



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

Psh. No.11/24

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, deciding according to the complaint of (EO) “Petrol Company - SH.P.K” against the Decision to contract award or a design competition of the “Supply of diesel and gasoline" with procurement number 12997 12998-23-13076-1-1-1, initiated by the contracting authority (CA) - Trepça SH.A, on the 01/03/2024 has issued this:

DECISION

1. Refused, as ungrounded the complaint of EO “Petrol Company - SH.P.K” with no. 2024/11, dated 05.01.2024, while the decision of the CA “Supply of diesel and gasoline" with procurement number 12997 12998-23-13076-1-1-1, initiated by the contracting authority (CA) - Trepça SH.A.
2. Remains in force the Notice on the Decision of the Contracting Authority -Trepça SH.A related to the procurement activity with the data as in point I of the provision.
3. The confiscation of the appeal fee is ordered in the amount deposited by the complaining economic operator based on Article 31 par. 5 of the Rules of Procedure of the PRB, while the funds go to the budget of the Republic of Kosova.

REASONING

- Procedural facts and circumstances -

On the 21.11.2023 Trepça SH.A. in the capacity of the Contracting Authority has published the Contract Notice B05 related to the procurement activity with title “Diesel and Gasoline Supply” with procurement no:12997 12998-23-13076-1-1-1. While on the 21.12.2023 CA published B58 Notice on the decision of the Contracting Authority where it awarded contracts to “Delta Group-Sh.P.K.”.

This procurement activity was carried out through an open procedure with the type of supply contract and estimated contract value: 158,000.00 €.

On the 26.12.2023, EO "Petrol Company - SH.P.K." submitted a request for reconsideration against the aforementioned decision of the CA. On the 28.12.2024, the Contracting Authority rejected the request for reconsideration as ungrounded.

On the 05.01.2024, PRB received the complaint from EO "Petrol Company - SH.P.K." with no. 0011/2024 related to the activity "Diesel and gasoline supply" with no. of procurement: 12997 12998-23-13076-1-1-1.

-On the stage of preliminary review-

The Review Panel has concluded that the complaint contains all the elements defined through Article 111 of the LPP and as such was submitted within the legal term in accordance with Article 109 paragraph 1 of the LPP after the preliminary procedure for resolving disputes in the sense of Article 108/A of the LPP, from the economic operator who is an interested party 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 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.

Claims of the complaining economic operator “Petrol Company - SH.P.K” are presented as follows:

The first claim: "We consider that Trepça SH.A has violated Article 7 (discrimination) of the LPP because it has discriminated against our Company by proposing a reward for an EO Contract which does NOT meet the conditions set out in the Tender File because in the TDS Article 9.1 and 9.2 for Requests on technical and/or professional opportunities, the EO has been requested to submit the retail license for the gas stations where the EO offers fuel supplies that it owns or leases VALID. In the request for clarification, EO has informed you that the point of sale for the region of Pristina is in Gadime te Poshtme-Llugagji and for this point EO has not presented a license at the time of submission of the offer and therefore we have been discriminated by you because the submitted offers on the part of EO, it has not been assessed in accordance with the requirements set out in the Tender dossier and in accordance with the provisions of the LPP and the Procurement Regulation. In the decision to reject the request for reconsideration, the CA stated that they make supplies for vehicles at their pumps in Stanterg and

Kishnic, where this reasoning is not true because we have a contract of several years with Trepça Sh. And all diesel vehicles are supplied at the EO points and in the Decision on the request for reconsideration, Trepça has mentioned that the retail supply points are used for Gasoline, but the EO point awarded with a contract for the Prishtina region is not licensed and no license has been received from CA for this point, therefore we think that CA has committed a violation because it will be supplied with derivatives at a point that is not licensed by the Ministry of Trade. In this case, Trepça SH.A has also violated the principle of transparency and Article 27 of the LPP (Tender Dossier). It should also be noted that the supply point for the Prishtina Region is 24 km from Pristina in one direction and in both directions 48 km and at the point for the region of Mitrovica, a pump has been set in Ternac-Skenderaj, which is at a distance of 15 km in one direction and 30 km in both directions supply than for their use for daily work”.

