



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

Psh. No.823/23

The Review Panel, appointed by the President of the Procurement Review Body (PRB), based on Article 105, 106, and 117 of the Law on Public Procurement of the Republic of Kosova (LPP) in the composition of Vjosa Gradinaj Mexhuani- President, deciding according to the complaint submitted by the Economic Operator (OE) “SHM Architecture SH.P.K, against the Decision on awarding a design competition of the MINISTRY OF CULTURE RS AND ÇJK in the capacity of the Contracting Authority (CA) related to the procurement activity "Development of the conceptual and detailed project [main implementer], of architecture and engineering, for the construction of the new Stadium in Peja, in accordance with Category III of the regulations and technical instructions for stadium infrastructure, approved by UEFA" with procurement number 207-23-3988-4-1-3, on the 27/12/2023 has issued this:

DECISION

1. **Approved**, as partly grounded, the complaint of Group of Economic Operators “SHM Architecture SH.P.K. with no. 2023/0823, dated 21/10/2023, whereas the decision of the CA MINISTRY OF CULTURE RS AND ÇJK related to the procurement activity "Development of the conceptual and detailed project [main implementer], of architecture and engineering, for the construction of the Stadium new in Peje, in accordance with Category III of the regulations and technical instructions for stadium infrastructure, approved by UEFA" with procurement number 207-23-3988-4-1-3 is cancelled, meanwhile the procurement activity is returned to Re-evaluation.
2. Within a period of 10 days, the CA must inform the PRB about all the actions undertaken in relation to this procurement activity, otherwise, the PRB has the right to take measures against the CA for non-compliance with the decision as provided by the provisions of Article 131 of LPP.
3. Returned the funds deposited in the name of the tariff tax for submitting the complaint to the account of the Economic Operator SHM Architecture SH.P.K.

REASONING

-Procedural facts and circumstances-

On the 25.04.2023, the MINISTRY OF CULTURE RS AND ÇJK in the capacity of the Contracting Authority has published the Notice for Design Competition B06 related to the procurement activity entitled "Development of the conceptual and detailed project [main implementer], of architecture and engineering, for the construction of the new Stadium in Peje, in accordance with Category III of the regulations and technical instructions for stadium infrastructure, approved by UEFA" with procurement number 207-23-3988-4-1-3. While on 09.10.2023 B58 published the Notice on the decision of the Contracting Authority to cancel the procurement activity on the grounds that the offers do not meet the administrative criteria during the evaluation phase.

This procurement activity was developed through an open procedure (design competition) with the type of award contract (competition) and with an estimated contract value of 165,000.00 €.

On the 12.10.2023, EO SHM Architecture SH.P.K submitted a request for reconsideration against the aforementioned decision of CA. On 13.10.2023, the Contracting Authority rejected the request for reconsideration as unfounded.

On the 21.10.2023, PRB has received the complaint from EO SHM Architecture SH.P.K with no. 823/23 related to the activity "Development of the conceptual and detailed project [main implementer], of architecture and engineering, for the construction of the new Stadium in Peje, in accordance with Category III of the regulations and technical instructions for stadium infrastructure, of approved by UEFA" with procurement number 207-23-3988-4-1-3.

- On the preliminary review stage-

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.

-Evaluation and administration of evidence -

The claims of the complaining economic operator SHM Architecture SH.P.K are presented as follows:

The complainant claims that: "the decision of the CA on the disqualification in this design contest due to the lack of documents required according to the tender dossier is unfounded. Also, not allowing the opening of the copy of the proposal of the complaining EO is contrary to the provisions of the Public Procurement Law (PPL)".

Referring to the claims as above, EO SHM Architecture SH.P.K requests from the PRB Review Panel to approve the complaint as well-founded, to cancel the notification on the decision of the CA and to return the procurement activity to re-evaluation.

Relying on article 111 paragraph 5 related to articles 113 and 114 of the LPP, the Review Panel dated 10/11/2023 has authorized the review expert to conduct the initial review of the file and claims according to complaint no. 823/23, while on 12/11/2023 the expert's report with no. 2023/0846 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 well-founded, the contract award notice be canceled and recommends that the matter be returned for reconsideration".

The expertise report has been duly accepted by all procedural parties. CA agrees with the recommendation of the review expert's report, stressing that "looking at the minutes presented by the Authorized Officials and after the opening, it was noted that the lack of the original is found in the File - Copy... I present to you as the Contracting Authority, we agree with the expertise of the professional expert and that the matter will be returned for reconsideration at the moment when a decision similar to the expertise comes, while the EO has not declared about the review expert's report.

