



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

Psh. No.377/23

Review Panel, appointed by the President of the PRB, Pursuant to the article 105 as well article 106, and 117 of the Law on Public Procurement of the Republic of Kosova (LPP), composed of: Vjosa Gradinaj Mexhuani - President, Agon Ramadani - referent, Vedat Poterqoi - member, deciding according to the complaint of the Economic operator EO "Buqa" Dyqani i Pavarur Tregtar Autopjese" shpk against the Decision for contract award or a design competition of the KOSOVA POLICE in the capacity of the Contracting Authority (CA) related to the procurement activity "Supply of parts for Shkoda Rapid vehicles" with procurement number 214-23-1137-1-1-1, on the 09/10/2023 has issued this:

DECISION

I. Approved, as partly grounded the complaint to the "Buqa" Dyqani i Pavarur Tregtar Autopjese" shpk submitted to the Procurement Review Body on the 09.06.2023(with protocol no.377/23) for the procurement activity "Supply of parts for Shkoda Rapid vehicles" with procurement number 214-23-1137-1-1-1, initiated by the Contracting Authority (CA) - Kosova Police..

II. Meanwhile, the aforementioned activity returns to **re-evaluation**.

III. 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 -

On the 02.03.2023, the Kosova Police, in the capacity of the Contracting Authority, published the contract notice for the procurement activity with title: "Supply of parts for Shkoda Rapid vehicles" with procurement number 214-23-1137-1-1-1. Meanwhile, on the 22.05.2023, the notice on the CA's decision was published.

EO "Dyqani i Pavarur Tregtar Autopješe" shpk on the 29. 05. 2023 submitted a request for reconsideration to CA. On the 02.06.2023, the CA- Kosova Police by decision rejected the request for reconsideration of the complaining EO.

Dissatisfied with the decision of the CA, the complaining EO "Dyqani i Pavarur Tregtar Autopjese" shpk, on the 09.06.2023, submitted a complaint to PRB, with protocol number 377/23, against the decision of the Contracting Authority regarding the procurement activity of described as above.

The contracting authority has implemented an open procedure, type of contract: supply, estimated value of the contract: 550,000.00 €.

The EO's complaint 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 an appeal to the PRB. 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 21.06.2023, the review expert submitted the evaluation report with the following recommendations:

- The complaint of the complaining economic operator should be approved as grounded
- Meanwhile, the aforementioned activity is returned to re-evaluation.

Introductory Clarification

The complaining EO group, dissatisfied with the CA's decision dated 31.03.2023 submits a complaint to the PRB with the same complaining claims, adding claims related to the reasonableness of the decision of the CA

RESPONSE TO THE COMPLAINING CLAIMS OF THE COMPLAINANT EO

Answer to Claim no. 1

Regarding the first claim related to the requirement of professional suitability 9.1 & 9.2 a) The economic operator must provide evidence that he has successfully concluded contracts of the same or similar nature during the last 3 (three) years (from the date of publication of the contract notice) not less than 400,000.00 €

Evidence: a) The list of contracts executed during the last three years (from the date of publication of this contract notice) signed and sealed by the EO. References or acceptance sheets in copies signed and stamped by the relevant Authority which must indicate the number of the procurement or contract, the value of the contract, the date of signing the contract, and the place of realization of the supplies. Note: No contract will be considered if there is no attached positive reference for the performance of supplies or reports of receipts of supplies when the supply is made for a public or private authority in Kosova or in another country, receipts must be submitted for proof or references (in references, the value of supplies, services or works should be mentioned issued by such authority

The review expert explains that the EO recommended for the contract with its offer has submitted the list of contracts in which part of that list is the contract "Supply of spare parts and maintenance of heavy machinery (bulldozers) with no. KMDK-19-4022-1-1-1 in the value of 394,361.81 €.

The EO recommended for the contract for the contract in question had not attached the "references or signed receipts" as requested with the tender dossier 9.1 & 9.2.

On the 14.04.2023, the CA has sent a request for clarification where it asks for clarifications about the origin of some products, the prices, and in the second point it requests the submission of references according to the list submitted with the offer with a deadline for the return of the answer until 19.04.2023.

EO sends the answers on the 19.04.2023, where as evidence it includes work orders and invoices from contract no. KMDK 19 4022 111 as above. EO again on the 02.05.2023 sends a communication to the CA with the contractor where in the request for "evidence that everything has gone well with the contract" he receives a confirmation via email that "the contract has gone well".

The CA has again sent a request for clarification on the 04.05.2023 with the same request for references and receipts according to the dossier request as above. Deadline for response to the request until 05.05.2023.