Referring to the claims as above, the complaining economic operator considers that the Contracting Authority has acted contrary to Article 7, 27, 59, 60 of the LPP.

Answer to the request for reconsideration: “1. The EO's claims that the CA did not treat the EO in an equal manner in accordance with Article 7 of the LPP do not stand, because the tenderers were examined and evaluated in a detailed and equal manner, and the evaluation commission proposed the tender for reward responsible with the lowest price. 2. The EO which has been awarded the contract has met all the criteria for qualification as a responsible tenderer from the administrative aspect, the aspect of acceptability, from the professional aspect, the technical and financial aspect, when it comes to technical and professional capacities: the EO has offered: valid wholesale licenses, valid transport licenses, valid licenses for points where the EO operates retail. We as the EO tender file in annex no. 1 have not requested the operating distance from our Operating headquarters, therefore what you claim does not hold, and we remind you Article 51-LPP-Notification of Selection criteria 1. The contracting authority must emphasize in the contract notice and define in its entirety in the tender file all the selection criteria that an interested economic operator must fulfill in order to be considered qualified: (i) in case of open procedures and procedures of quoting the price for awarding a contract; or (ii) in the case of limited procedures or competitive procedures, start negotiations, to accept an invitation to tender. All selection criteria must be limited to the criteria necessary to ensure that only economic operators who possess the necessary professional, financial and technical skills to fulfill the conditions of the relevant contract will be considered qualified to receive such a contract or for receiving the tender invitation. In no case, the contracting authority must not include, specify or use selection criteria that are based on considerations other than those allowed by the provisions of articles 65-70 of this law. 2. The contacting authority must: (i) determine in the contract notice, as much as possible, all the documents and other information that the interested economic operators must submit together with the tender or the request for participation; and (ii) define in its entirety in the tender file, all the documents and information in question. All these requests for documents and information will be limited to only those documents and information that are necessary to allow the contracting authority to verify that the relevant economic operator: (i) is not considered unsuitable according to Therefore, we do not have the right to ask for other criteria during the evaluation after meeting those criteria that are presented in the tender file. We have to remind you that we have reservations for fuel storage at the Stantërg Mine and at the Flotation in

Kishnica, since we can also supply vehicles and automobiles. We have not defined the distance of the retail distribution points in the technical specification in annex no.1 of the tender dossier or in the technical capacities where we can be supplied with derivatives for vehicles, and EO: Delta group "Sh.P.K has offered us two points where we can be supplied. These retail supply points serve us more for gasoline supply, because we can supply diesel through the pumps in our units in Stantërg and Kishnica, We inform you that Trepça Sh.A has not made the announcement through CPA. During the evaluation, the Contracting Authority acted on the basis of law no. 04/L-042 for 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, based on paragraph no: 6, 7, 10, and the Public Procurement regulation and guide. We have made an assessment in accordance with article 59 point 4 as well as article 69. And the decision of "CA, Trepça has been for the responsible EO with the lowest price EO: Delta Group Sh.P.K.

-Administration and evaluation of evidence -

Relying on article 111 paragraph 5 related to articles 113 and 114 of the LPP, the Review Panel dated 05.01.2024 has authorized the review expert to conduct the initial review of the file and claims according to complaint no. 11/2024, while on 06.01.2024 the review expert's report with no. 2024/11 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 rejected as unfounded and that the decision of the CA remain in force.

The expertise's report has been duly accepted by all procedural parties. CA declares that it agrees with the recommendations of the review expert's report, as well as EO Disagrees with the report of the review expert.

