



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

Psh. No.1027/23

The Review Panel, appointed by the President of PRB, based on Article 105, 106, and 117 of the Law on Public Procurement of the Republic of Kosova (Law no. 04/L-042, supplemented and amended by Law 04/L-237, Law 05/L-068, supplemented and Law 05/L-092) in the composition of: Isa Hasani - President, Vedat Poterqoi-Member and Vjosa Gradinaj-Mexhuani- Member, deciding according to the complaint of EO "Beni Dona Plast SH.P.K", against the Contract Notice or the tender documents regarding with the procurement activity “Food preparation and supply services for the needs of AKSP – Re-tender” with procurement number 214-23-13065-2-1-1, initiated by the contracting authority (CA) - Kosova Academy for Public Safety, on the 23.02.2024 has issued this:

DECISION

1. Approved, as partly grounded the complaint of “Beni Dona Plast SH.P.K with no. 2023/1027, dated 18/12/2023, regarding with the procurement activity “Food preparation and supply services for the needs of AKSP – Re-tender” with procurement number 214-23-13065-2-1-1, initiated by the contracting authority (CA) - Kosova Academy for Public Safety.
2. The CA is obliged, related to the procurement activity; 214-23-13065-2-1-1, to make corrections to the Tender dossier/Contract Notice B05, according to the assessment given in the Review Expert’s Report no. 2023/1027, dated 12.01.2024, supported by the Review Panel, in justification of the decision and to extend the deadline for bidding according to the law.
3. Within 10 days, the CA must inform the PRB about all the actions undertaken in relation to this procurement activity, otherwise, for non-compliance with the decision, the PRB can take measures against the CA as provided by the provisions of the article 131 of the Law on Public Procurement of Kosova.
4. Since the complaint of the complaining EO is approved as grounded, the complaint fee is returned to the amount deposited when the complaint was submitted. The complaining EO is obliged to, in accordance with Article 31 point 6 of the Rules of Procedure of the PRB, within a period of sixty (60) days, make a request for the return of the insurance of the complaint, otherwise the deposit will be confiscated, and these funds will go to the Budget of the Republic of Kosova.

REASONING

- Procedural facts and circumstances –

On the 23.11.2023, the Kosova Academy of Public Safety, in the capacity of the Contracting Authority, has published the Contract Notice B05 related to the procurement activity with "Food preparation and supply services for the needs of AKSP - Retender", with procurement number 214-23-13065-2-1-1.

On the 07.12.2023 EO "Beni Dona Plast" SH.P.K submitted a request for reconsideration against the aforementioned decision of CA. On the 08.12.2023, the Contracting Authority rejected the request for reconsideration as unfounded.

On the date: 18.12.2023, EO "Beni Dona Plast SH.P.K." - Prishtina, submitted a complaint with no: 2023/1027, related to the procurement activity: "Food preparation and supply services for the needs of AKSP - Retender" with no. of procurement: "214-23-13065-2-1-1"

-On the stage of preliminary review-

Review Panel found that both complaints contain all the elements defined through Article 111 of the LPP and as such were submitted within the legal term in accordance with Article 109 paragraph 1 of the LPP after the preliminary procedure for resolution of disputes in the sense of Article 108/A of the LPP, from economic operators who are interested parties according to Article 4 paragraph 1 sub-paragraph 26 of the LPP. In this way, the Review Panel has concluded that it is competent to review these complaints according to Article 105 of the LPP and there is no procedural obstacle to proceed with reviewing the complaints in a meritorious manner.

The CA's response to the Request for reconsideration of the EO "Beni Dona Plast".

The answer to claim 1: As for this claim that the company Beni Dona shpk mentioned, it does not stand for the fact that we answered you on 7.12.2023 and at the same time an unfounded claim that your company made about the CA is claim that contains false or misleading information.

Response to claim 2: Violation of Article 7, Equality in Treatment / Non-Discrimination. The contracting authority in the case of the announcement of the Contract Notice and the tender file that according to the Complainant company has set discriminatory criteria, this does not stand as the Producer Authorization is the right of the CA to request the criteria, this is allowed by Article 51 of the LPP based on the above mentioned, we think that the criteria have been requested in accordance with the law and the regulation and a request for a manufacturer's authorization is not a restriction of competition since there are authorizations for ready-made food manufacturers in the region but everywhere in Europe. The tender file criterion is a professional criterion to exercise the professional activity for the provision of services of the nature of the tender as requested by the CA. Other authorities, such as the Kosovo Police, the Municipality of Pristina, have requested the authorization of the manufacturer, which is the exclusive right of the CA based on Article 51 of the LPP. As for the procedure - the Negotiated Procedure without the Publication of the Contract Notice, this procedure is allowed by Article 35 of the LPP since you,

as the EO, have deliberately made requests for reconsideration and complaints only by neglecting the project, you have signed the procedure without publication you too in the Kosova Police but also in the FSK.

