



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

Psh. No.902/23

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, supplemented and Law 05/L-092) in the composition of: Isa Hasani-President, Vedat Poterqoi-Member and Vjosa Gradinaj-Mexhuani- Member, deciding according to the complaint of the Economic Operator (OE) "Nika PrO-Ing" SH.P.K., against the Decision to contract award or a design competition, related to the procurement activity “Construction of SHFMU in Pozharan - Municipality of Viti” - continuation of Works” with procurement number 214-22-8829-5-1-1, initiated by the contracting authority (CA) - Ministry of Internal Affairs, on the 22/01/2024 has issued this:

DECISION

1. Refused, as ungrounded the complaint of EO “Nika PrO-Ing” SH.P.K with no.2023/902 of the 13/11/2023, related to the procurement activity “Construction of SHFMU in Pozharan - Municipality of Viti” - continuation of Works” with procurement number 214-22-8829-5-1-1, initiated by the contracting authority (CA) - Ministry of Internal Affairs.
2. It is confirmed the "Notice on the Decision of the Contracting Authority” published on the 26.10.2023, of the Contracting Authority, Ministry of Internal Affairs, related to the procurement activity with number: 214-22-8829-5-1-1.
3. In accordance with Article 31 point 5 of the Rules of Procedure of the PRB, the complaining economic operator is confiscated the complaint fee in the amount deposited when the complaint is submitted, while the funds go to the Budget of the Republic of Kosova.

REASONING

- Procedural facts and circumstances –

On the 25.08.2022, the Ministry of Internal Affairs, in the capacity of the Contracting Authority, published the Contract Notice B05 related to the procurement activity "Construction of SHFMU in Pozharan - Municipality of Vitia - continuation of works" with no. of procurement: "214-22-8829-5-1-1". On the 23.01.2023, CA published B58 Notice on the cancellation of the Contracting Authority. The contracting authority has implemented an open procedure, type of contract: work, estimated value of the contract: 939,633.44 €.

In relation to this case, a previous decision of PRB was issued, on No. 2023/569- 579/2022 and PSH no. 2023/074.

On the 26.10.2023 through the e-procurement electronic platform, we were notified of the CA's decision, where they recommended the EO group "AAG Projekt SH.P.K & AC ing SH.P.K & Euro Eervices" SH.P.K for the contract

On the 31.10.2023, EO "Nika PrO-Ing" Sh.P.K has submitted a request for reconsideration against the CA's decision of 26.10.2023.

On the 03.11.2023, the Contracting Authority rejected the request for reconsideration as unfounded.

On the 13.11.2023, PRB received the complaint from EO "NIKA PrO- Ing SH.P.K."- Ferizaj with no. 902/23 related to the activity "Construction of SHFMU in Pozharan - Municipality of Vitia - continuation of works" with no. of procurement: "214-22-8829-5-1-1".

- On the stage of preliminary review-

The Review Panel has concluded that the complaint contains all the elements defined through Article 111 of the LPP and as such was submitted within the legal term in accordance with Article 109 paragraph 1 of the LPP after the preliminary procedure for resolving disputes in the sense of Article 108/A of the LPP, from the economic operator who is an interested party according to article 4 paragraph 1 sub-paragraph 26 of the LPP. In this way, the Review Panel has concluded that it is competent to review this complaint according to Article 105 of the LPP and there is no procedural obstacle to proceed with reviewing the complaint in a meritorious manner.

Claims of the complaining economic operator "NIKA PrO-Ing SH.P.K." are presented as follows:

The first claim (I): The EO recommended for the contract is not responsible because the same has not extended the validity which expired on dt. 20.10.2023 means the EO recommended for the contract in the last extension of the validity of the offer did it on dt. On 20.07.2023, we requested these documents in our approach and noticed that the EO recommended for the contract did not have continued validity at the time of evaluation of the offers. This is the responsibility of the procurement official who, after several decisions of the PRB that declared

the EO recommended for the contract as irresponsible, it is clearly seen that the above-mentioned has committed major legal violations after declaring the EO the winner for the third time of the same, even though the same has not had continued validity. We ask the RP to take legal measures to confiscate the procurement manager's license in accordance with the LPP.

The second claim (II): EO is irresponsible according to 2 decisions of PRB, which PSH has concluded that EO has not been able to fulfill the criteria required in TD... Point a. EO has not been able to fulfill the request for machinery, which in TD was of technical and professional capacity 9. I& 9.2 EO must prove that it possesses the following equipment (Clear request and limited request): Grader 5.2-6.2 tons. This Equipment, the EO certifies that it does not possess or has an agreement with any EO, but instead of this request, it has offered an equipment with a weight greater than 10 tons, RP has determined that the requirements in TD are not allowed equivalence, but they are decisive requests.

