



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

Psh. no.40/23

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: Vjosa Gradinaj Mexhuani - President, Vedat Poterqoi - member, Agon Ramadani - Member, deciding on the complaint lodged by the Economic operator: “Pe-Vla-Ku” sh.p.k., branch in Kosova- Prishtina, regarding the procurement activity: “Demolition - Execution of buildings erected without a building permit - Illegal and other services”, with procurement no: 632-22-11389-5-2-1, initiated by the Contracting authority – Municipality of Gjakova, on the 26.04.2023 has issued this:

DECISION

1. Approved as grounded the complaint submitted by the economic operator “Pe-Vla-Ku” sh.p.k., branch in Kosova- Prishtina,, submitted to the Procurement Review Body on the 16.01.2023 (with protocol number 40/2023) for the procurement activity with title: “Demolition - Execution of buildings erected without a building permit - Illegal and other services”, with procurement no: 632-22- 11389-5-2-1, initiated by the Contracting authority – Municipality of Gjakova.
2. Cancelled, the Notice on the decision of the contracting authority to contract award for the procurement activity entitled: “Demolition-Execution of buildings erected without a construction permit-Illegal and other services” with procurement number: 632-22-11389-5-2-1 is cancelled, initiated by the Contracting Authority Municipality of Gjakova, meanwhile the procurement activity with the data as noted above is returned to re-evaluation.
3. Within 10 days, the CA is obliged to inform the PRB about the implementation of this decision for this procurement activity described in the preliminary paragraph of the provision. 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 the Law on Public Procurement of Kosovo (consolidated version). The notification for the implementation of the decision is sent to the official email to the Procurement Review Body by the responsible procurement official in accordance with Article 105, paragraph 2.12 of the LPP.

4. Since the complaint of EO "Pe-Vlaku" Sh.P.K. is approved as based on the reasoning of the decision, the appeal fee will be returned to the amount deposited when the complaint was submitted.

5. The complaining economic operator is required to, in accordance with Article 31 point 6 of the PRB's work regulations, within sixty (60) days make a request for the return of the complaint insurance, otherwise the deposit will be confiscated and these funds will be transferred to the budget of the Republic of Kosovo.

REASONING

- Procedural facts and circumstances -

On the 30.12.2022, the Municipality of Gjakova in the capacity of the Contracting Authority has published the Notice on the decision of the contracting authority to award the contract for the procurement activity: "Demolition - Execution of buildings erected without a building permit - Illegal and other services", with procurement no: 632-22- 11389-5-2-1, in which GOE N.P.Sh. "Eltoni Com" & I Seferi Sh.P.K., with headquarters in Gjakovë, was recommended for the contract.

On the 04.01.2023, EO "Pe-Vla-Ku" Sh.p.k. submitted a request for reconsideration to the CA-Gjakovë Municipality, which was rejected as unfounded on 11.01.2023, confirming the notification on the decision to the contracting authority of the date 30.12.2022.

On the 16.01.2023, the Economic Operator "Pe-Vla-Ku" sh.p.k. submitted a complaint to PRB, with protocol number 40/2023, against the notification on the decision of the CA to award the contract for the procurement activity described above.

On the occasion of the preliminary examination, the Review Panel found 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 a complaint to the PRB only after the leadership of a preliminary procedure for resolving the dispute in accordance with Article 108/A of this law.

- 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 accordance with Article 113 of the cited Law, conducts the initial review of the file and complaints, in relation to the procurement activity described above. In this regard, on 17.01.2023, the external review expert submitted the evaluation report with the following recommendations:

- The complaint of EO "Pe-Vla-Ku" sh.p.k. is approved as well-founded,
- The Notice on the Decision of the CA dated 30.12.2022 (intention to award the contract) should be annulled, while the procurement activity with the above-mentioned data should be re-evaluated.

