



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

Psh. No.532/23

Review Panel, appointed by the President of the Procurement Review Body (PRB), Pursuant to the article 105, article 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) as well as articles 21 and 29 of the PRB Work Regulations 01/2020, amended on 09. 08. 2023, in the composition of Agon Ramadani - President, Vjosa Gradinaj - Mexhuani and Vedat Poterqoi – Members, deciding according to the complaint of the EO “Inovix” SH.P.K, against the Contract Notice or the tender documents related to the procurement activity: “Bathymetry (Measurement of water volume), analysis of sediments for 6 Dams” with procurement no: 210-23-4683-2-1-1, of the Ministry of Environment and Spatial Planning as contracting authority (CA), on the 17/10/2023, has issued this:

DECISION

1. **Approved**, as grounded the complaint of the Economic operator “Inovix” SH.P.K of the 31.07.2023 with protocol number 532/23, regarding with the procurement activity with title: “Bathymetry (Measurement of water volume), analysis of sediments for 6 Dams” with procurement no: 210-23-4683-2-1-1, initiated by the contracting authority (CA) – Ministry of Environment and Spatial Planning.
2. The above-mentioned activity is cancelled, and if the CA is still interested, the procurement activity will be re-tendered.
3. Within 10 days, the CA must inform the PRB about all the actions undertaken in relation to this procurement activity, otherwise, for non-compliance with the decision, the PRB can take measures against the CA, as provided by the provisions of Article 131 of Law on Public Procurement in Kosova.
4. It is allowed the return of the deposited amount when the complaint is submitted, and the complaining economic operator is obliged, in accordance with Article 31 point 6 of the PRB's Work Regulations, within a period of sixty (60) days to make a request for the return of the complaint insurance, otherwise, the deposit will be confiscated and these funds will go to the Budget of the Republic of Kosova.

REASONING

- Procedural facts and circumstances –

Ministry of Environment and Spatial Planning (MESP), in the capacity of the Contracting Authority, dated 12.05.2023 submitted the Contract Notice - B05, for the procurement activity with title: “Bathymetry (Measurement of water volume), analysis of sediments for 6 Dams” with procurement no: 210-23-4683-2-1-1.

On the 18.07.2023, EO "Inovix sh.p.k" SH.P.K submitted a request for reconsideration to CA. While on the 20.07.2023, CA- MESP, rejected the request for reconsideration of the complaining Economic Operator as ungrounded.

The economic operator "Inovix sh.p.k", dissatisfied with the Contract Notice, on the 31.07.2023 submitted a complaint to PRB, which was registered with protocol number 532/23.

- During the preliminary review phase-

The Review Panel concluded that the complaint in this case was filed 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 after conducting a preliminary procedure for resolving dispute in accordance with Article 108/A of this law. Since the Applicant has the status of the interested party in the sense of Article 4, paragraph 1.26, and the complaint contains the essential elements provided for in Article 111 of the cited Law, it means that it met the conditions foreseen in the sense of the cited provisions and falls under the powers of this Body, in the sense of Article 105, of the LPP.

The Review Panel has also concluded that there are no circumstances of conflict of interest in the sense of Article 11 of Regulation no. 01/2020 of the Work of the Procurement Review Body related to article 4 paragraph 1 under paragraph 75 of the LPP.

Based on the actions described above, the PRB has appointed the Review Panel and has also appointed the evaluation expert, as provided by article 111, paragraph 5 of the LPP, with the duty that the same in the sense of article 113 of the cited Law, to do the initial review of the file and appeal claims, in relation to the procurement activity described above. In this regard, on 07.08.2023, the review expert submitted the evaluation reports with recommendations:

- The complaint of the complaining EO is approved as grounded,
- Cancel the contract notice, re-tender the activity if CA has further interest.

The expertise’s report has been duly accepted by all procedural parties. The Contracting Authority has notified the Review Panel that it does not agree with the expert's recommendations, while the Complaining Economic Operator has not declared.