Even according to the LPP and RROUP, the requirements in TD must be met precisely. If the EO has concerns, I can ask for additional clarification or Request for reconsideration at the contract notification stage. The EO recommended for the contract has not made such a request. It is worth noting that you, as the procurement office, have made a request to the request unit to provide the largest equipment, which is contrary to the LPP and RROUP. Finding of the RP according to the PRB with no. 2023/0074 we have noticed that EO AAG does not meet the requirements of the Tender dossier. With all that regarding the requirements of the dossier about the machine. specifically the grader where the maximum allowed in the file was 5.2 to 8 tons, EO has provided evidence for a 10 ton grader, that means 2 tons more than the maximum weight set by CA. So from the aforementioned fact it is clearly understood that the same is irresponsible and the same should not have been recommended for a contract.

The third claim (III): EO has not been able to fulfill the request for professional staff, which in DT was for technical and professional capacity 9. I& 9.2. A manufacturer certified technician for CCTV and an expert in installing BMS systems. The EO recommended for the contract is also irresponsible for the fact that it does not meet the request of the tender file, where the request was "A technician certified by the manufacturer for CCTV", while as documentary evidence "Certificates - proof of CCTV qualification" was requested - copy, CV, contract or work agreement for this valid project with the employer - Copy". The same EO for the aforementioned request in the offer presented evidence for Mr. Bujar Morina, but that these evidences were not provided in accordance with the request of the tender file, since the required certificate proving the fact that the same is qualified for CCTV has not been provided. Also for the same, several certificates have been presented which do not conform to the tender dossier requirement and also the same certificates are without validity, since they were issued in 2020 and are only valid for two years. Apart from the fact that some of the certificates offered are invalid, others do not conform to the tender dossier requirement. While the EO recommended for the contract did not present the CCTV qualification certificate, it is clear that it is irresponsible and as such should have been eliminated from the procurement activity and not recommended for the contract. The EO recommended for the contract is irresponsible, because it has not fulfilled another requirement of the tender file "The Economic Operator or the group of economic operators must

present that it has an expert available for the installation of BMS systems", while as documentary evidence it is requested "Certificates - proof of qualification for BMS installation and startup - Copy, contract or work agreement for this valid project with the copy employer". The same economic operator recommended for the contract does not meet the requirement of the tender file due to the fact that in the offer was presented by Mrs. Jasna Vasilevska, who does not meet the above-mentioned request, since there is no evidence that she is certified for the installation of BMS systems. For the same, the certificates were not presented according to the above-mentioned request and as such these evidences were not provided in accordance with the above-mentioned request, therefore this fact proves that the same EO recommended for the contract is irresponsible. The EO recommended for the contract has presented several certificates for the same, but the presented certificates do not conform to the tender dossier requirement. The finding of the RP with the decision 2023/0074- The Review Panel, analyzing the documents of this case and the actions taken by the parties, finds that the CA should be more clear when setting the technical specifications and in this particular case to clarify about the established request as for the CCTV and BMS certificates, do the offers provided by the bidding EO meet the requirements decisively or are they equivalent for which equivalence is not allowed in the request established in the TD. Even in the first decision of the PRB 569/579/22, PSh found that the EO is irresponsible. Regarding the appeal claim submitted by the complaining EO against the recommended GOE claiming that the recommended GOE did not meet the criteria according to the tender file, where the request was a technician certified by the manufacturer for CCTV", while as documentary evidence "Certificates the evidence" was requested of the qualification for CCTV copy, CV contract or work agreement for this valid project with the employer-Copy", claiming that the GOE for the aforementioned request in the offer presented evidence for Mr. Bujar Morina, but that these evidences were not provided in accordance with the request of the tender file, since the required certificate proving the fact that the same is qualified for CCTV has not been provided, also for the same, several certificates have been presented which do not conform to the request of the tender dossier and also the same certificates are invalid, since they were issued in 2020 and are only valid for two years, except that some of the certificates offered are invalid, the others do not conform to the request of the tender dossier, the RP classifies the complaint claim as based on the fact that the recommended EO does not meet this established requirement of TD. therefore, since this evidence is required in TD to the technical and professional capacity in TD, which as such are qualifying criteria, therefore RP finds that this claim is grounded and as such made the recommended EO irresponsible in relation to this procurement activity .

The fourth claim (IV): I do not agree with the reason for our elimination, where it has been noted that a member of our consortium has declared that he is part of another bidding group in this procurement activity, we clarify that this finding is completely incorrect, because we are a group of economic operators consisting of Nika Pro-Ing LLC & NNPT Engineering & NNP Art Projekt and that this fact is also confirmed in the minutes of the opening of offers, where all the names of the consortium members appear, while none of these members is a bidder in this procurement activity with any group or as an individual bidder. If you refer to the statements of our consortium, we clarify that there is a technical omission in the statement. The agreement for the establishment of the consortium between the three members is signed and sealed by the three

parties and is in order, where it is determined that the leader of the consortium will be Nika PrO-Ing SHPK. Likewise, the individual declarations left to the members of the consortium are signed by each member of the group and are in order, but the only technical omission is in the three joint declarations, where the omission is only in the entry of the name (at the beginning where the names are mentioned), where instead of the name of the company Nika PrO-Ing Shpk, there is a template of the name of another company Global Holding Shpk, and this is left over from past collaborations, but even in these statements, the correct name of Nika is written at the end PrO-Ing LLC and is signed and sealed by the representative of the said company. This is only a technical omission because all the statements are signed and sealed by the three members of the consortium, and when the statements are unclear according to Article 39 of the RRUOPP it is allowed to request clarifications even though in this case all the statements are signed by all three members of the consortium and are in order in terms of signatures and seals.

