



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

Psh. No.401/23

Review Panel, appointed by the President of the Procurement Review Body (PRB), Pursuant to the article 105 , 106, and 117 of the Law on Public Procurement of the Republic of Kosova (LPP), composed of: Vedat Poterqoi – President, Vjosa Gradinaj Mexhuani – member, Agon Ramadani - member, deciding according to the complaint of the Economic operator (EO) “HARST Group SH.P.K, against the Decision on contract award or a design competition of the MUNICIPALITY OF PEJA as the Contracting Authority (CA) related to the procurement activity “Construction of the gym in Zahaq RITENDER” with procurement no.: 635-23-3456-5-1-1, on the 13/09/2023 has issued this:

DECISION

1. Approved as partly grounded the complaint of the EO “HARST Group SH.P.K” submitted to the Procurement Review Body dated 16.06.2023 (with protocol number 401/23) for the procurement activity entitled: “Construction of the gym in Zahaq RITENDER” with procurement no.: 635-23-3456-5-1-1, initiated by the Contracting Authority (CA) – Municipality of Peja.
2. Cancel the contract award notice and recommend that the case returns for re-evaluation.
3. It is allowed to return the funds deposited upon filing the complaint, in which case the Complainant must submit a request for the return of the funds within the period of sixty (60) days from the date of acceptance of this decision, otherwise the funds will be confiscated and transferred to The budget of the Republic of Kosova, in accordance with article 31 point 6 of the Rules of Procedure of the PRB.

REASONING

- Procedural facts and circumstances -

On the 07.04.2023, the Municipality of Peja, in the capacity of the Contracting Authority, published the Contract Notice, for the procurement activity “Construction of the gym in Zahaq RITENDER” with procurement no.: 635-23-3456-5-1-1. Meanwhile, on the 02.06.2023, the notice on the CA's decision was published.

EO "HARST Group" sh.p.k. on the 07.06.2023 submitted a request for reconsideration to the CA. On the 08.06.2023, the CA- Municipal Assembly of Peja rejected as unfounded the request for reconsideration of the EO.

Dissatisfied with the decision of the CA, EO "HARST" SH.P.K. the complainant on the 16.06.2023 submitted a complaint to the PRB, with protocol number 401/23, against the decision of the Contracting Authority regarding the procurement activity described above.

The EO's complaint was made in accordance with Article 109.1 of the LPP, according to which any interested party can submit a complaint to the PRB against any decision taken by the CA. Since the EO has also applied for reconsideration, it means that its actions also refer to Article 108/A of the cited Law. Therefore, the PRB considers that the complaint fulfills the prerequisites in terms of the provisions now cited and the same falls under its competences in terms of Article 105 of the LPP.

- Evaluation and administration of evidence -

Based on the actions described above, the PRB has engaged the evaluation expert to, in accordance with article 111, paragraph 5 of the LPP, with the duty that the same in the sense of article 113 of the cited Law, make the initial review of the dossier and the complaining claims, in relation to the procurement activity described above. In this regard, on the 10.07.2023, the review expert submitted the evaluation report with the following recommendations:

Based on the aforementioned clarifications, the review expert proposes to the review panel that the complaint of the Group of EO "HARST" SH.P.K. It is approved as grounded, and recommends that the notification to be canceled and recommends that the case returns for re-evaluation.

The parties are aware of the documents of this case as required in accordance with paragraph 2 of Article 20 of the cited Regulation and it is established that there are no elements to prevent conflict of interest, as required in the sense of Article 11 of the Regulation on the Work of PRB. Therefore, the Panel further analyzed the papers of this case, including all the acts and actions of the parties and their statements, considered that there is no need to convene a public session with the parties because there is sufficient evidence and there are conditions to decide meritoriously regarding the complaints in the specific case, as provided by paragraph 1, of article 24 of the cited Regulation. In this case, the Panel preliminarily concluded that the CA has implemented:

- a. open procedure, as defined by paragraph 1.37. of Article 4 of the LPP;
- b. type of contract: Work, as provided by paragraph 3, of article 27, of the LPP;

c. estimated value of the contract: 858.509.50 € large value, as defined by paragraph 1.28 of article 4, related to paragraph 1, of article 19, of the LPP

-Evaluation and administration of evidence -

The review panel (in a collegial composition) administered all the documents of this case, analyzing all the complaint statements, acts and actions of the parties which (in summary) it reviewed as follows:

Complaining claims of EO "HARSTGroup" sh.p.k.

The appellant (with data as above) has attacked the above-mentioned decision of the CA from its eliminated aspect because (according to the CA) the EO offered the dynamic plan 150 working days while it was intended to offer 150 calendar days. The complaining EO claims that such reasoning does not hold, and that the same from the start date to the end have foreseen the dynamic plan of 150 days. The examining expert, after analyzing the complaining claims, the CA's reasoning and the complaining EO's offer, has found that the same dynamic plan has a total of 150 days. The same dynamic plan according to the table completed by the EO despite the expression used by the EO before the start of the table "150 working days", The same plan does not foresee additional days or "non-working" days. also in the offer of the recommended EO for the contract, it was completed in the same way, i.e. not providing for "non-working" days and in total there are 150 days, the same as the complaining EO.