EO sends the answers dated 04.05.2023, which includes "invoices and work acceptances" for the contract in question, which he did not send in the request dated 04.14.2023.

Based on the request for clarification from the CA dated 19.04.2023, the review expert requested clarification from the CA with the request dated 21.06.2023 regarding the communication of the EO recommended for the contract as follows:

In the clarifications given by the EO recommended for the contract, an email requested by the official of the EO A.F for the representative of the executed contract KMDK M.T was

submitted as well as the same's response. Please provide me with proof of when the request was sent and when the answer was received from MT, so I need the dates of communication”.

- The CA in its response sends the communication dated 02.05.2023 to the official of the CA H.Z and the response of the official M.T dated 03.05.2023.

- In addition, the testimony sent by the EO recommended for contracts was sent after the request deadline (02.05.2023) in which the communication dates were not included.

- In the request for clarification, the contracts for some positions were also requested. The same has not been requested for EO Toverlani with the reference of 45,267.48 on the 01.08.2021 to prove whether the contract is completed. The CA has counted it in the list of completed contracts.

- Also, CA during the calculation of the acceptances did not take into account the deliveries that do not enter the period of the last three years from the date of the contract notification.

The EO recommended for contracts has submitted acceptance receipts, which in the request for clarification have been named "work acceptances".

- The reviewing expert estimates that the submitted document, which constitutes 80% of the evidence according to article 9.1 and 9.2, does not meet the requirement 9.1 & 9.2 of the tender dossier.

The review expert assesses that during the request for additional clarifications, the CA did not act in accordance with Article 59 paragraph 2 k amini i, le ë imi d e K a a imi i en e ë e, Neni 69 ë ia e nike d e/ose o e io ale si dhe

Article 72 Additional documentation and information Paragraph 1 When the information or documentation to be submitted by economic operators is or appears to be incomplete or incorrect, or when specific documents are missing, the contracting authorities may require economic operators to submit, complete, clarify or complete the appropriate information or documentation within a certain time limit, provided that such requests are made in full accordance with the principles of equal treatment and transparency.

3. The provision of missing information or the provision of information will be applied only to documents whose existence is fixed, before the deadline for the submission of tenders, and can be objectively verified.

Consequently, the review expert assesses **that the complaining claim is grounded.**

Answer to Claim no. 2

Regarding the claim of the complaining EO that has to do with the origin of the products, the reviewing expert clarifies that the EO recommended for contracts with its offer also submitted

the origin of the products, which it submitted even after the request for clarification of the tender dated 02.06.2023 .

In clarification, he also submitted the corresponding certificate from the manufacturer, which proves that the manufactured products are in accordance with the standards.

The review expert estimates that all major world companies today have their production line in China without losing quality and brand, so the issue of origin and quality of products is a matter regulated by contract with the general conditions article 3 and the special conditions article 16.2. Therefore, the review expert assesses that the complaining claim on this **point is not grounded**.

-Findings and conclusions of the review panel-

The Review Panel administered all the documents of this case, including the acts and actions of the CA, the submissions and evidence of the appellant and the review expert's report and by analyzing all of them in the general context of this issue, it created its independent conviction/ because the expert's report did not find full support from the RP for the reasons that will be elaborated below. The review expert's report does not produce binding effects for any of the parties nor for the review panel, therefore the same (and of course its evidentiary values) are always analyzed in relation to all the documents of a case, with the course of the procurement process, the actions of parties, the purpose and nature of a procurement activity, which in principle aims to fulfill public needs, with the use of public funds, which have been entrusted to each CA, at any level.

Regarding the complaint as an object of examination in relation to the complaint claims presented in this complaint, the RP has reached the final decision-making by considering the key determining point which have oriented towards the decision as if in the enacting clause, the determining issue was considered the issue raised by The complaining EO, in which case it has claimed that it has not fulfilled the request related to similar completed contracts, specifically the claims separated by the expert, presented with serial no. 1.

It is worth noting that in relation to the request in question, the review panel, based on the evidence and arguments presented, considered the main elements of the course of this activity, which are the evaluation of the offers in relation to the contracts presented by the EO recommended for the contract, where, based on the findings of the expert and the evidence presented in this procedure, it results that the EO recommended in its offer has submitted a list of contracts in which part of that list is the contract "Supply of spare parts and maintenance of heavy machinery (bulldozers) with no. KMDK-19-4022-1-1-1 in the value of €394,361.81, which can be considered as the main contract in the submitted list due to its value in relation to other contracts, in case this contract is not considered by the of CA, the recommended EO could be described as an irresponsible EO, due to the course of circumstances developed in relation to the evaluation of offers by the CA regarding the same contract, it is evidenced that the CA has requested clarifications from of the recommended EO related to the reference, also related to the termination of the same in which case the complaining EO presented the sales invoices for the services and supplies of this contract as well as a communication from the CA of that contract that the "same has been completed in order".