The claims of the complaining economic operator "Beni Dona Plast" are presented as follows:

The first claim (I): In the Tender File of Tender Data Sheets (FDT), of article 7.1 & 7.2 - Professional suitability requirements - and of the Contract Notice, article III.2.2) - Professional suitability, CA has required: 8. Authorization from the manufacturer or authorized dealer for the sale of packaged food with no. 3,4,5,6. Required documentary evidence: 8. Authorization from the manufacturer for the sale or authorized dealer for the sale of packaged food with no. 3,4,5,6., (original or notarized copy). Request for Authorization from the manufacturer or Dealer authorized for sale for packaged food with no. 3,4,5,6, is discriminatory and in complete contradiction with Article 7 of the LPP - Equality in Treatment/Non-Discrimination, Article 51 of the LPP - Notification of Selection Criteria and Article 25 of Regulation 01/2022 - Selection criteria. This request is discriminatory due to the fact that it is not directly relevant and proportional in relation to the subject - the procurement activity which the CA is developing. The CA has decided this request to favor the EO preferred by the CA, which it has rewarded with contracts for over ten years in a row. The CA that one year intentionally fails the procurement activity and then develops another procurement activity using the Negotiated Procedure without the Publication of the Contract Notice and in complete violation of the public procurement legislation, invites only the preferred EO for negotiations and continues the contract at prices over 30% higher than other bidders who have bid in the procurement activity that CA has deliberately failed. As a company, we have offered in hundreds of procurement activities of the same nature as the activity that the CA - Kosovo Academy for Public Safety is developing, but never for over 20 years has it happened that any of the CA in Kosovo has requested Authorization from the manufacturer or authorized dealer for food items. So far, not even the CA - the Kosovo Academy for Public Safety has had such a discriminatory request. But as it seems there is no possibility that through an open and non-discriminatory procedure I will reward him with preferred EO contracts at much higher prices than the market, he has decided in the Description of Articles, four articles which have never been traded on the market of Kosova and which are not produced and sold even in the Balkan region and with more difficulty are found in the European market, and precisely for these four items he requested Authorization for their sale.

The second claim (II): CA - Kosovo Academy for Public Safety, Tender File - Annex no. 1- Mandatory Technical Specifications and Price Description - The Specification for Preparation Services and food supply for the needs of AKSP, has been drafted in complete violation of the LPP - Article 27 of the LPP - Tender File, Article 28 of the LPP - Technical Specifications, Article 17 of Regulation 01/2022 - Tender File and Article 19 of Regulation 01/2022 - Technical Specifications. Why do we consider it this way: Part A - Breakfast - for all items from no. 1 to no. 21, CA has requested the amount of 12145 pieces. For article no. 1 - Bread 150 gr. CA has requested the quantity of only 12145 pieces, and on the other hand, for all other items that make up at least 10 types of breakfast rations (menus), for each one of them, it has requested the quantity of 12145 pieces. According to what the CA noted, it turns out that each person for each

breakfast ration consumes all 21 items that are listed in Annex 1 of the DT and the Price Description, which is not true.

Part B - Lunch - for all items from no. 1 to no. 26, CA has requested the quantity of 16890 pieces. For article no. 1 - Bread 200 gr, which is consumed with each ration of lunch AK, requested the amount of only 16890 pieces. For item no. 2 - Soup 200 gr, which is consumed with every lunch ration, AK requested the quantity of only 16890 pieces. For item no. 3 - Salad 200 gr, which is consumed with every lunch ration, AK has requested the quantity of only 16890 pieces. For item no. 4 - Desert 80 gr, which is consumed with every ration of lunch AK, requested the amount of only 16890 pieces, For the article with no. 5 - Peme, which is consumed with every ration of lunch AK, has requested the amount of only 16890 pieces, For article no. 6 - Carbonated drinks 330.ml that is consumed with each lunch ration, AK has requested the quantity of only 16890 pieces. Also for all other items that make up 20 types of lunch rations (menus), for each one of them, it has requested the amount of 16890 pieces. According to what the CA has requested, it turns out that each person for each lunch ration consumes all 26 items that are.