Evaluation of the review expert through report no. 2024/11 of the complaint claims of EO "Petrol Company - SH.P.K appellant, as follows;

First finding (I): "The review expert has examined this complaint claim of the complaining EO, after reviewing and analyzing the tender documentation as well as the complaint claim of the complaining EO against the recommended EO for contracts, ESH clarifies as follows: Compilation of the Dossier of the Tender is a requirement of Article 27 of the LPP and Article 17 of the Regulation on Public Procurement (RRPP). In accordance with Article 17.12 of the RRPP, "In the tender file, the CA will declare all relevant information for the contract in question that interested EOs should know for the preparation of tenders without requesting additional information. Such information will include all specifications, requirements, criteria, timelines, methodologies, contract conditions, site visits or pre-tender meetings, etc. related to contract award procedures. Each sentence in the tender file will be well compiled, since the tender file is the basic material, on the basis of which the economic operators will create their tenders. The tender file will be prepared in such a way that - as a rule of principle - there is no need for additional clarifying information..." The placement of requirements, criteria, conditions, specifications or evidence in the Tender File and in the Contract Notice is full competence and responsibility of the Contracting Authority. The provisions of the Law on Public Procurement

and secondary legislation require the Contracting Authority to specify the criteria, conditions, requirements, evidence and specifications in the tender file and contract notice in a clear, non-discriminatory and comprehensible manner for Economic Operators. The reviewing expert clarifies that, for any ambiguity related to the selection criteria specified by the CA in the Tender Dossier and in the Contract Notice, the EO according to Article 53 of the LPP can request additional clarifications from the CA within the legal term of specified in the Tender Dossier, so even in this case, for any ambiguity regarding the selection criteria specified by the CA, the Economic Operators were able to clarify them in advance with the Contracting Authority, because the Tender Dossier is the main document on the basis of which the bidder prepare his offer, therefore the offer is evaluated by the CA based on the requirements, conditions and criteria defined in the Tender dossier and in the contract notice. Regarding the complaining claim of the complaining EO, The review expert clarifies that, during the drafting of the tender file for this procurement activity, the Contracting Authority, among others, in the requirements set in the tender file and in the contract notice (Requirements and Evidence), specifically in the Requirements on technical possibilities and/or professional article 9.1 & 9.2, has determined the requirements (documents) for Economic Operators, as follows: Requirements on technical and professional opportunities: 1. The economic operator must provide proof that he is licensed for retail and wholesale fuel trade. Required documentary evidence: 1. Import license - Valid 2. Wholesale license - Valid 3. Transport license - Valid 4. Retail license for gas stations where the Economic Operator offers fuel supplies and which owned or rented - Valid The Reviewing Expert, after reviewing and analyzing the tender documentation and case documents in the e-procurement platform, namely the complaining claim of the complaining EO against the recommended EO for the contract, always based on the aforementioned request in the tender file, clarifies that: The CA in the tender file requested "Retail license for fuel stations where the Economic Operator offers fuel supplies that it owns or leases - Valid", without specifying the distance to the retail distribution points for Mitrovica and Pristina. Therefore, based on the high demand mentioned in the tender file, the EO recommended for the contract according to the request of the CA has delivered the Licenses for the points operated by the recommended EO, thus fulfilling the request of the tender file. Whereas, regarding the communication between the CA and the EO recommended for the contract regarding the clarification of the tender, I consider that the recommended EO could not respond to the request of the CA for additional information at all, due to the fact that, in its offer, it offered Retail license for gas stations where the Economic Operator offers fuel supplies that it owns or leases - Valid, , therefore, the request of the tender file in question has been fulfilled. However, in spite of this, the CA in order to implement the contract with the lowest cost of expenses for the CA, through the Standard Letter has requested clarifications from the EO recommended for the contract and according to the request for clarification, the EO recommended for the contract has stated that , "we have retail outlets for the Mitrovica region, on the Mitrovica Skenderaj highway in Ternac. As for the region of Pristina, on the Pristina-Ferizaj highway in the lower Gadime-Llugagji area". So since the CA in the tender file has not determined the distance for the retail distribution points, the License presented by the EO recommended for the contract is in accordance with the request of the tender file and the contract notice. Therefore, the claim of the complaining EO that the EO recommended for the contract does not meet the requirements of the tender file is unfounded.

