



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

Psh. No.858/24

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) composed of Batisha Ibrahim – Individual panelist, deciding upon the complaint of EO “EJONA ” SH.P.K”, against the Decision to contract award or a design competition of the MINISTRY OF INTERNAL AFFAIRS in the capacity of Contracting Authority (CA) regarding the procurement activity Supply and installation of new chillers and heat pumps in government buildings with procurement number 214-24-4897-1-1-1, on the 20/11/2024, has issued this:

DECISION

1. **Approved**, as partly grounded the complaint of EO “EJONA” SH.P.K”, with no.2024/0858 of the 16/09/2024, whereas the decision of the CA Ministry of Internal Affairs regarding the procurement activity "Supply and installation of new chillers and heat pumps in government buildings" with procurement number 214-24-4897-1-1-1 is cancelled, while the procurement activity is returned to Re-evaluation.
2. Within 10 days, the CA must inform the PRB of all actions taken regarding this procurement activity, otherwise, the PRB has the right to take measures against the CA for non-compliance with the decision as provided for in the provisions of Article 131 of the LPP.
3. The funds deposited in the name of the tariff fee for filing the complaint are returned to the account of the Economic Operator “Ejona” Sh.P.K.

REASONING

-Procedural facts and circumstances –

On the 28.05.2024, the Ministry of Internal Affairs in the capacity of the Contracting Authority has published the Contract Notice B05 regarding the procurement activity.

While on the 29.08.2024 it has published the B58 Notice on the decision of the Contracting Authority where it has awarded the contract to the EO “Termo Solar Engineering SH.P.K.”.

This procurement activity has been developed through an open procedure with the type of contract supply with an estimated contract value of 194,500.00 euros.

On 23.09.2024, EO “Ejona” Sh.P.K., has submitted a request for review against the above-mentioned decision of the CA. On 06.09.2024, the Contracting Authority has rejected as unfounded the request for review.

On the 16.09.2024, the PRB has accepted the complaint from EO “Ejona” Sh.P.K. with protocol number 2024/0858 regarding the procurement activity Supply and installation of new chillers and thermopumps in government buildings with procurement number 214-24-4897-1-1-1.

-On the stage of preliminary review-

The Review Panel has found that the complaint contains all the elements set out in Article 111 of the LPP and as such has been submitted within the legal deadline in accordance with Article 109 paragraph 1 of the LPP after the preliminary procedure for the resolution of disputes in the sense of Article 108/A of the LPP, by the economic operator that is an interested party according to Article 4 paragraph 1 sub-paragraph 26 of the LPP. In this way, the Review Panel has found that it is competent to review this complaint according to Article 105 of the LPP and there is no procedural obstacle to continue with the review of the complaint on its merits.

The claims of the complaining economic operator “Ejona” Sh.P.K. are presented as follows:

First claim (1): “The CA requests additional clarifications for documents which were not requested by the TD nor by the Contract Notice, thus violating Article 72. respectively, paragraph 1) No material changes and no aspect of the tender shall be requested or accepted by the contracting authority or offered by a tenderer. and Article 40 - RrPP paragraph 40.2. Thus, contracting authorities may not change, modify or remove previously established requirements, criteria or specifications or add new ones during the examination, evaluation and comparison of tenders. We have responded to the CA with a statement where we have specified that their request is in violation of the LPP and RrPP and we have confirmed once again that the products and services offered are in full compliance with the technical specifications, as well as the statement of technical specifications that we submitted before the opening. We have also declared that we will submit the catalog after signing the contract and the site visit for approval by the CA, as we do in all other projects, especially with this CA...”

Second claim (II): “The CA violates Article 59 of the LPP and Article 40 of the RrPP by not carrying out the Examination, Evaluation and Comparison of tenders according to the law. So, the CA, in addition to requesting changes to the documents before opening, also adds new criteria during the examination, evaluation and comparison of tenders, and uses those fabricated criteria to eliminate us from the competition, an action completely prohibited by the LPP. The CA with the announced decision completely violates Articles 59 and 40 by evaluating the bids based on criteria that were not in the DT nor in the Notice of Contract, and for the same criteria eliminates from the competition two EOs that have bid with a lower price and declares the winner the EO with a higher price than us of 35,188.12 euros, thus directly damaging the RKS budget. The CA also declares the winner an EO that has submitted a catalog, however, the same does not meet the minimum requirements of the requested product.