Part B - Lunch - for all items from no. 1 to no. 26, CA has requested the quantity of 16890 pieces. For article no. 1 - Bread 200 gr, which is consumed with each ration of lunch AK, requested the amount of only 16890 pieces. For item no. 2 - Soup 200 gr, which is consumed with every lunch ration, AK requested the quantity of only 16890 pieces. For item no. 3 - Salad 200 gr, which is consumed with every lunch ration, AK has requested the quantity of only 16890 pieces. For item no. 4 - Desert 80 gr, which is consumed with every ration of lunch AK, requested the amount of only 16890 pieces, For the article with no. 5 - Peme, which is consumed with every ration of lunch AK, has requested the amount of only 16890 pieces, For article no. 6 - Carbonated drinks 330.ml that is consumed with each lunch ration, AK has requested the quantity of only 16890 pieces. Also for all other items that make up 20 types of lunch rations (menus), for each one of them, it has requested the amount of 16890 pieces. According to what the CA has requested, it turns out that each person for each lunch ration consumes all 26 items that are listed in Annex 1 of the TD and the Price Description, which is not actually consumed.

These six items are consumed in each lunch ration, while the other 20 items are consumed according to the menus that the CA requires during the execution of the contract, usually only three to five of them are consumed in a day. Only these six items, not including the menu - the main meal, have a cost of €5.10. When you add the price of the menu - the main meal that EO has offered, on average €2.60, the total cost of a lunch portion is €7.60. Such a high and manipulative price of the lunch menu has not been contracted by any of the Contracting Authorities in the Republic of Kosovo. This way of price manipulation has been made possible by the CA - Kosovo Academy for Public Safety, by drawing up the Description of Articles - Price List with the same quantities for all articles as in the current case in the activity it is developing now. CA has requested the same amount of 16,890 pieces for the six items separately that are consumed for each lunch ration and on the other hand, it requests the same amount of 16,890 for each main menu item that a maximum of only three to five of them are consumed as rations. lunch in one day. Part C- Dinner - for all items from no. 1 to no. 20, CA has requested

the quantity of 12145 pieces. For article no. 1 - Bread 200 gr, which is consumed with each ration of the AK dinner, has requested the amount of only 12145 pieces. For item no. 2 - Salad 200 gr, which is consumed with every dinner ration, AK has requested the quantity of only 12145 pieces. For item no. 3 - Fruit juice 250 ml, which is consumed with each dinner ration AK, requested the amount of only 12145 pieces, Also, for all other items that make up 17 types of rations (menus), for dinner, for each one of them, he requested the amount of 12145 pieces. According to what the CA requested, it turns out that each person for each dinner ration consumes all 20 items that are listed in Annex 1 of the DT and the Price Description, which is not really consumed. These three items are consumed in each portion of the dinner, while the other 17 items are consumed according to the menus that the CA requires during the execution of the contract, which usually can be only three to five of them in one dinner. Only these three items, not including the menu - the main meal, have a cost of 2.80 €. When this is added to the price of the menu - the main meal that EO has offered, on average 2.70 €, it turns out that a dinner portion has a total cost of 5.50 €.

The request of these four items of packaged foods (3,4,5,6) that CA has noted in Annex No. 1 of the Tender Dossier and List of Items - Price Description is made only for you without enabling EOs to bid in this procurement activity. It is very clear that the technical specifications of the CA have been adapted by only one manufacturer who has never until now sold these four products on the Kosovo market, which are not even produced and sold in the Balkan region, and with more difficulty are found in the European market and precisely for these four items he requested Authorization for their sale. Due to the small amount of these items, and the adaptation of the technical specifications for a certain manufacturer, European companies are reluctant to authorize companies in the Kosovo market and produce these items with the specifications requested by the CA.

Based on all that I mentioned above, we ask the PRB Review Panel to consider our Complaint as well-founded and with the aim of eliminating all the omissions, discrimination and speculations that the Contracting Authority made during the drafting of the Dossier Tender, Description of Prices - Articles and Notice for Contracts and with the aim of giving the opportunity to as many EOs as possible to bid in this procurement activity.

- Administration and evaluation of evidence -

In order to fully prove the factual situation, the review expert's report, the opinions of the parties regarding the expert's report, the complainant's submissions and documents, the contracting authority's letters and documents, the relevant documents related to the procurement activity and all the evidence that has been proposed by the procedural parties.

