



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

Psh. No.784/23

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 (Law No. 04/L-042, supplemented and amended by Law 04/L-237, Law 05/L-068, and Law 05/L-092), composed of: Vedat Poterqoi - President, Vjosa Gradinaj Mexhuani - Member and Isa Hasani - Member, deciding according to the complaint submitted by the Economic Operator (EO) "Termomontimi" SH.P.K. related to the procurement activity entitled: "Construction of the gym in Zahaq Re-Tender" with procurement no: "635-23-3456-5-1-1", initiated by the Contracting Authority (CA) - Municipality of Peja, on the 13/12/2023 has issued this:

DECISION

1. **Refused as ungrounded, the** complaint of EO "Termomontimi" SH.P.K, submitted to the Procurement Review Body on the 12.10.2023 (with protocol number 784/23) decision of the CA regarding the procurement activity entitled: "Construction of the gym in Zahaq Re-Tender" with procurement no: "635-23-3456-5-1-1", initiated by the Contracting Authority (CA) - Municipality of Peja, remains in force.
2. In accordance with Article 31 paragraph 5 of the Rules of Procedure of the PRB, the funds deposited in the name of the complaint's fee are confiscated and the same are transferred to the Budget of the Republic of Kosova.

REASONING

-Procedural facts and circumstances-

On the 07.04.2023, the Municipality of Peja, in the capacity of the Contracting Authority, has published the contract notice for the procurement activity entitled: "Construction of the gym in Zahaq Re-Tender" with procurement no: "635-23-3456-5-1-1" .

EO "Termomontimi" Sh.P.K. on the 02.10.2023 submitted a request for reconsideration to the CA. On the 27.09.2023, the CA - Municipality of Peja, by decision, rejected the requests for reconsideration of the complaining EO "Termomontimi" Sh.P.K., for the procurement activity entitled: "Construction of the gym in Zahaq Re-Tender" with procurement no: "635-23-3456-5-1-1" , initiated by the Contracting Authority (CA) - Municipality of Peja.

In its decision, the CA requested to reject the proposed request for review as baseless.

Dissatisfied with the CA's decision, the complaining EO "Termomontimi" SH.P.K. on the 12.10.2023 submitted a complaint to PRB, with protocol number 784/23, against the decision of the Contracting Authority regarding the procurement activity described above.

In the preliminary review stage

The PRB has determined that the appeals in the present case were exercised in accordance with Article 109.1 of the LPP, according to which against any decision taken by the CA, any interested party has the right to submit a complaint after the implementation of the preliminary procedure for resolving disputes, such as provided by Article 108/A of this law. Since the complainants have the status of the interested party as defined by Article 105, paragraph 1, in relation to Article 4, paragraph 1.26 of the LPP, while the complaints contain the essential elements foreseen by Article 111, of the cited Law, which means that they meet the conditions in terms of the cited provisions and falls under the powers of this body in terms of Article 105 of the LPP, in relation to Article 9 of the Regulation on the Work of PRB.

Based on the actions described above, PRB has appointed the Review Panel according to Article 111, paragraph 5 (ii) of the LPP and has engaged the review expert in accordance with Article 111, paragraph 5 (i) of the LPP, with the duty that the same do the initial review of the file and the appeal claims, in relation to this procurement activity, in the sense of article 113 and 114 of the LPP in relation to article 17 and 19 of the cited Regulation. Regarding this, it is established that the Review Expert's Report was received on 01.11.2023 with the following recommendations: The complaint of the economic operator "Termomontimi" LLC, submitted to the Procurement Review Body on 12.10.2023 (with number protocol 784/23) for the procurement activity entitled: "Construction of the gym in Zahaq Re-Tender" with no. of procurement: "635-23-3456-5-1-1", initiated by the Contracting Authority (CA) - Municipality of Peje. The contract award notice should be canceled and the matter returned to 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

Complaining claims of the complainant

Regarding the complaining assertion that the EO recommended for the contract did not provide the dynamic plan in accordance with the requirements of the tender file. The conclusion of the reviewing expert is that after analyzing the complaint claims, the reasoning of the CA and the offer of the recommended EO, we found that the same in the dynamic plan has a total of 150 days. Test: Dynamic plan in recommended EO offer. 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. Moreover, with the aim of equal treatment of EOs, we have also analyzed the offer of the complaining EO, which according to our assessment has been completed in the same way, that is, not providing for "non-working" days, and in total there are 150 days, the same as the complaining EO. In addition, the decision requirements in the tender file were as follows: "Time limits for the start and / or end of the contract: minimum 150 days to a maximum of 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 that was mentioned above, we estimate that the complaining claim is unfounded.

