



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

Psh. No.569/23

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 (LPP), composed of Vedat Poterqoi - President, Vjosa Gradinaj Mexhuani - Member and Isa Hasani - Member, deciding according to the complaint of the Economic Operator (EO) Flamur Isufi B.I., against the Decision to cancel the procurement procedure of the MINISTRY OF HEALTH in the capacity of the Contracting Authority (CA) related to the procurement activity: “Supply of equipment for microbiological laboratories at IKSHPK” with procurement no. 206-23-651-1-1-1, on the 13/12/2023 has issued this:

DECISION

- 1.It ends the administrative review process, started according to the complaint of EO "Flamur Isufi" B.I., submitted to the Procurement Review Body on the 11.08.2023 (with protocol number 2023/0569) for the procurement activity with title: “Supply of equipment for microbiological laboratories at IKSHPK” with procurement no. 206-23-651-1-1-1, initiated by the Contracting Authority (CA) - Ministry of Health.
2. The complainant regarding these actions of the CA regarding the cancellation of the procurement activity in the contrary to the law, can turn to the competent Court for the protection of his/her rights.
3. The funds deposited in the name of the tariff tax for submitting the complaint to the account of the Economic Operator "Flamur Isufi" B.I..

REASONING

-Procedural facts and circumstances-

On the 15.02.2023, the Ministry of Health, in the capacity of the Contracting Authority, published the contract notice for the procurement activity entitled: "Supply of equipment for microbiological laboratories in IKSHPK Lot 2" with procurement no: 206-23-651-1-1-1. Meanwhile, on the 16.05.2023, the notice on the decision of the CA was published. The contracting authority has implemented an open procedure, type of contract: Supplies, estimated value of the contract for Lot 2: 165,600.00 €. The opening of offers for this procurement activity was done on the 12.04.2022. Four (4) EOs participated in this procurement activity that submitted bids, and the CA on the 16.05.2022 publishes the notice on the decision of the CA (B58) declaring the winner EO Flamur Isufi B.I. in the amount of 165,180.00 €.

After the passing of the legal deadline for submission of requests for reconsideration/complaints in accordance with the legal deadlines defined in the LPP, namely Article 108/A, the contracting authority on the 24.05.2022, having no request for reconsideration/complaint in the PRB, they also published the contract award notice (B08). After the publication of the contract award notice, the CA does not take any action for two (2) months, where on the 27.07.2023 it publishes a notice to cancel the procurement activity (B10), ending the procurement procedure with the reasoning "Cancellation of the contract award for LOT 2 is made at the request of the Secretary General with protocol No. 05-4516 dated 24.07.2023, with which the MAO has notified the MPO of the Procurement Division that I therefore request you to proceed in accordance with the Law on Public Procurement in the cancellation of this procurement activity. The General Secretary has refused to sign the contract and has requested that the contract be cancelled, on the grounds that the technical specifications have been drawn up in such a way as to favor specific producers, limiting competition Based on the opinion of the PPRC, MAO has requested expertise from the World Bank unit, with which, based on their opinion, this activity has ended".

Dissatisfied with the CA's decision, the complaining EO "Flamur Isufi" B.I. on the 11.08.2023 filed a complaint at the PRB, with protocol number 569/23, against the decision of the Contracting Authority regarding the procurement activity described above.

- Administration and evaluation of evidence -

Based on the actions described above, the PRB has engaged the evaluation expert 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. Regarding this, on the 17.08.2023, 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 EO "Flamur Isufi" B.I.

I. The complaint of the economic operator "Flamur Isufi" B.I. is approved, submitted to the Procurement Review Body on the 11.08.2023 (with protocol number 569/23) for the

procurement activity entitled: "Supply of equipment for microbiological laboratories in IKSHPK Lot 2" with no. of procurement: 206-23-651-1-1-1, initiated by the Contracting Authority (CA) - Ministry of Health.

II. Cancel the notification for cancellation of the procurement activity and recommend that the case returns for re-evaluation.