Relying on article 111 paragraph 5 related to articles 113 and 114 of the LPP, the Review Panel dated 03.01.2024 has authorized the expert to conduct the initial review of the file and claims according to complaint no. 1027/23, while on 12.01.2024 the expert's report with no. 1027/23 with the following recommendations: Based on the above-mentioned clarifications, the review expert proposes to the review panel that the complaint of the complaining EO be approved, as partially based.

Assessments to the reviewing expert through Report no. 1027/23, of the complaining claims to EO "Beni Dona Plast", as follows:

Claim no. 1 The first claim of the complainant is against the CA's request for authorization from the manufacturer or dealer, for packaged food items 3, 4, 5 and 6. The complaining EO claims that this request for authorization in combination with the composition-technical specifications for these items, it has been decided to prevent EOs from participating in this procurement activity. The opinion of the examining expert is that the request for authorization in itself is not illegal or favorable since such a request is very common in all types of procurement whenever we are dealing with the provision of products manufactured by a third party (not from the bidding EO), including procurements for food (as the CA emphasized in the decision on the request for reconsideration), therefore we assess that the request is relevant and proportional to the procurement activity in question. In addition, according to the tender dossier, the authorization, in addition to the manufacturer, can also be provided by the authorized dealer, which made it even easier for the economic operators to meet the request of the CA.

Based on what was mentioned above, we estimate that the appellant's claim at this point is unfounded, while regarding the claims that this is related to the technical specification for the items mentioned above, we will give an answer below.

Claim no. 2 The other claim of the appellant is that for packaged food items 3, 4, 5 and 6 CA has set discriminatory technical specifications, since according to the complaining EO there is only one specific producer that offers these products with this technical composition/specification. While the other producers according to the complaining EO, due to the limited quantity required, do not accept to produce the product at all. However, when submitting the complaint to the PRB, the complaining EO did not provide any evidence from the market research that would support the claims of the complaining EO. Regarding this complaining claim, the review expert's opinion is that the contracting authorities are the ones who identify their own needs. and in accordance with them place the requirements in the tender file. However, after analyzing the tender file and technical specifications, we estimate that there is room to make some corrections to the file which would create opportunities for wider participation of economic operators. For packaged food items 3, 4, 5 and 6, the contracting authority, in addition to (rightly) setting the food content for these products, CA also set the exact amount/percentage (without tolerances) for some ingredients. especially the amount/percentage of meat and animal derivatives for items such as:

Pasta - turkey liver (20%), chicken meat (20%),

Goulash - Pieces of meat (33%)

Chicken - Chicken pieces (33%), mushrooms (6%)

Since meat and animal derivatives, both in terms of nutritional value and value (price), are the main ingredients that also dictate the final price of the product, the review expert's opinion is that for these positions, the amount/percentage of meat and animal derivatives be set as a minimum threshold, not as a fixed amount/percentage. The same can be done for other ingredients required with fixed quantities/percentages such as mushrooms or onions.

Example of how the correction can be made:

Pasta - Turkey liver (minimum 20%), chicken meat (minimum 20%),

Goulash - Pieces of meat (minimum 33%)

Chicken - Chicken pieces (minimum 33%), mushrooms (minimum 6%).

In this way, we think that there would be a greater opportunity for the participation of EOs, without damaging or reducing the quality of the products/foods requested. Based on all that was mentioned above, we estimate that the complaining claims at this point are only partially based, and we propose to make the corrections described above, but not to completely remove the mentioned products from the file as requested by the complaining EO.

Claim no. 3 The other claim of the appellant according to complaint 1027/23 is that the CA has set manipulative pre-measures/amounts for some positions. After analyzing the complaint claims and pre-measurement of the tender file, we clarify that in this particular case we are dealing with a framework contract, and the CAs are obliged to realize at least 70% but not more than 130% of each position/quantity except except provided in the tender file. Since the foreseen quantities and the (legally allowed) deviation from these quantities by +/- 30% apply to all EOs equally, we do not see how the requirements/quantities determined by the CA can favor or discriminate against any particular EO . Identifying the needs and determining the quantities/requests in the tender file and planning the budget (estimated value) in proportion to those requirements is the responsibility of the CA, and it is also the responsibility of the CA to implement the contract in accordance with the conditions/requirements of the file, the value provided by the CA and the prices offered by the economic operator, and we cannot assume that the execution of the contract will be contrary to the conditions and value provided in the tender file and the prices offered by the potential EO contract winner. We consider that from the position of PRB review expert we do not even have the logistical capacity (information on the exact needs of the CA), and in reality we do not even have the authorization/competence to dictate the quantities to the contracting authority, and we consider that such a thing remains in full responsibility of the Contracting Authority.