Regarding the other complaining claim that the EO recommended for the contract: the criterion of the tender file for the electrotechnical engineer, energy direction Certified for energy efficiency is not fulfilled. The expert finds that according to the complaining EO, the EO recommended for the contract presented two electrical engineers as evidence for this criterion. 1. Skender Nitaj. This person is an electrotechnical engineer in the direction of Electronics, while in the tender file the direction of Energy was requested. Therefore, the criterion of the tender file is not met. 2. Sahit Hasani. This person is an electrotechnical engineer in the Energy department, but is not certified for energy efficiency as required by DT. We must clarify that the PRB, through decision 401/23, obliged the CA to seek clarification from the university institutions on this issue. From the case files, we have not found evidence that the CA has undertaken such an action, therefore we consider that the decision of the CA was not made in accordance with the

requirements of the decision of PRB 401/23. Likewise, we have not found evidence that the CA has requested clarifications according to the decision of PRB 401/23 regarding the energy efficiency certification of the EO engineer (now the appellant), so even on this point the decision of the CA is not receive in accordance with the obligations set by the PRB with decision 401/23. Based on what was mentioned above, we estimate that the complaining claim is grounded.

The review panel analyzed all the documents of this case, including all the acts and actions of the parties and considered that there is a need to hold a public session with the parties and for these cases in order to clarify in as much detail as possible, the review panel held a session on 01.12.2023 . In this case, the panel took into consideration all the complaint statements, acts and actions of the CA and the expert's report.

- Findings of the Review Panel -

The review panel independently and objectively, conscientiously and professionally evaluated all the evidence of the case. In this way, it was found that related to the activity of "Construction of the gym in Zahaq Re-Tender" with no. of procurement: "635-23-3456-5-1-1", there was a decision issued by the PRB with no. 2023/0401 on 13.09.2023. The review panel evaluates the complaints submitted by the complaining party, are claims that have been reviewed by this review panel and for these claims the panel in decision 2023/0401 acted by supporting the findings of the review expert, who is the same review expert in both cases.

In this case, comparing the complainant's statements (not only from the point of view of the examining expert) but in the general context of the documents of this case, he finds according to his independent judgment that the statements of the complainant which constitute the subject of the examination in this case issues, have been dealt with before and with PRB Decision No. 2023/0401. For this reason, the Panel considers this case, now a judged case, as this is expressly foreseen by article 105, paragraph 2.15, of the LPP, according to which, cited: In repeated cases with the same complaints, when the object of the dispute and the parties are the same, for cases that have been examined before, the chairman of the review panel must treat it as a "res judicata" case. Moreover, according to the cited decision, it was requested (for the sake of objectivity and impartiality) that the CA, through reassessment, verify the responsibility of the complainant and the recommended. Therefore, the PRB evaluates this issue as a judged issue and it remains at the discretion of the CA (in its capacity as an entity of the state administration) to independently assess whether other actions should be taken, as provided by article 59 of the LPP . Likewise, the finding of the review expert in his report dated 01.11.2023 regarding the second claim is quite contradictory in his assertions with the preliminary report dated 10.07.2023. Likewise, the review expert's statement that "PRB, through decision 401/23, has obliged the CA to seek clarification from the university institutions on this issue" is not sustainable, because in decision 401/23 the panel has found that "the review panel , analyzing and comparing the complaint statements in relation to the offer, the expert's explanations and the requests of the DT, 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 needed by the university institutions as far as the engineers are concerned, whether any of them meet the

conditions of the Tender Dossier". Therefore, CA was not necessarily obliged to request additional information from university institutions.

It is also worth highlighting the fact that the contracting authority Municipality of Peja, specifically the procurement manager, addressed the PRB twice. The last time on dt. 13.12.2023 with this note: "Hello dear, I am writing to you regarding the activity Construction of the Gym in Zahaq RITENDER with procurement number: 635-23-3456-5-1-1 to inform you that we as CA We are waiting for a decision from you, since we have asked the economic operators to extend the validity and the insurance, but none of the operators has extended either the validity or the insurance of the tender, so we are talking about the Termomontimi Operator and please let us know. return an answer as soon as possible, since we as CA have respected the first Decision of the Procurement Review Panel respecting your judgment in this activity". Regarding this review panel in the e-procurement system, the CA's request to the participating economic operators regarding the continuation of the second consecutive validity regarding this activity has not been found. But it has been found that both the recommended and the complainant have extended the validity of the offer, but it is not known whether the extension was made within the deadline set by the CA. In any case, the review panel thinks that not continuing the validity of the offer (within the deadline) is classified as a party without interest according to article 4.1.26 of the LPP.

Therefore, in light of the above, the Review Panel emphasizes that each contracting authority (at the central and local level) enjoys autonomy in planning the procurement (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 this particular case had the right to decide also on the EO recommended for awarding 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 authority contractors to be executed in full compliance with this law".

Therefore, without the need for further explanations, the Review Panel has decided to confirm the challenged Decision of the CA for awarding the contract related to this procurement activity and to confiscate the funds deposited by the complainant, in the name of the complaint fee, as it is regulated by the provision of article 31 paragraph 5 of the Rules of Procedure of the Procurement Review Body, in which case the funds will be transferred to the budget of the Republic of Kosova.

Therefore, based on the above and after the administration of the documents of this case, the Panel has decided as in the provision of this decision, in accordance with Article 98, 99 related to Article 104 and 105 of the LPP.

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 – **TERMOMONTIMI;**

1x1 Archive of the PRB;

1x1 For publication on the website of the PRB.