Complainant's claims

The complainant claims that the cancellation of the contract award for LOT 2 is unfounded and is not based on the fact that we have been announced as the successful tenderer, since we have fulfilled all the requirements of the tender dossier and the contract notice, this proven fact from the CA itself, since the same has sent us the draft contract for this lot. As long as the evaluation report was first signed by the evaluation committee and by the responsible procurement officer, the notice on the decision was published and all the procedural issues of the right of appeal were passed and as long as the contract award notice was published, it is clearly understood that they have been fulfilled all conditions for signing the contract according to article 26 of the LPP. The refusal of MAO to sign the contract is a direct intervention in the procurement process, and moreover, this action shows a discriminatory tendency towards us and favoring a certain company. therefore this action is illegal by the CA.

The review expert assigned to deal with these claims has made his findings by referring to legal provisions such as: LPP No. 04-L-042 & 05-L-068 & 05-L-092 - Article 10 *Means for promoting Transparency 3. Upon written request from any interested party, the contracting authority provides reasonable access to the party requesting access in the data described in paragraph 1 and 2 of this article, except business secret information which is certified by a relevant authority related to any procurement activity that has been closed. For the purposes of paragraph 3. of this article, the procurement activity is considered closed (i) on the date of publication of the contract award notice or the design competition results notice, (ii) on the contract award date in case of tenders according to Article 37 of this law, or (iii) if the procurement activity has been formally canceled or otherwise terminated before the award or selection of the winner, then on the date of the cancellation notification according to paragraph 2. of Article 62 of this law or on the date when the activities were completed.*

Regulation No. 001_2022 on public procurement - Article 43 Termination of procurement procedures 43.5 The procurement procedure after the opening of bids must be canceled for one of the following reasons: a. no tender was submitted within the specified deadline; b. none of the accepted tenders is responsible; REGULATION No. 001/2022 ON PUBLIC PROCUREMENT 81 c. the number of EO responsible for a framework public contract with more than one EO is less than 3 (three); d. there are no requests to participate, in limited or competitive procedures with negotiations, that have been submitted within the specified deadline; e. the number of qualified candidates in the limited/competitive procedure with negotiations is less than 3; p. no projects have been submitted within the specified deadline; g. none of the projects accepted in the design competition are responsible; h. if ordered by the Procurement Review Body; i. a violation of the law has occurred or will occur and cannot be corrected or prevented through an

amendment; j. if the CA during the preparation and management of the procedure has mistakenly used the option for the relevant procedure and which error is irreparable with the verification of the KRPP; or k. if a technical error has been presented in the electronic procurement platform due to any unforeseen situation and beyond the control of CA and which error is irreparable according to verification and ascertainment by PPRC.

Based on Regulation No. 001_2022 on public procurement - Article 43 Termination of procurement procedures, no condition has been met for the CA to take a decision on the cancellation of the procurement activity and as such it should continue because at this stage "before signing the contract - Complaining EO - recommended for contracts" when all the information is known from the EOs who have offered both in terms of prices and the nature of the description of the works, I think that there is no basis to cancel and as such the procedure should continue. Further, the reviewing expert continued that the cancellation of the award of the contract for Lot 2 by the General Secretary by not signing the contract and interfering with the powers of the procurement manager is an action that may be accompanied by legal challenges and consequences, since the powers of the manager of procurement are defined and limited by public procurement procedures and applicable law. The procurement manager is responsible for implementing public procurement procedures in accordance with the law and procurement principles. In this context, the Secretary General should not arbitrarily or unlawfully interfere with the powers of the procurement manager. Based on the information provided, the review expert proposes that the review panel approve the complaint of (EO) as based. Therefore, the recommendation is that the notice of cancellation of the procurement activity be canceled and the matter returned for re-evaluation. This means that the review panel must consider that the EO's complaint has a basis to approve it as such and that the cancellation notice is not based on sufficient data.

Findings of the Review Panel

The review panel assesses that the expert's report contains the essential elements of such a document as provided by the provision of Article 113 in relation to Article 114 of the LPP, according to which the expert is required to review all the procurement documentation, including all appeal claims and to provide the panel and all parties with an independent and professional assessment of the procurement activity and the validity of the complaining claims. However, it should be noted that the expert's report is not binding on the Review Panel and that each such report is evaluated and/or analyzed in the general context of the case documents, asserted facts and other possible evidence, taking into account the nature of the violations. event, the course, nature and purpose of the procurement activity.

Therefore, the fact that in which cases and for what, the Panel supports or not, any report and/or any of the recommendations, belongs to his/her independent and professional judgment, just as these responsibilities are addressed in the sense of article 98, 99 related to article 105 of the LPP.