This conclusion is based on the fact that: Paragraph 3 of Article 56 of the LPP defines: 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 file. the tender". The reviewing expert, based on the above-mentioned findings and clarifications, also taking into account the case documents presented in this report, as well as based on the requirements of the tender file, considers that the CA has evaluated the tender in accordance with paragraph 4 of article 59 of the LPP. Paragraph 4 of Article 59 of the LPP, defines: "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. Notwithstanding the foregoing, the contracting authority may consider a tender to be responsive if: (i) contains only errors or ambiguities that can be corrected without changing the material condition or aspect of the tender in question, or (ii) contains only minor deviations that cannot cause material changes or deviations from the characteristics, conditions, and requirements of others presented in the contract notice and in the tender file; provided that, any such deviation is quantified, as much as possible, and taken into account during the evaluation and comparison of tenders". The Contracting Authority during the implementation of the provisions of the LPP and secondary legislation must always be based on its purpose defined by paragraph 1 of article 1, as follows, I quote: "The purpose of this law is to ensure the most efficient, most transparent way and more right to use public funds, public resources as well as all other funds and resources of the contracting authorities in Kosova..." Likewise, according to paragraph 1 of article 6 of this law, all contracting authorities are obliged to ensure that public funds and public resources are used in the most economical way while taking into consideration the purpose and subject matter of the procurement".

- Findings of the Review Panel -

The Work Regulations of the Public Review Body, which is published on the PRB website, with Article 20, paragraph 2 of the Regulations, defines the requirements for the Contracting Authority and the Economic Operator, that all information and notifications must be submitted and communicated through the public communication platform, if this is possible.

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 related 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 panel assesses that the review expert's report has dealt with 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. The findings in the expert's report can be confirmed through the tender file as well as the documents with which the tenderers have offered. 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 assessed as unfounded.

The review panel after the administration and assessment of the evidence, the complete ascertainment of the factual situation, relying on the LPP as applicable material law, after reviewing the complaining claims, taking into account all the documents of the case and the recommendations of the review expert, has found that the complaint of the Economic Operator must be rejected as unfounded.

The Review Panel, based on the findings of the review expert, considers that the complainant failed to prove with concrete evidence that there was a legal violation by the Contracting Authority during the development of the procurement activity in question. Therefore, the Review Panel has assessed that the Contracting Authority has acted in accordance with the legal provisions for public procurement and the requirements of the Tender Dossier regarding the procurement activity "Diesel and gasoline supply" with no. of procurement: "12997 12998-23-13076-1-1-1". Consequently, the Review Panel has decided to reject the complaint of the Economic Operator "Petrol Company - SH.P.K and has certified the Decision of CA -B58 dated 21.12.2023, Contracting Authority Trepça SH.A related to the procurement activity.

The Review Panel emphasizes that each contracting authority (at the central and local level) enjoys autonomy in procurement planning (Article 8) and in determining the needs that must be met (Article 9), of course in accordance with the budget capacity and that the CA in the specific case has have the right to also decide on the EO recommended for the award of the contract based on article 24 paragraph 2 of the LPP quoted "The contracting authority is responsible for ensuring that all procurement activities of such contracting authority are executed in compliance with complete with this law".

Based on the fact of the rejection of the EO complaint, the review panel decided to confiscate the complaint fee in the amount deposited by the complaining economic operator based on Article 31 par. 5 of the Rules of Procedure of the PRB, while the funds go to the budget of the Republic of Kosovo.

The Review Panel has decided in accordance with the legal powers in the sense of Article 104 paragraph 1 in relation to Article 103 and Article 105 of the LPP for the implementation of the procurement review procedure in a fast, fair, non-discriminatory manner, with the aim of resolving legal and effective of the subject. 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.

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. 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 – **Trepça SH.A.;**
1x1 EO – **Petrol Company - SH.P.K.;**
1x1 Archive of the PRB;
1x1 For publication on the website of the PRB.