While the main issue identified as the object of review of this complaint was the way the commission evaluated the offers in terms of the similarity of the contracts, where in this case based on the facts and arguments presented by the parties in relation to the claim raised on the part of the complaining EO that the contract in question cannot be considered similar due to the fact that it contained services to a large extent and not supplies such as the activity in question as well as the request in TD. Based on the course of this activity, it can be estimated that the CA in relation to this contract has calculated the services as well as the supplies performed by the recommended EO, in which case from its total value (394,361.81 €) after the calculations of services and supplies have been assessed as acceptable value of about 300,000 €, while based on the calculations of the reviewing expert, the acceptable value of the supplies was around 219,000 € for the same contract, as a result, not exceeding the required threshold by not fulfilling the relevant request, in relation to this issue, the RP concludes that in terms of how they should be treated contracts of the same nature, the legislation in force specifies that their classification can be determined initially starting from the procurement code as well as its classification as supply or service or work. Moreover, based on Article 14.7 of the Regulation on Public Procurement, it determines: "For a public contract that can be a "combination": Supply/Service, Work/Service; Work/Supply; combination in Supply/Labor/Services, the basic method to handle this division is always the simple cost model. Any element of the contract that has the highest anticipated contract costs must be classified under that type of contract...". It is also worth adding that PPRC on the 09.06.2023 has published legal opinion no. 11 related to the question "What is the definition of the terms "same" and "similar" in the sense of contracts executed in the last three years?" it is immediately explained that: "Such a determination is the exclusive competence of the CA. So the Responsible Procurement Officer with the help of the request unit and/or experts in this field can determine similar services. In which case, the codes defined in the FPP can serve as a good orientation for determining supplies, services or similar works, where currently 8,323 FPP codes are published on the Public Procurement Electronic Platform. Also related to the allocation of contracts, invoices or situations in basic contracts related to their termination, we have a legal interpretation from PPRC, specifically question no. 10 "List of contracts realized (completed) in the last three years from the date of publication of the Contract Notice", during the evaluation of tenders, should the total contract value be taken as a basis or should it be prorated? , while in the answer, among other things, it is emphasized that:

As a result, during the evaluation process of tenders in accordance with the above-mentioned provision, the total amount of the contract specified in the list should be taken as a basis and not prorated.

In the specific case, the contract based on the procurement number was a "supply" contract, and also the requirement of the relevant activity as well as the activity itself based on the code is a "supply" contract.

Regarding this issue, the RP concludes that while the evaluation of the offers is done by separating the supplies from the services and distinguishing their value, the RP also assesses that since this issue is not decisively specified in the legislation in force, while in the opinions and the provisions referred to above, it can be concluded that the situations referred to contain similarities and can be applied in the concrete case, but at the same time the legislation as well as the requirements in the CN and TD always refer to the "contract" as a whole, as well based on the current practices as well as the basic features of the LPP, the RP finds that in relation to this

issue the CA based on the presented documentation (contracts) can consider or not a contract as a whole, which means the value total, not dividing the same and accepting it in part.

Regarding the application of clarification/additional information related to the reference, as an issue raised, the RP notes that in this regard, the legislation in force regulates the specific case, specifically Guideline No. 001/2023 for Public Procurement, Article 10.1 specifies that in cases where : The reference/certificate of acceptance from the list of presented contracts is missing, it is determined that, Clarifying information may be requested in accordance with articles 72 and 59 of the LPP, therefore the action taken by the CA requesting clarifications regarding the references as part of the list of contracts in the recommended EO offer is considered to be in harmony with this provision.

Regarding claim no. 2, the RP finds that it supports the opinion of the professional review expert given in the expertise report, so consequently this claim is classified as unfounded.

Therefore, finally, regarding this issue, the final decision was reached as detailed above, which consequently resulted in the fact that the panel considered that the activity should be reassessed and the reassessment should be done by assessing the contracts as complete contracts and not separated, accepting or not accepting the same as a whole based on the request of the TD and the legislation in force, also in case of lack of information regarding the conclusion, reference and other information apply the regulatory provisions of articles 72 and 59 of the LPP- of, and based on the findings, issue a final decision.

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. 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 – **KOSOVA POLICE**;
1x1 EO – **Dyqani i Pavarur Tregtar Autopjesë " Buqa "**;
1x1 Archive of the PRB;
1x1 For publication on the website of the PRB.