In order to fully confirm the factual situation, the Review Panel has administered as evidence: the Review Expert's Report, the complaint of EO Flamur Isufi B.I., the Notice on the decision of

the CA (B58), the Notice of Award (B08), the Notice on the cancellation of procurement activity no. 214-23- 2530-2-1-1.

The Review Panel regarding the Notice of the Contracting Authority, dated 27.07.2023, for the cancellation of procurement activity no. 206-23-651-1-1-1, notes that the CA on page three (3) of the Notice for the cancellation of the procurement activity, in Article IV.4 Reason for the cancellation of the public procurement procedure, has noted these points on it which is the cancellation of this activity "An order issued by the Procurement Review Body requires the cancellation of the contract award notice. Decision of the Procurement Review Body; Cancellation and Re-tendering of the procurement activity; A recommendation issued by the Public Procurement Regulatory Commission requests the cancellation of the contract award notice" and in the additional information states that "Cancellation of the contract award for LOT 2 is made at the request of the Secretary General with No. protocol 05-4516 dated 24.07.2023, with which MAO has notified the MPO of the Procurement Division that I therefore request you to proceed in accordance with the Law on Public Procurement in the cancellation of this procurement activity. The General Secretary has refused to sign the contract and has requested that the contract be cancelled, on the grounds that the technical specifications have been drawn up in such a way as to favor specific producers, limiting competition. Based on the opinion of the PPRC, MAO has requested expertise from the World Bank unit, with which, based on their opinion, this activity has been ended".

The review panel has identified the legal provisions for public procurement that are related to these actions of the CA. Since Article 62 of the LPP clearly specifies in which cases the procurement activity can be terminated, Article 43 of the RRPP 001/2022 also defines the cases when the procurement procedure can be interrupted, while the CA's reasonableness for termination of this procedure is not provided for in this provision. Because the CA is obliged to comply with the legal provisions to make the legality of each action and these to be verified before the initiation of the procurement activity but also in the later stages. However, not at the stage when the contract award notice (B08) is published, when the contract is expected to be signed by the parties. Even the interpretation of the PPRC as mentioned in the answer is related to the entire process of public procurement from the initiation of the procurement activity until its closure. Whereas, with the publication of the contract award notice by the CA, the procurement activity is considered closed because the time for complaints to the CA and PRB also passes, and these actions of the CA are after the closure of the procurement activity.

With the publication of the notice on the decision of the CA (B58) and the expiration of the time limits for submitting complaints, then with the publication of the notice for the award of the contract (B08) for the review panel in accordance with the legal provisions, it is considered a closed activity, as defined by the article 10 paragraph 3, point (i) of the LPP, quote "the procurement activity is considered closed (i) on the date of publication of the contract award notice or the notice on the results of the design competition", as well as article 42.4 of the RRPP no. 001/2022.

In article 42.4 of RRPP no. 001/2022, obliges the CA to, quote: "After the expiration of the deadline for submitting and reviewing complaints in the Notice on the CA's Decision (B58), the

Contracting Authority is obliged to prepare the draft contract and sign it within 30 calendar days". as required by article 24, paragraph 2 of the LPP "The contracting authority is responsible for ensuring that all procurement activities of such contracting authority are executed in full compliance with this law".

Therefore, the review panel based on article 10 of the LPP, related to article 42.4 of the RRPP no. 001/2022, assesses that this case has been concluded and therefore decided as in point 1 of the provision. Whereas the complainant can turn to the competent institutions for the realization of his/her right.

Therefore, acting on the basis of the basic principles of the procurement review procedures, which, among other things, are specifically sanctioned by the provision of Article 104 of the LPP and at the same time analyzing the documents of this case in relation to the facts and circumstances of described as above, and especially paying due attention to the nature and purpose of the complaining claims, the Review Panel took into consideration all the statements of the complainant, the acts and actions taken by the CA, the review expert's report and analyzed them with take care of all the documents of this case and considers that the examination of this complaint falls outside the defined legal authorizations.

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. The review panel in accordance with Article 117 of the LPP, as well as based on the evidence presented above, decided as in the enacting clause of this decision.

The review panel in accordance with Article 117 of the LPP, as well as based on the evidence presented above, 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 – **MINISTRY OF HEALTH;**

1x1 EO – **Flamur Isufi B.I.;**

1x1 Archive of the PRB;

1x1 For publication on the website of the PRB.