In addition, in the decision requests in the tender file, the following was stated: "Time limits for the start and / or end of the contract: minimum 150 days to maximum 250 calendar days". In addition, this is also proven through the declaration of annex 7, the EO declaration for the project implementation period and the guarantee period, which decisively states that the implementation period of this project is 150 days from the date of commencement of works and 6 years (maximum possible) period guarantee. Based on all this, according to the reviewing expert, the appeal claim is grounded and that the CA has acted contrary to the request of the tender dossier. The review panel, analyzing and comparing the complaining statements in relation to the offer, the expert's explanations and the requests of the TD, the Panel supported the explanations given in the expert's report, therefore the complaining statement in this case is considered grounded.

because (according to the CA) that the EO has offered ISO 3834-2005 certificate, while ISO 3834-2006 should be offered, where also according to the CA this requirement must be met by all members of the group separately. The reviewing expert clarified that ISO 3834-2006 is a standard for "Fusion welding of metals" and as such we estimate that it is a technical/professional capacity requirement, which is also placed in the tender file in the requirements on technical and professional capabilities, and as such, this requirement should be applied to the group as a whole and not to be fulfilled by each member separately as the CA claims. In the specific case, the group leader offered the ISO 3834-2005 certificate (identical to ISO 3834-2006), while the other two members have provided the certificate for welding according to ISO 3834-2006 as requested by the CA. In this case, it was enough for only one member of the group to provide the certificate in question to meet the request of the CA. Based

on all this, according to the examining expert, the appeal claim is grounded and that the CA has acted contrary to the requirements of the tender dossier and the provisions of Article 71 par.4 in relation to Article 69 of the LPP. The review panel, analyzing and comparing the complaining statements in relation to the offer, the expert's explanations and the requests of the TD, that the leader *the group leader has provided the ISO 3834-2005 certificate (identical to ISO 3834-2006), while the other two members have provided the welding certificate according to ISO 3834-2006 as requested by the CA*", the review panel classifies the complaint claim as based *relying on this research of the review expert regarding this certificate that it is identical and conforms to the Tender dossier.*

The complainant has attacked the above-mentioned decision of the CA from his/her eliminated aspect because (according to the CA) the EO does not meet the requirement for "A Graduated Electrical Engineer (energy direction) with a minimum of 5 years of experience after graduation." Certified for energy efficiency.". After analyzing the offer of the complaining EO, the review expert found that for this request, apart from the persons contested by the CA, the EO has provided evidence for Mr. Shabani, which meets the requirements of the tender dossier. Likewise, Mr. Nitaj has provided evidence in accordance with the requirements of the file, that is. Graduated Electrical Engineer and efficiency certificate. CA is also able, in accordance with Article 72, to request additional clarifications for the disputed persons that were taken as a reason for elimination, so that for the examining expert the complaint claim is grounded and that the EO meets the requirements of the tender file for Graduated Electrotechnical Engineer certified for efficiency. The review panel, analyzing and comparing the complaining statements in relation to the offer, the expert's explanations and the requests of the TD, thinks that the best solution would be for the CA, in order to avoid discrimination or inequality, to request additional information in accordance with Article 72 of the LPP , if it is necessary also from the university institutions regarding the engineers, whether any of them meet the conditions of the Tender dossier.

The complainant attacked the above-mentioned decision of the CA from its eliminated aspect because (according to the CA) the complaining EO did not provide evidence for Excavator (skip), "you presented a testimony, agreement, with the EO" LG Construction Group SH.P.K", for the device Bucket loader, Brand: Fermecc. However, this device is not on the list of any of the EO." The review expert's assessment is that despite the fact that the EO has not listed the equipment in question in the "list" of equipment, the provision of evidence/agreement is convincing and undeniable evidence that the EO has this equipment available. Likewise, EO has provided evidence for other excavators that, in our opinion, meet the request of the CA, this is because the term "skip" does not define any equipment in Albanian or other languages. Moreover, if the term "skip" is searched on the Internet, it gives results for a waste container, which has nothing to do with an excavator or a loader. Based on all that was mentioned above, the reviewing expert assesses that the appeal claim is grounded. The review panel, analyzing and comparing the complaining statements in relation to the offer, the expert's explanations and the requests of the TD, the Panel relying on this research of the reviewing expert given in the expertise's report, considers the complaining statement in this case to be grounded.

The complainant also asserted the classification or ranking claiming that he should be ranked first according to points. Although the review expert has classified this claim as grounded, the review panel is not released on this claim because the matter is returned to re-evaluation and in

the re-evaluation phase the responsibility of the EO must first be proven, then the calculation of points and ranking by points.