Third claim (III): “The CA violates Article 56, paragraph 3 by disqualifying us from the competition based on a criterion that was not mentioned in the Tender Document and Contract Notice.”

Referring to the above requests, EO “Ejona” Sh.P.K., considers that the Contracting Authority has acted in violation of articles 56, 59, 72 of the LPP and article 40 of the Rrpp. We request the PRB to cancel the announced decision, return the case for re-evaluation and oblige the CA to conduct the Examination, evaluation and comparison according to the LPP and Rrpp. This is already the second case that we have submitted to the PRB for the same CA and for the same reasons for elimination, therefore these actions of the CA seem to be very biased towards us.

CA's response to the request for review: "The claim of the complaining tenderer "Ejona" Sh.P.K,

Peja, states that the CA, when evaluating the tenders, violated Article 72 of the LPP. The Contracting Authority, after carefully reviewing the request for review, once again finds that the complainant's claims are unfounded, because the CA, when evaluating the tenders for this procurement activity, complied with and implemented Article 59, paragraph 2, of the LPP, and Article 72, because during the procedure for examination, evaluation and comparison of the tenders The bid evaluation committee, with the aim of better ensuring that the evaluation is accurate and proper, based on Article 59 and 72 of the LPP, on 22.07.2024, through a standard letter, requested information such as "Catalogs with technical specifications for the products offered by all EOs participating in this procurement activity - All participating tenderers have submitted catalogs with detailed specifications, except for you "Ejona ShPK", who have not submitted a catalog or technical specifications for the goods offered. This situation was clarified and supported in the Guideline No. 001/2023 on Public Procurement

Article 10. Clarification of tenders during the tender evaluation process 10.1 The following examples are not the only cases. Depending on the case presented, the CA must act in accordance with Article 72 and Article 59 of the LPP. Based on Guideline 001/2023 which states that: The technical specification for the goods offered and the catalog ("technical specification" - the CA determined the minimum and maximum requirements of a product, while the EO appears to submit the detailed specification of the goods offered. Except in cases where the EO cannot submit the technical specification of a certain product e.g. trees / vegetables etc. the EO submits

a declaration declaring that the goods will comply with the required specification), According to paragraph 2 of Article 52 of the LPP which states that: The contracting authority may in writing request a tenderer to provide a written explanation on any aspect of its tender, in order to conduct the examination, evaluation or comparison of tenders, on this basis (Article 59, point 2 of the LPP) the commission has requested additional clarifications from the tenderer EJONA SHPK, requesting a catalog along with detailed technical specifications for the goods offered, while the same, even after the request for clarification, has not submitted either a catalog or a technical specification of the goods offered, stating that they were not a request in the tender dossier. Despite the fact that there was no request in the tender dossier based on Article 59, point 2 and according to the Public Procurement Guideline 001/2023, the tenderer was obliged to submit detailed technical specifications and not just submit a statement on technical specifications, because these goods are not fruits and vegetables, so he only submitted a statement on technical specifications. As a result, the evaluation committee was unable to evaluate the technical offer of the products offered with those required, because even after the request for clarification, the same did not provide any evidence of what products it offers, in order to establish compliance with the technical specification required by the CA-MIA and the technical offer offered, therefore the committee has rightly decided to eliminate your offer. The company's claim that additional clarifications were requested that were not in the tender dossier or in the contract notice is not valid because we have requested clarification only for the specified items that were in the tender dossier and any clarification must be proven with a document, and in this case the only document that proves and clarifies is the catalog and technical specification for the items offered. The statement of the complaining Tenderer that: the catalog will be submitted after signing the contract for approval by the CA as we do in all other projects, has no legal basis because in the tender dossier it is not stated or allowed that different products after signing the contract and also variants were not allowed as the economic operator claims that they proposed different products after signing the contract until approval by the CA. For us as the CA-MPA, it is surprising how an economic operator can bid for items such as chillers for cooling and heating and the same does not have a technical specification of the items from the manufacturer with which it bids, nor a catalog, and also opposes the submission of the technical specification with the catalog even after the request from the CA-MIA. Therefore, the bid evaluation committee has rightly decided to eliminate you and this claim is unfounded. 2. Response to claim 2 above)