The expertise's report has been duly accepted by all procedural parties. The CA agrees on the recommendations of the review expert's report. While EO does not agree about the recommendations of the review expert.

- Findings of the Review Panel -

Based on the papers of this case, the Panel considers that regarding the matter in the present case, there is no need to convene a hearing with the parties, in the sense of Article 24 paragraph 1 of the Rules of Procedure of the PRB, taking into account the fact that the claims of the parties and their submissions, evidence as well as the review expert's report provide sufficient data to decide on the merits.

The review panel assesses that the Report of the review expert, drawn up at the request of the Panel regarding the dispute in this matter of the public procurement activity, contains the

essential elements of such a document as provided by the provision of article 113 in relation to article 114 of the LPP, according to who is required by the expert to review all procurement documentation, including all appeal claims and provide the Panel and all disputing parties with an independent and professional assessment of the procurement activity and the validity of the complaining claims.

However, it should be emphasized the legal fact that the expert's report is not binding on the Review Panel and that each such report is evaluated and/or analyzed in the general context of the case documents, asserted facts and other eventual evidence, taking into account the nature of eventual violations, the flow, nature and purpose of the procurement activity, therefore the fact that in which cases and for what, the Panel relies or not, the expert's report and/or any of the recommendations, belongs to its independent and professional judgment/ thanks, just as these responsibilities are addressed in terms of article 98, 99 related to article 105 of the Public Procurement Law.

The review panel assesses that the report of the review expert has handled the claims of the complaining Economic Operator in a professional and objective manner, the report is based entirely on the relevant documents that refer to the procurement activity and the findings in the report of the expert can be confirmed through the tender dossier. The Review Panel regarding the claims of the complaining economic operator has given full confidence to the expert's report, according to which the complaining claims of the complaining Economic Operator have been evaluated as partially founded.

The review panel supports the evaluation of the review expert regarding complaint claim 2, so that the Kosova Academy for Public Safety, in the capacity of the contracting authority, is obliged to improve the Tender Dossier, with the evaluations given according to the report of the review expert as follows:

Since meat and animal derivatives, both in terms of nutritional value and value (price), are the main ingredients that also dictate the final price of the product, the review expert's opinion is that for these positions, the amount/percentage of meat and animal derivatives be set as a minimum threshold, not as a fixed amount/percentage. The same can be done for other ingredients required with fixed quantities/percentages such as mushrooms or onions.

Example of how the correction can be made:

Pasta - Turkey liver (minimum 20%), chicken meat (minimum 20%),

Goulash - Pieces of meat (minimum 33%)

Chicken - Pieces of chicken meat (minimum 33%), mushrooms (minimum 6%).

The review panel finds that the improvement of the Tender Dossier would offer greater opportunities for the participation of EOs in the procurement activity, without damaging or reducing the quality of the requested products/foods. PSH considers that all CAs should be extra careful so that the selection criteria will not be unfairly strict leading to discrimination and limiting competition, as well as to ensure as much competition as possible. without risking the

contracting of unprofessional companies as well as with the understandable purpose of filtering and excluding unstable companies that cannot implement the specific contract, so the selection criteria must fulfill its objective and practically filter out unstable companies, in relative to the volume and complexity of the work foreseen in the activity, but not to the extent that the established criteria lead to discrimination and instability and opposition to legal provisions.

The review panel finds that the return of a procurement activity for the improvement of the Tender Dossier, with facts and evidence and/or legal basis, is 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 public officials, civil servants and other persons who perform or are involved in a procurement activity by requiring that the decisions of such individuals and the legal and factual basis for such decisions, not to be influenced by personal interests, to be characterized by non-discrimination and a high degree of transparency, and to be in accordance with the procedural and essential requirements of this law". However, for each request placed by the CA in the Tender File, based on Article 24, paragraph 2 of the LPP, the Contracting Authority is responsible for ensuring that all procurement activities of such Contracting Authority are executed in compliance complete with this law. Likewise, according to article 51, paragraph 3 of the LPP, CA, all selection criteria as well as the required documents and information that have been established and described in this article, must be directly relevant and proportional in relation to the subject of the respective contract.

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. Therefore, the Review Panel based its findings on the relevant provisions of the LPP, which foresee and regulate such situations, which may appear during a procurement activity.

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

President of the Review Panel

Mr. Isa Hasani

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 ACADEMY FOR PUBLIC SAFETY;**

1x1 EO – **Beni Dona Plast SH.P.K.;**

1x1 Archive of the PRB;

1x1 For publication on the website of the PRB.