaining economic operator in this case, in none of his complaining claims established in his complaint, does not defend his elimination from this procurement activity, but with his claims he only attacks the recommended EO, which also has the offer cheaper. Therefore, the review panel sees the economic operator complaining about this procurement activity as a party without a material legal interest, in accordance with Article 4, paragraph 1.26 of the LPP, which quotes: "Interested party - the person who can prove a material interest in the result of the procurement activity implemented by the contracting authority in relation to a particular public contract or design competition involving any person who has been or may be at risk of harm from an alleged violation".

Acting on the basis of the basic principles of procurement review procedures, which, among other things, are specifically sanctioned by the provision of Article 104 of the LPP and at the same time analyzing the documents of this case in relation to the facts and circumstances described as above and the course of the procedure. As can be understood from the content of the complaint, a priori the complaint claims do not consist of whether or not the economic interest of the Complainant was attacked. Therefore, the complainant cannot have the status of the interested party in the sense of paragraph 1.26, of Article 4 (Definitions), of the LPP, according to which the interested party is the person who can demonstrate a material interest in the result of the procurement activity. The review panel is forced to take into consideration the principle fact that the tender offered by the complaining EO according to the amount offered is ranked 2nd (second) in a row in the process of examination, evaluation and comparison of tenders, officially announced by CA through in the standard letter for the eliminated tenderer and by means of the complaining claims presented in his complaint, he only attacks the recommended one and does not argue that his offer is responsible.

In the context of the explanations as above, the Panel also implemented article 103 of the LPP, according to which, "The provisions of this part determine the fundamental and procedural rights

and legal remedies available to interested parties as this term is defined ("interested party") in Article 4 of this law". The meaning of this provision clearly proves the opinion of this Panel that legal remedies can be initiated only by the interested parties, referring in this case to the definition given in Article 4 of the LPP.

In relation to this PRB through the announcement published on its website has notified all parties how they can obtain the status of the interested party. It is emphasized in this notice that the PRB has the right to reject the appeal as unfounded and is obliged to confiscate the appeal fee if, point a, it is cited: "If the appellant does not present any facts or facts and evidence regarding the verification of the asserted facts that the assessment does not hold and/or is illegal, respectively the attacked act of the CA for its elimination and/or does not argue the basic fact/assertion that it is responsible for the procurement activity for which it complained.

Therefore, based on the understanding of Article 4 of the LPP, in relation to Article 103 and 111 of this Law, the Panel considers that its applicant cannot be considered an interested party and that there is no need to issue a merit assessment of the specific assertions of this Complaints, because they are irrelevant in the sense of Article 111 of the LPP. Meanwhile, the contracting authority bears full responsibility regarding compliance with the legal provisions for public procurement. This decision is supported by the review panel in article 31, paragraph 2 of the Rules of Procedure of the Procurement Review Body no. 83/20.

-Conclusion –

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, 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 without a contested legal re-evaluation basis is not in harmony with Article 1 of the LPP, according to which, the purpose of this Law is, among others, cited: "...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”.

The complaining economic operator in this case, in none of his complaining claims established in his complaint, does not defend his elimination from this procurement activity, but with his claims he only attacks the recommended EO, which also has the cheaper offer. Therefore, the review panel sees the economic operator complaining about this procurement activity as a party without material legal interest, in accordance with Article 4, paragraph 1.26 of the LPP.

The review panel in accordance with Article 117 of the LPP, as well as based on the evidence presented above 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 – Kosova Police;
- 1x1 EO – “Ideal Shala B.F”;
- 1x1 Archive of the PRB;
- 1x1 For publication on the website of the PRB.