- *Administration and evaluation of evidence* -

The Review Panel analyzed all the documents of this case, including all the acts and/or actions of the parties, as described above (procedural facts and circumstances), there are no elements to

prevent the conflict of interest, as required in terms of Article 11 of Regulation on the Work of the PRB, related to paragraph 1.75, article 4 of the LPP and at the same time analyzed all the documents of this matter, including all acts and actions of the parties and considered that there is no need to convene a hearing with the parties, as long as the submissions of parties and their actions, constitute a sufficient basis to decide on the merits as provided by paragraph 1, article 24 of the PRB Working Regulation, and that there is no need to request the contracting authority and/or the complainant to provide additional information and/or explanations, in the sense of paragraph 3, of article 116 of the LPP.

Answers of the CA regarding the complaining claims in the decision to reject the request for reconsideration

First, we inform you that this procurement procedure cannot be canceled due to your request, which is not based and argued. At the same time, analyze the tender dossier that the criterion for selection is not only the financial offer but also the technical offer and each position has its own weight and is quite well specified and easily measurable. In annex 6 of the tender dossier, the criteria and sub-criteria with the respective weights and points are defined, which makes it very easy to evaluate them based on points since they are measurable. Therefore, based on the answers given by the CA, we inform you that your request is rejected as unfounded.

Claims of the complainant "Inovix" SHPK

- *The first claim (I) - The Contracting Authority, since it has not respected the Suspension of the procedure according to Regulation 001/2022 Article 61 Paragraph 1, making a substantial violation of the provisions of the LPP by the Responsible Procurement Official, then the complaints submitted in the request for reconsideration, there are now the second ones presented in the complaint. We ask the PRB review expert to treat the first point of the complaint as a complaint because it is a serious violation by the PPO.*
- *The second claim (II) - In this dossier, in addition to the first violation of the same criteria, a substantial violation is the immeasurable and non-objective criteria, because there is no minimum to maximum threshold for how tenderers during the bidding phase can reach the milestones so there is no ceiling. Based on this wording, apart from the price offered, the EO can know the points obtained based on the opening minutes, all under the contract award criteria are immeasurable as a whole and discriminatory for each EO because no EO can know in any case how many points will I earn in relation to other tenderers. We request from the Procurement Office that the substantial violations of the LPP mentioned above and which are not suitable for determining the economically favorable tender, be acted upon in accordance with Article 27 Criteria for Awarding the Contract paragraph 27.7 When the award of the contract is made on the basis of the "most economically more favorable tender" criterion, the tender dossier and, if applicable, the contract notice must state all the criteria (in an objective and measurable way) that is applied in the award process, the award of relative weights (in monetary terms) defined for each criterion.*

Findings of the review expert for complaint 532/23

• *First finding (I)* - CA Ministry of Environment and Spatial Planning has not respected Article 108A as the request for reconsideration regarding the criteria made by the complaining EO "Inovix shpk" was based on and in accordance with Article 108A. Based on the complaints that were made in the request for reconsideration, the criteria of the tender file, the minimum criteria for qualification (selection criteria) were not used as criteria in the process of awarding the contract in this tender, they are the same criteria that these criteria are evaluated as pass criteria. /doesn't pass. Based on the criteria for awarding the contract in the tender file from the CA, only the methodology criterion can be considered as a criterion for awarding the contract and that is not the same as the selection criteria. Based on the public procurement regulation, article 25, eligibility criteria and minimum requirements for qualification, all of these are considered selection criteria, the selection requirements are the requirements that the EO must meet to be considered qualified and then when the evaluation of the criteria is done EO selection that are considered for qualification. These qualification documents, however, in an objective manner must present sufficient evidence that reasonably reflect the existing state of the EO that wishes to compete in the tender, the CA must define in the Tender dossier the objective and non-discriminatory criteria. In this case, when the CA announces a tender based on the criterion "the most economically more favorable tender", all criteria must be in an objective and measurable manner and must not be the same as the selection criteria, the criteria applied for giving, giving the weights determined for each criterion must be measurable, they must be placed in the tender file and made known to the tenderers. Based on the public procurement regulation, when award criteria and selection criteria are mixed/repeated or good criteria are not set as measurable criteria, then the procurement procedure must be cancelled.