Claim of the complaining tenderer Ejona Sh.P.K, that Article 59 of the LPP and Article 40 of the RrPP were not violated in the case of tender evaluation. CA-MPB has reviewed the claim of the complaining tenderer and finds that these claims are not grounded and we are not dealing with a violation of the articles mentioned in this claim, because CA-MPB (evaluation committee) has not requested changes to the documents and has not set other criteria but based on paragraph 2 of Article 52 of the I.PP where it is stated that : "The contracting authority may, in writing, request a tenderer to provide a written clarification on any aspect of the tender, in order to enable the examination, evaluation or comparison of tenders: "The clarifications requested do not relate to selection criteria or the addition of criteria but are an assessment and clarification of the items required in the technical specification in the tender dossier, therefore this claim is unfounded. Also, the allegation of the complaining Tenderer that the selected winning EO does not meet the technical product requirements for the Thermal Pump and that it does not meet the requirements

according to the technical specification, CA-MPB has reviewed this allegation and has also viewed and compared the catalog of the selected winning EO, LPP has noticed after the request for access and submission of the documents "catalog of the winning EO" to the complaining Tenderer, all catalog materials were mistakenly not forwarded for fun because the winning EO has submitted several separate folders of catalogs and during the submission without any intention, the catalog for thermal pumps was forgotten (we will attach to this decision a part of the catalog sent on 25.07.2024). However, after reviewing and comparing the catalog of the selected winning EO with the minimum requirements of the required items with the technical specification in Annex 1 of the DT and FTD, it is concluded that this product meets all the required technical specifications, therefore the complaint claim at this point is unfounded. 3. Response to claim 3 above The complaint tenderer's claim that the CA violates Article 36, paragraph 3 by disqualifying us from the competition based on a criterion that is not mentioned in the TD and Contract Notice. The CA-MIA has reviewed the claim of the complaining Tenderer and finds that these claims are not based and do not involve violations of the articles mentioned in this claim, because the CA-MIA (evaluation commission) did not request changes to the documents and did not set other criteria, but based on paragraph 2 of article 52 of the LPP which states that "The contracting authority may in writing request a tenderer to provide a written explanation and any of the aspects of your tender in order to conduct the examination, evaluation or comparison of tenders. Therefore, this complaining claim is unfounded.

Based on Article 111 paragraph 5 in connection with Articles 113 and 114 of the LPP, the Procurement Review Body on 25/09/2024 authorized the review expert to conduct the initial review of the file and claims according to the complaint with no. 0858/2024, while on 07/10/2024 the review expert's report with no. 2024/0858 was submitted 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 partially grounded, the contract award notice be canceled and recommends that the case be returned for re-evaluation.

The expertise's report has been duly accepted by all procedural parties. The CA did not agree with the recommendation of the review expert's report, while the EO partially agreed with the expert's opinion.

The review panel has assessed that the conditions have been met to decide on this case without a hearing in accordance with 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 and the report of the review expert provide sufficient data to decide on the merits of the case.

- Administration and evaluation of evidence –

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

Regarding the claims of EO “Ejona” Sh.P.K, the review expert through report no. 2024/0858 has assessed as follows:

First finding (I): “The review expert clarifies that according to the tender dossier and the contract notice, the CA has not stated in any request that the bidding economic operators must also submit the catalog/brochure or technical specifications for the offered products. Such requests are not seen in Annex 1-Mandatory technical specifications. The CA with the date 22/07/2024 sent a standard letter of request for clarification of the tender, through which the authority requested the complaining EO and other operators to submit the catalogs from the manufacturer for positions 1-6 together with a description of the characteristics of the products. In response to this request, the complaining EO on date 25/07/2024 submitted a statement through which, among other things, it is stated that after consulting with the PPRC, we remind you that the CA has the right to request additional information only for the documents that have been requested and for the documents that have been submitted during the tendering phase and that after signing the contract, the catalogs will be submitted for approval for the offered products.