Acting on the basis of the general principles provided for in Articles 6 and 7 and the basic principles of procurement review procedures, which, among other things, are specifically sanctioned by the provision of Article 104 of the cited Law and at the same time analyzing documents of this case in relation to the facts and circumstances described above, especially paying due attention to the nature and purpose of the complaints, it is found that:

- CA has implemented an open tendering procedure, with the following criteria: type of contract: service, estimated value of the contract 202,550.00 €
- 4 groups of economic operators participated in this procurement activity. The tender with the highest price contained the value of 186,050.00 € while the tender with the lowest price contained the value of 89,660.00 €.
- The main claims on the basis of which the complaint was filed, are directed to the fact that the contracting authority has recommended an administratively irresponsible EO for the contract, acting in violation of Article 1, 7, 59, 60, 61, 69, 72 of the LPP regarding with article 39 of the Rroup for abnormally low tenders,

-Public hearing–

The review panel considers that regarding the issue in the present case, a hearing with the parties should be convened, as long as the statements of the parties in the session will create a sufficient basis to decide on the merits, therefore the PRB review panel, dated 13.03 .2023 held a hearing.

The review panel after reviewing the case documents, review of the Appellant's complaints, findings, concrete analysis and recommendations of the review expert, the declaration of the parties in the procedure, discussions and administration of the evidence as a whole, and the entire high procurement activity noted as follows:

The main claim on the basis of which the complainant addressed the PRB, consists in the fact that the CA with the decision dated 05.12.2022 had recommended an EO for the contract which does not meet the criteria of the tender file.

The complainant asserts that the CA had requested clarifications from the recommended, asking that for the electrical engineer, he should propose the notarized diploma and the employment contract with the employer for this project (original or notarized copy), while in relation to these clarifications, the recommended had offered as evidence of the contract and the notarized diploma, which according to the complainant were part of the tender dossier, he also attached the CV which was attached to the file but the same was not according to the request because with these evidences the work experience of the engineer in question cannot be proven and he did not

provide any reference, further explaining that the recommended person did not offered the notarized contract between the two parties for this project as requested in the TD and consequently this request which was not fulfilled by the recommended person made him irresponsible for this activity.

Regarding this claim, the reviewing expert clarified that CA in the contract notice and in the tender file of Requirements on technical and/or professional opportunities article 9,1 & 9.2 III.2.4) Technical and professional capacity had requested that the Economic Operator must provide evidence that there are at least 10 (ten) sufficient workers as well as having professional staff for the execution of the project a.) a graduated engineer or master of construction, constructive direction or architecture with 3 years of work experience after graduation b.) a graduated engineer or master of construction, hydrotechnical direction with 3 years of work experience after graduation c.) a graduate engineer or master of electrical engineering with 3 years of work experience after graduation, d.) a surveyor or geodesy technician (geometer) with 3 years of work experience after graduation graduation. However, as evidence, he requested the List of educational and professional qualifications of the professional staff to be proven with CV, diploma and employment contract or in case of concluding a contract on the work, the title of the project for which the contract is concluded (original or notarized) should be specified. The expert clarifies that the CA during the evaluation of the tender had considered it necessary to request clarifications according to Article 72 of the LPP for the professional staff with a standard Letter of request for information on the tenders three times and on 29.11.2022; the request dated 23.12.2022 as well as the standard letter dated 27.12.2022 completing the documentation.

The economic operator N.P.Sh "Eltoni Com" & Iseferi SH.P.K for the proposed staff based on the request for information on the tenders for the proposed staff as follows:

- For a graduate engineer of Hydrotechnics (Mr....) he submitted the diploma No. 67 of February 2, 2017, notarized LRP No. no. order 3156/2022 dated 03.03.2022 by notary Sevdije S. Krasniqi, which fulfills the requested request. The employment contract between N.P.Sh. Eltoni Com and (Mr....) dated 07/11/2022 in the original as well as the CV, which meets the request of the CA.