The complainant attacked the CA's decision from the aspect of the responsibility of the EO recommended for the contract, claiming that the EO recommended for the contract provided a "notarized copy" that does not meet the CA's request for a "notarized contract". According to the reviewing expert, the requirement of the file was the "notarized contract" and not the notarized copy, and the essential difference in his opinion between these two documents is that the notarization of the contract requires the authentication of the signatures of all parties in the presence of the notary, with which also formalizes/solemnizes the document/contract, while the certification of a copy of a contract does not require the certification of any signature of any party and does not formalize/solemnize the document in question. However, we appreciate that in the eventual case of re-evaluation, CA may request additional information/clarifications, if these persons are really employees of the company through evidence from TAK, regular monthly and annual contributions. The review panel, analyzing and comparing the complaining statements in relation to the offer, the expert's explanations and the requests of the TD, supports the opinion of the review expert and finds that the best solution would be for the CA, in order to avoid discrimination or inequality, to request additional information in accordance with Article 59 and Article 72 of the LPP, if these persons are really employees of the company through evidence from TAK, regular monthly and annual contributions.

The complainant attacked the CA's decision from the aspect of the responsibility of the EO recommended for the contract, claiming that the EO recommended for the contract for Mr. Hajdari, the efficiency certificate from SEEK where GFS Consulting was a trainer, does not meet the CA's request for certification in efficiency. The reviewing expert, after analyzing the case files, has found that the certificates for energy efficiency in Kosovo are issued by the Center for Energy and Sustainability at Hasan Prishtina University together with the Ministry of Economy - Kosovo Agency for Energy Efficiency and the training lasts for over 1 months, and include lectures, field audit, preparation of energy audit report and exam based on DIN EN 16247 standard for energy efficiency, while the recommended EO provided a certificate of a two-day course issued by SEEK and the course was held by GFA Consulting Group, so in the opinion of the expert it is that the certificate of the two-day course held by GFA Consulting Group and issued by SEEK does not meet the Energy Efficiency Certification requirement as such certification is done by the relevant local institutions written above. The review panel, I cannot ascertain this claim, but by analyzing and comparing the complaint statements in relation to the offer, the expert's explanations and the requests of the DT, it obliges the CA to also do this verification in the re-evaluation phase, either with other institutions regarding the issue of this certificate and the CA finally evaluates that the EO in question has provided the evidence in accordance with the requirements of the Tender File.

Therefore, referring to article 104.1, of the LPP, according to which it is required that the review procedure be implemented in a fast, legal and effective manner and also analyzing in their entirety the documents of this subject in the context of this procurement process. Among other things, in the contested decision of the contracting authority and in the review expert's report, explanations were given regarding the complaining statements. Therefore, the review panel, based on the explanations of the review expert, who explained in his expert report, as well as

based on legal provisions, that the CA must take into account that the evaluation of offers must be made in accordance with the legal provisions, specifically Article 59 of LPP, which in paragraph 4, quotes: "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", as well as in accordance with article 56 of the LPP, which in paragraph 3, cites : "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 dossier. supports the review expert's recommendation that the case returns for re-evaluation.

- *Conclusion* -

Based on the above, the Review Panel considers that the CA has acted contrary to the provisions of Article 7, 59 and 72 of the LPP, cited in the Complaint. 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 be re-evaluated again because in the opposite will contradict the scope of the LPP and the argumentative basis of the appeal claims, which the Panel evaluates according to its independent assessment in the sense of Article 104 in relation to Article 105 of the LPP. The return of a procurement activity based on a contested legal re-evaluation is in harmony with Article 1 of the LPP, according to which, the purpose of this Law is, among others, quoted: "...to ensure the integrity and responsibility of public officials , civil servants and other persons who perform or are involved in a procurement activity, requesting that the decisions of such individuals and the legal and factual basis for such decisions, are not influenced by personal interests, are characterized by non-discrimination and with a high degree of transparency and, to be in accordance with the procedural and essential requirements of this law".

Regarding Article 105, taking into account the requirement of Article 104, paragraph 1, of the cited Law according to which, quoted: "The procurement review procedure will be implemented and carried out in a fast, fair and non-discriminatory manner, which aims at the fair, legal and effective resolution of the matter..." Therefore, the Review Panel based its findings on the relevant provisions of the LPP, which foresee and regulate such situations, which may arise during a procurement activity .

Therefore, from the above, the review panel in accordance with article 117 of the LPP decided as in the provision of this decision.

President of the Review Panel

Mr. Vedat Poterqoi

Legal advice:

An appeal is not allowed against this decision,

but the dissatisfied party can appeal to the Commercial Court, within 30 days from the date of acceptance of this decision.

Decision to be submitted to:

1x1 CA – **MUNICIPALITY OF PEJA;**

1x1 EO – **HARST Group SH.P.K.;**

1x1 Archive of the PRB;

1x1 For publication on the website of the PRB.