The Review Panel has assessed that the conditions have been met to decide on this case without a hearing in the sense of Article 24 paragraph 1 of the Rules of Procedure of the PRB, taking into account that the claims of the parties and their submissions, the evidence as well as the review expert's report provide sufficient data to decide on the merits of the case.

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

Regarding the claims of EO SHM Architecture SH.P.K, the review expert through report no. 2023/0823 assessed as follows:

Initially, the expert clarifies that in relation to this procurement activity, CA has implemented the Design Competition procedure, with the following rewards: the first prize in the maximum value of 155,000.00 Euros, the second prize in the value of 7,000.00 and the third prize in the amount of 3,000.00. Submission of proposals is done in physical form at the Procurement Office in the Ministry of Culture, Youth, Sports and Non-Resident Affairs (hereinafter the Ministry). In the tender file, namely Annex 1 - Mandatory technical specifications regarding the submission, CA has requested: "Stamping and marking of tenders. Participants must submit one [1] original and two [2] copies of the original: One [1] ORIGINAL : One [1] original of the candidate's Documentation - in printed form; One [1] original of the candidate's Documentation - in digital form, [A CD or a Data storage device]. An original [1] of the Idea Project - in printed form; An original [1] of the Idea Project - in digital form, [A CD or a Data storage device]. Two [2] COPIES OF THE ORIGINAL: One [1] copy of the original of the candidate's Documentation -

in printed form; One [1] copy of the candidate's original Documentation - in digital form; [A CD or a Data storage device]. One [1] copy of the original Idea Project - in printed form; One [1] copy of the original Idea Project - in digital form; [A CD or a Data storage device]".

Further, according to the case documents, the complaining EO submitted an original and two copies of the proposal with the code 1861. CA, in the decision dated 09.10.2023, states that the Professional Jury recommends the cancellation of the procedure, as a result that none of the figures (offers) do not meet the administrative criteria during the evaluation phase. Further, in the standard letter for the eliminated tenderer, the CA has specified the justification for the elimination for the complaining EO as follows: "For not fulfilling these conditions such as 1.3 The program matrix, which is missing 1.4 The report on the design approach and methodology, which is missing. This project is considered irresponsible."

The complaining EO dated 11.10.2023 submitted the request for access to the evaluation documentation and requested the opening of the copy of the offer which was submitted together with the original. On the same day, deputy The Director of Procurement has notified the party of the right of access to the evaluation documentation, but has refused the possibility of opening the copy of the application.

On 12.10.2023, he received the evaluation report of the tenders (proposals), but not the access or the possibility of opening the copy of the offer. The CA on 13.10.2023 through its decision rejected the request for reconsideration. In the decision to reject the request for reconsideration, the CA gave the following reasoning: "The Procurement Office at MKRS provides access as much as the right to access Procurement documents allows, specifically accept the details on access to your documents: Dear Sir/Madam. You are invited tomorrow at 10:00 a.m. for access to the physical documentation and evaluation according to your request Office 021 MKRS. Until tomorrow at this time the Law and regulations will be analyzed to verify whether the opening of the copy is allowed or not. Based on the analysis of the Law specifically in the article where you are called: Article 10. Means for promoting Transparency in the Law on Public Procurement of the Republic of Kosovo no. 04/L-042 amended and supplemented by Law No. 04/L-237, Law No. 05/L-068 and Law No. 05/L-092, point 8. The contracting authority will provide a review expert. KRPP or PRB and or a review panel. access to copies of any procurement activity, including business secret information and any other information related to procurement. immediately after the above request. The contracting authority shall also provide access and copies of records and information to a court of competent jurisdiction if such access or copies are required by an order issued by such court. The contracting authority will immediately ensure access and requested copies in an orderly and unhindered manner. So. in none of the points is it specified that the Economic Operator can have access to their copies. The same can be opened only at the request of the PRB at the moment it is required to open the files and with any decision from the Court. The A3 matrices and the Report up to 50 pages were not attached to the original evaluated by the Evaluation Committee and were noticed in the evaluation phase. Therefore, your claim is unfounded. It is also clearly specified in the report that number 1861 - I .5-The exhibition material (consisting of 6 panels) - is not complete and the Bidder has presented 2 panels (tiles) missing -1- panels (tiles) Let them concentrate on The idea project of architecture

and engineering construction and 15 drawings in Hamer, this was explained yesterday by the monitoring official in the process. As such, the claim from number 1861 is unfounded." The complaining EO, as a party dissatisfied with the decision of the CA dated 13.10.2023, submitted a complaint to the PRB registered with number 2023/0823.