• *The second finding (II)* - The criteria have not been well defined in the tender dossier according to the procurement law and according to the regulation and the Guide. First, based on the procurement law, the criteria from the CA should not be mixed, we are quoting the article: 4. The contracting authority must ensure that a clear distinction is made between the criteria of paragraph 3. of this article and the selection criteria in relation to the general professional, financial and technical skills established on the basis of Article 51 of this law and that there is no repetition of these two categories of criteria. 3. Only the measurable criteria that are defined in advance in the tender file can be used for evaluation. The contracting authority may only use criteria that are directly relevant to the subject of the contract. Such criteria are but not limited to: quality, price, technical merit, aesthetic, and functional characteristics, environmental characteristics, running costs, cost effectiveness, after-sales services and technical assistance. While based on the Public Procurement regulation, article 27.3, we are quoting: 27.3 If the criterion is the 'most economically advantageous tender', the contract must be awarded to the tender that best fulfills the relevant criteria. In addition to the price, CA may include other criteria relevant to the subject of the contract, such as:

a. Quality characteristics

b. Operating costs, maintenance and other life-span costs

c. Functional, technical, environmental, aesthetic or similar characteristics

d. After-sales service and technical assistance

27.4 Criteria must be weighted according to relative importance. If you look at article 52 of the Law that I have quoted above and article 27 of the Regulation, it clearly shows that the criteria should not be the same for evaluation if the tender is economically more favorable, see how the law and the regulation provide that in addition to the price, quality must be , maintenance, functional and other technical characteristics. Also, according to the reviewing expert, the criteria should reflect the measurable market in the regions as the EO fulfills the award criteria, so there should be no discrimination and they should be related to the nature of the subject of the contract. The criteria must be expressed with the weights and the formula used for awarding points in a clear and precise manner, in order to enable the EOs to submit bids having accurate knowledge of the needs of the CA and the rules that must be applied for the evaluation of a tender. Only in this way is the principle of equal treatment and full transparency guaranteed. Regarding this claim, some things are also clarified in the answer to claim 1 and this claim is grounded.

Answer to the claim of Article 7

Violation of Article 7, Equality in Treatment/Non-Discrimination. The contracting authority on the occasion of the announcement of the contract notice and the tender file has set discriminatory criteria, based on the above we think that the criteria have been requested to the maximum possible and this indicates that competition has been restricted and should not be neglected the criterion of the tender dossier to prepare criteria as professional as possible to exercise the professional activity for the provision of services of the same nature as requested by CA. Info for the PRB panel. The economic and financial criterion is required more than what is required by the Law on public procurement of Kosova as it is required more than 1.5 times. The budget is 950,000.00 €, the requested turnover is 1,920,000.00 €, 1.5 times the budget is 1,425,000.00€. See how it is with the Law quote: In determining the minimum turnover, the contracting authorities must not exceed twice the estimated value of the contract. The turnover request must be expressed in figures and must refer to the last three financial years at most. Such financial years must be clearly defined in the contract notice or invitation to tender or participation. Where, in addition to the minimum turnover, a specified minimum turnover in the specific areas covered by the contract is necessary, such turnover must not exceed 1.5 times the estimated value of the contract. Based on this, the review expert thinks that the CA has exceeded the limits set by law and regulation and the procurement activity should be canceled since the probability of adapting the criteria and the budget can be considered large for the adaptation of the criteria by the CA.

Findings and evaluations of the Review Panel.