For the proposed surveyor (Mr....) he submitted License for performing cadastral services No. 23 of the award date 03.03.2020, with an expiration date of 03.03.2025, Diploma no. 1609 of July 20, 2017, notarized No- LRP. No. order 10734/2022 dated 23.08.2022 by notary Mr. Arber Sadiku, who fulfills the requested request. The contract on the work for this project concluded between N.P.Sh. Eltoni Com and Mr... dated 07/11/2022, notarized copy LRP. No. 14729/2022 from the notary Arber Mr. Sadiku and also the CV which fulfills the request requested in the DT

For electrical engineer graduate (notarized diploma is required) employment contract for this project (original or notarized copy),! the recommended person submitted Diploma no. 191 dated March 8, 2005, notarized LRP. No. 12703/2018 dated 23.07.2018 for (Mr....) by notary Valbona Y. Murtezi Bytyqi, which fulfills the requested request. The employment contract between N.P.Sh. Eltoni Com with headquarters in Gjakove and Mr.... dated 07/11/2022 in the original, which meets the required requirement, as well as the CV, which meets the required requirement of the CA.

Based on the additional information provided, the review panel according to the expert clarifies that the person recommended for the contract has managed to prove with evidence that he meets the requirement for technical and professional capacity, clarifying that the DT did not require that the contract be notarized in notary public (but only the copy if presented to be certified notarized by the original), not as claimed by the complainant, further asserting that the recommended in his offer has presented the disputed contracts in the original, therefore the claim in this point of the Complainant is unsustainable.

As for the complaining claim that the CA, in the evaluation and re-evaluation report, it states that the winner was declared "NPSH Eltoni Com & I Seferi ShPC, while from the tender form, the announcement on the decision of the CA, the evaluation reports, it is understood that the group leader of the consortium is EO N.P.SH. Eltoni Com and not I Seferi Sh.P.K, despite the fact that in one of the statements of the EO group it is written that the leader is EO Iseferi Sh.P.K. The creation of a group of economic operators is cited: point c). A statement signed by all group members authorizing the lead partner to act on behalf of the group. In this case, the group of economic operators "NPSH Eltoni Com & Iseferi Shpk based on the cited article has signed a statement from all members of the group who have authorized the leader of the group "Iseferi" Sh.P.K. with headquarters in Suhareka as and Mr. B.. I. who was authorized to present all the necessary documentation to the Contracting Authority, to conclude the contract with the investor, to follow the works in the object until their completion and handing over the object to the investor, hence the complaint claim for this point, it is unstable and not based on legal provisions, therefore the panel supports the expert's report.

Regarding the claim of the complaining EO that CA - Municipality of Gjakova, proposed for the contract the group of EO where the leader of the group is NPSH Eltoni Com, then the aforementioned request was not fulfilled by the group of EO recommended for the contract, since the request was that in the case of the EO group, the leader must offer 60% of the contracts, while the recommended has presented a list of contracts where the total value of the contracts is in the amount of 110,270.00 €, also the presented list does not meet the requirement that the leader possess 60 % of the contracts, since 60% of the requested value is in the amount of 177,000.00 €.

The review panel in accordance with the expert in relation to this complaining claim clarifies that the CA in the contract notice and the tender file in the Criteria for Evaluation of Requirements on technical and/or professional opportunities article 9.1 & 9.2 had requested: the Economic Operator must provide evidence that he has completed with successful contract of a similar nature in the last 3 (three) years (starting from the date of publication of the contract notice. In a value of not less than 295,000.00 €, in case the leading consortium must have at least 60% contracts of a similar nature. While as evidence he had requested: List of contracts specifying all the works carried out in the past 3 (three) years, specifying the works carried out, the amount of the contract, the date of the acceptor or the certificate of good execution of the works (reference or job acceptance report which matches the submitted list), in case the economic operator presents contracts and references with a private economic operator, then the economic operator must present the signed situations together with the bank transaction, that match the same

contract-reference The leader of the group EO "I Seferi" Sh.P.K. has submitted the list of contracts of works performed, and the references in the amount of 1,462,736.46 € which are mostly sufficient for this procurement activity (presented in reports listed), therefore the complaining claim is deemed unfounded at this point as well.

Further, regarding the claim that the CA has proposed for the contract the group of EO NPSH "Eltoni Com & I Seferi" LLC which does not meet the request regarding the mobile crane, since in the offer there is no evidence presented that it owns the requested mobile crane, the review panel clarifies that CA in the article 9.1 & 9.2 requirements on technical and/or professional opportunities, requested that the economic operator should provide evidence that they have at their disposal or a contract on the rental of these technical means-equipment for the realization of the contract. The review panel clarifies that the EO recommended in the list of equipment did not present the van, but since the disputed van was presented in the offer of the recommended one, it can be considered as a deviation in accordance with Article 59.4 of the LPP.