In order to open the copy of the offer, the expert requested through the email dated 15.11.2023 from the deputy. The head of the PRB Secretariat formed a commission for the opening of the copy of the offer with the presence of the parties. Deputy The head of the PRB Secretariat dated 16.11.2023 issued decision number 823/23 for the appointment of the commission for the opening of the copy of the proposal submitted by the complaining EO, composed of: 1. Visar Basha, 2. Kreshnik Spahiu and 3. Gjemajli Bellanica.

On 22.11.2023, in the presence of representatives of the complaining EO and representatives from the Ministry of Culture, the Commission opened the copy of the proposal and found that the following were submitted: Programming Matrix and Report on the design approach and methodology. At the end of the opening process, the minutes were drawn up and signed by the Commission and the representatives of the Ministry and the complaining EO.

Therefore, according to the facts and written evidence in the procedure, the expert clarifies that in relation to the access to the tender documents of the complaining EO, namely the copies of the tender, the CA did not act in accordance with Regulation 001/2022 on Public Procurement, Article 31.3, in which states: "The tender will be submitted to the CA in a form of the original and a number of copies which the CA has clearly requested in the tender file. The original tender as well as the requested copies will be identical. Copies are opened at the service of the evaluation committee."

Further, regarding the reasons for elimination mentioned in the decision of the CA dated 09.10.2023, as explained above, in the opening of the copy of the offer dated 22.11.2023, in the presence of representatives from the CA and EO, the opening commission in the PRB has concluded that the documents "Programming matrix" and "Report on the design approach and methodology" have been submitted, therefore the expert assesses that the complaining claim of the complaining EO is grounded.

According to the above, the reviewing expert handled the claims of the complaining economic operator in a professional and objective manner. The argumentation in the expert's 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. Consequently, the Review Panel regarding the claims of the complaining economic operator has given full confidence to the expert's report. In this way, it has been found that the claims of the complaining economic operator SHM Architecture SH.P.K are grounded.

- Findings of the Review Panel -

The review panel independently and objectively, conscientiously and professionally evaluated all the evidence of the case. 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 appeal claims, taking into account all the documents of the case and the recommendations of the review expert, has found that the complaint must be approved as well-founded. Consequently, the Review Panel has decided to cancel the Notice on the Decision of the Contracting Authority MINISTRY OF CULTURE RS AND ČJK dated 09.10.2023 regarding the procurement activity entitled "Development of the conceptual and detailed project [main implementer], of architecture and engineering , for the construction of the new Stadium in Peje, in accordance with Category III of the regulations and technical instructions for stadium infrastructure, approved by UEFA" with procurement number 207-23-3988-4-1-3, while the procurement activity to return to Reassessment. The Review Panel has assessed that the Contracting Authority did not act in accordance with the legal provisions of Article 1, 7, 59, 62 LPP and Regulation 001/2022 on Public Procurement, as the opening commission in the PRB (composed of three members) found that the documents were submitted "Programming matrix" and "Report on design approach and methodology". However, from the documents of the case, it can be seen that the CA has also agreed that this case should be returned to the re-evaluation, cited as follows: Having also seen the minutes presented by the Authorized Officials and after the opening, it was noted that the lack of the original is in the File - Copy... I present to you as the Contracting Authority we agree with the expertise of the professional expert and we will return the matter for reconsideration at the moment when a decision similar to the expertise comes.

Without the need for further analysis of complaint claims and other evidence, PRB always starts from the fact that each CA (at any level) enjoys complete independence in the exercise of powers and the assignment of needs in harmony with budgetary capacity, but the CA must take care ex-officio also for the basic principles of the LPP. Therefore, based on the above, 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 return to re-evaluation related to the procurement activity described above, while CA is obliged to act in harmony with this decision and the recommendation of the reviewing expert in accordance with Article 59 of the LPP. As for the other bidders who have not challenged the decision of the CA dated 09.10.2023 for their elimination from this procurement activity, they are considered parties without legal-material interest in accordance with article 4 point 1.26 quoted "the person who can prove material interest from 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".

The Review Panel requests the Contracting Authority to be attentive during the public procurement procedures, acting in full compliance with the LPP and other legislation in force for public procurement, as well as to act in harmony with the findings of this decision.

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.

Regarding the appeal fee, it was decided in accordance with article 31 paragraph 4 and paragraph 6 of the PRB Work Regulations in relation to article 118 of the LPP.

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

President of the Review Panel

Mrs. Vjosa Gradinaj

Legal advice:

An appeal is not allowed against this decision, but the dissatisfied party can appeal to the Commercial Court, within 30 days from the date of acceptance of this decision.

Decision to be submitted to:

1x1 CA – **MINISTRY OF CULTURE RS AND ÇJK;**

1x1 EO – **SHM Architecture SH.P.K;**

1x1 Archive of the PRB;

1x1 For publication on the website of the PRB.