In order to fully confirm the factual situation, the Review Panel administered as evidence the Review Expert's Report, the opinions of the parties regarding the review expert's report, the submissions and documents of the complaining Economic Operator and the Contracting Authority, and found that the complaint submitted by the EO "Inovix" SHPK for the aforementioned procurement procedure, is grounded.

The review panel independently and objectively, conscientiously and professionally evaluated all the evidence of the case. 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 canceled because this contradicts the scope of the LPP and the argumentative basis of the appeal claims, which the Panel evaluates according to its independent assessment in terms of Article 104 in relation to Article 105 of the LPP. The Review Panel considers that the course of the procurement activity is not characterized in accordance with the legal provisions, which in relation to the intended purpose of this procurement activity, from the point of view of this Panel, have been implemented with increased care and in a professional manner.

Based on the factual situation ascertained as above, the review panel in its independent evaluation considers the CA did not respect the legislation in force referred to because the minimum criteria for qualification (selection criteria) were not used as criteria in the process of awarding the contract in this tender, the criteria are the same and these criteria are evaluated as pass/fail criteria, therefore the panel regarding the repetition of the criterion assesses that based on the criteria for awarding the contract of the tender dossier by the CA, only the methodology criterion can be qualified as a criterion for awarding the contract and which is not the same as the selection criteria, also, the sub-criteria compiled in terms of evaluation are not clear, due to the fact that they are also immeasurable and non-objective, because a minimum to maximum threshold has not been identified as to how the tenderers during the bidding phase can reach the points.

The review panel assesses that all criteria must be objective and measurable and must not be the same as the selection criteria, the criteria applied for awarding, the awarding of the weights determined for each criterion must be measurable, they must be placed in the tender dossier and made known to tenderers, this is clearly specified according to article 52, paragraph 4: "The contracting authority must ensure that a clear distinction is made between the criteria of paragraph 3. of this article and the selection criteria in relation to the general professional, financial and technical skills established on the basis of Article 51 of this law and that there is no repetition of these two categories of criteria".

In the notification for the contract and the tender dossier, the criteria have not been defined in accordance with the LPP and according to the regulation and the Guide, since the same should not be repeated by the CA as foreseen in the article, the provision referred to above and also with Article 27 of the Public Procurement Regulation.

The other determining reason that guided the decision-making as in the enacting clause of this decision was the issue identified by the panel regarding the criterion of financial turnover - the total turnover for the past three-year period in which it was requested that the value should be no more less than 1,920,000.00 €, while the estimated value of this activity was 950,000.00 €, regarding this matter, Article 68, paragraph 1 clearly defines that: When required, the minimum annual turnover that the economic operators must have will not exceed twice the estimated value of the contract.", which in the specific case in accordance with this provision is that the CA was able to determine the value up to 1,900,000.00 €, so consequently the determined value of

1,920,000.00 € exceeds the limit allowed according to the law, specifically the provision referred to above.

Therefore, based on the reasons given above, the panel has reached the final conclusion that the TD has not been compiled in accordance with the legislation in force, therefore, since the criteria at this stage (after the submission of offers) cannot be improved, the only solution is that the activity be canceled in its entirety, while in case of retendering, the CA should take extra care in drafting the criteria according to the legislation in force, based on the requirements, needs and their plans.

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 decision of the CA should be canceled and if the CA is still interested in continuing with this procurement procedure, I will retender it.

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.

For points I and II and III of the decision, it was decided based on article 117 of the LPP in relation to article 29 of the PRB Work Regulations.

For point IV of the decision, it was decided based on article 118 of the LPP in relation to article 31 paragraph 6 of the PRB Work Regulations.

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

President of the Review Panel

Mr. Agon Ramadani

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 Environment and Spatial Planning;**

1x1 EO – **“Inovix ” SH.P.K;**

1x1 Archive of the PRB;

1x1 For publication on the website of the PRB.