According to Article 56 of the Law on Public Procurement, point 3 of this article, which states that no tenderer shall be disqualified or excluded from procurement procedures based on any requirement or criterion that is not specified in the contract notice and in the tender dossier, then the opinion of the review expert is that in this specific case the CA should not request clarifications for additional criteria and the same does not have the right to eliminate bidding operators based on new criteria that were not previously part of the contract notice and the tender dossier. However, considering the nature of the procurement activity, through which the contracting authority, although it did not include this request in the dossier, in the expert's opinion it is difficult for the CA to evaluate the bids without having clear information about either the manufacturer or the model of the products with which it is bidding. In this specific case, according to the expert, we consider that if the CA does not have the right to add requests that were not in the CN and TD, then at least the complaining operator can submit a statement clarifying which manufacturer and which model the products with which it has bid belong. From what we have explained, we consider that the claim raised is partially founded.

Second finding (II): "Regarding this claim, the complaining EO in the complaint was not at all clear about which requirements for which product the catalog sent through additional clarifications by the recommended operator does not meet, however, in the documents provided as evidence, the expert saw that some specifications of some products were elaborated for which the CA also responded that it had mistakenly given the complaining EO access to only one catalog, therefore, according to them, the claims raised were based on the wrong catalog. In this case, the expert assesses that after returning the case for reassessment, the same should be offered access to the second catalog in order to raise specific claims based on the appropriate catalogs. In this case, we consider that this claim is partially founded."

Third finding (III): "On this issue, the review expert has provided an answer to the first claim and the same answer applies to this raised claim.

- Findings of the Review Panel —

The Review Panel has independently and objectively, with due diligence and professional care, assessed all the evidence in the case. It has been found that the Contracting Authority has not acted in accordance with the legal provisions on public procurement and the requirements of the tender dossier regarding the procurement activity Supply and installation of new chillers and heat pumps in government buildings with procurement number 214-24-4897-1-1-1. The review panel assesses that the review expert has professionally and objectively addressed the claims of the complaining economic operator “Ejona” Sh.P.K and that the reasoning in the expert report is sufficiently detailed, understandable and based entirely on the relevant documents referring to the procurement activity. The findings in the expert report can be confirmed through the tender dossier, as well as the documents with which the tenderers have bid. Consequently, the Review Panel regarding the claims of the complaining economic operator has granted credence to the expert report. In this way, it has been found that the claims of the complaining economic operator “Ejona” Sh.P. K are partially founded.

The review panel, after administering and evaluating the evidence, fully ascertaining the factual situation, relying on the LPP as the applicable substantive law, after reviewing the complaint claims, taking into account all the case files and the recommendations of the review expert, has found that the complaint of the Economic Operator is approved as partially grounded. Consequently, the Review Panel has decided, regarding the procurement activity entitled Supply and installation of new chillers and heat pumps in government buildings with procurement number 214-24-4897-1-1-1, to cancel the contract award notice and return the case for re-evaluation. The Review Panel, taking into account the description and the above-mentioned facts and after reviewing the case, the complaint of the complaining economic operator, the concrete analysis and the documentation of the case, finds the operator's complaint as partially grounded, recommending that the procurement activity Supply and installation of new chillers and heat pumps in government buildings with procurement number 214-24-4897-1-1-1 be returned for re-evaluation and the CA to act in accordance with the legal provisions of the LPP according to the requirements of the Tender Dossier and the Contract Notice.

The Review Panel has decided in accordance with the legal powers within the meaning of Article 104, paragraph 1, in conjunction with Article 103, Article 105 and Article 117 of the LPP to implement the procurement review procedure in a prompt, fair, non-discriminatory manner, with the aim of resolving the case legally and effectively. Therefore, the Review Panel based its findings on the relevant provisions of the LPP, which foresee and regulate such situations that may arise during a procurement activity.

Point I of the decision was decided based on Article 117 of the LPP in conjunction with Article 29 and 31 paragraph of the PRB Rules of Procedure.

Point II of the decision was decided based on Article 131 of the LPP in conjunction with Article 29 paragraph 3 of the PRB Rules of Procedure.

Point III of the decision was decided based on Article 31 paragraph 4 and paragraph 6 of the PRB Rules of Procedure in conjunction with Article 118 of the LPP.

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

Mrs. Batisha Ibrahim

Legal advice:

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

Decision to be submitted to:

1x1 CA – **MINISTRY OF INTERNAL AFFAIRS;**

1x1 EO – **“EJONA " SH.P.K.”;**

1x1 Archive of the PRB;