Further, the complainant asserts that the CA, even though it had partially approved the request of the appellant for re-examination, during the re-evaluation, it did not ask for additional clarifications for evidence and other very important elements, such as clarifications for abnormally low prices, so the CA did not correctly apply Article 59.2 and 72 Article 61 of the LPP has also not been implemented.

Meanwhile, regarding the Complainant's claim that the CA proposed for the contract the group of EO which offered at an abnormally low price, the review panel declares that the CA was obliged to act based on Article 61 of the LPP and 42. Tenders No -normally low Rules and Operational Guide for Public Procurement, related to article 3 of the rules for abnormally low tenders in which it is provided cited 3.7 The contracting authorities will ask the economic operators to explain the price offered, when all the conditions are met the following: the price offered is more than 30% lower than the average price of responsible tenders; the price offered is more than 10% lower than the price or costs of the second lowest tender; at least 3 (three) tenders have been submitted. Further 3.2 When tenders appear to be abnormally low for reasons other than those provided for in paragraph 3.1 of these rules, the contracting authorities may assess the reliability of such tenders and consequently request explanations in accordance with the following paragraphs and Article 61 of the LPP. Because this regulation was in force at the time of the initiation of this activity on 19.10.2022. Based on these data, the review panel assesses that the CA during the reassessment should ask the economic operators to explain the price offered for responsible tenders, since according to the expert's report, all the conditions have been met, according to the aforementioned provision, to prove whether they have offered manipulative or not normally low prices, and this matter is the competence of the CA.

Regarding the Complainant's claim that GOE N.T.SH. "Marash - Shped" SH.P.K. & Company Zuka Commerce Sh.P.K. & Hagi Sh.P.K., are irresponsible for facts without the need for them to be presented again, the Review Panel clarifies that the CA had administratively assessed this group of economic operators as irresponsible and the tender was eliminated, on the grounds that they had not responded to the request made by the CA for clarifications according to Article 72 of the LPP even though they were notified of such an action, therefore at this point it assesses

that this GOE cannot be interested as a material legal interest party according to Article 4. 1.26 of the LPP for this activity of procurement.

- Conclusion –

The review panel, after analyzing all the complaints one by one and evaluating the explanations given by the review expert, evaluates that the CA, with the development of this procurement procedure, did not act in harmony with the provisions of article 59 and 72, which stipulates that each tenderer through the written request requested by the contracting authority, to provide the necessary additional clarifications, in a procurement procedure. Also, according to the Regulation on public procurement, Article 45.29 is cited: For tenders that meet the requirements regarding formal accountability, technical conditions, description and specifications of the tender file, and financial evaluation, the contracting authority will proceed to evaluate/verify suitability, and if applicable, the bidders' qualifications according to the selection criteria specified in the contract notice and tender dossier, based on the necessary documentary evidence. 45.30 The verification of the suitability, and if applicable, the qualifications of the bidder, is done through the standard Letter B45 "Request for clarification of the tender" through the electronic platform.

Based on the above and referring to the documents of this case, the Panel notes that the CA did not ask for a written explanation from the recommender for the prices offered and recommended the offer without justifying the action and/or the act in the specific case even though it was raised as a claim by the complainant, based on the legal provisions. Likewise, the CA has not respected the Rules for abnormal tendering, respectively Article Article 4 Review procedure (inter-parte) for the same reasons, not requesting a written explanation from the EO for the prices offered.

Therefore, from the above, the review panel in accordance with Article 117 of the LPP decided as in the provisions of this decision, while the Decision as in point 2 of the provision was made in the sense of Article 31, paragraph 6, of the Work Regulation of the Procurement Review Body.

Head of the Review Panel

Mr. Vjosa Gradinaj Mexhuani

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 – Municipality of Gjakova;

1x1 EO – “PE -VLA-KU” sh.p.k,branch in Kosovë-Prishtinë;

1x1 Archive of the PRB;

1x1 For publication on the website of the PRB.