The fifth claim (V): As for the other reason that we submitted a non-standard allowance, which was not in the procurement system, even though there is no change in the calculation of the allowance, we clarify that this is only a small deviation according to article 59.4 of the LPP point (ii) where it is said that it contains only small deviations that cannot cause material changes or deviations from the characteristics, conditions, and other requirements set forth in the contract notification and in the tender file. In this case, the CA has pointed out that the calculation does not change, therefore this really has no effect in advance and absolutely does not affect the circumstances that our offer is declared irresponsible, therefore small deviations are determined for these cases which are not affect the substance and which do not deviate from the requirements, conditions and characteristics defined in the tender dossier. I do not agree with their conclusion (the evaluation commission or the procurement office) regarding the reasons for our elimination, as their conclusion is contrary to the LPP- and RROUP. As can be seen from the first evaluation of this procedure, in every decision of yours you have eliminated us for several points, the last time you eliminated us only for two technical errors, for which we have requested an interpretation in the PPRC and in the request dated 11.10.2022 first for reconsideration, we have offered this interpretation, but they have not taken it back as a basis, or have not notified the evaluation commission that there is an interpretation, in the attachment we are forwarding the request and the response from the PPRC regarding the creation of the group and the deviation in advance, which does not change the result. Based on all the evidence and facts mentioned above, we conclude that the examination, evaluation and comparison of the tenders was not done in accordance with Article 59 of the LPP, because the EO was recommended for contracts, which did not fulfill all the requirements of the tender file and contract notification. Also, the main criterion for awarding the contract, which was the responsible tender with the lowest price, as provided for in article 60 paragraph 1.1 of the LPP, was not respected, because you recommended the irresponsible economic operator for the contract. you have not respected article 7 of the LPP, discriminating against us as an economic operator, even though we have met all the requirements of the TDS and the contract notice, we have not been declared the winner of this tender, but it is seen that the purpose yours is that we are not declared the winner of this tender. Paragraph I of Article 7 of the LPP clearly foresees that "The contracting authority will treat economic operators equally and non-discriminatory and will act in a transparent manner.

Likewise, paragraph 6 of article 7 of the LPP foresees that during the management of procurement activities, all contracting authorities will ensure; that (vi) the selected tender complies with all substantive aspects of the relevant conditions, criteria and specifications, but you have not complied with this legal provision either. Also, you have not respected article 6 of the LPP even though the contracting authorities are obliged to ensure that public funds and public resources are used in the most economical way, simultaneously taking into consideration the purpose and subject of the procurement as provided in article 6 of the LPP. The general interest also mentioned in the decision of the PRB is the sensitive nature of the work, which knows that this delay of several years of this school is a problem for the community in the village of Pozhoran, which is holding classes in 4 shifts with one school. other, this procrastination is occurring from the procurement office that twice in a row and a cancellation has been made for the same EO.

Referring to the claims as above, the EO considers that the Contracting Authority has acted in violation of Article 1- Purpose, Article 7- Equality in Treatment/Non-discrimination, Article 59- Comparison, Evaluation and Examination of Tenders, Article 60 - Criteria for contract award, article 69- Technical and/or Professional Ability, and article 72 of the LPP.

- Administration and evaluation of evidence -

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

Relying on article 111 paragraph 5 related to articles 113 and 114 of the LPP, the Review Panel dated 18.12.2023 has authorized the review expert to conduct the initial review of the file and claims according to complaint no. 902/23, while on 19.12.2023 the review expert's report with no. 2023/0902 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 rejected as unfounded and that the decision of the CA remain in force.

Regarding the claims of EO "NIKA PrO-Ing SH.P.K." review expert through report no. 2023/0902 assessed as follows:

Procurement activity entitled: "SHFMU construction in Pozharan - Municipality of Vitia - continuation of works" with no. of procurement: "214-22-8829-5-1-1", initiated by the Contracting Authority (CA) - Ministry of Internal Affairs, has started with the publication of the contract notice dated 25.08.2022, the opening of offers has been made dated 15.09.2022. We clarify that this procurement activity has several re-evaluations and decisions by CA and PRB. Referring to the latest decisions by PRBO- PSH. no. 074/2023 dated 25.07.2023, and PSH 588/2023 dt, 11.10.2023, which decision returns the procurement activity to re-evaluation and to the zero point of the evaluation of offers. Further, after the reevaluation of the offers by the CA, on 26.10.2023, the same recommends the Group of Economic Operators (GOE) "AAG PROJEKT SHPK & AC ing SHPK & Euro Services SHPK" for the contract, while the EO

declares the complainant eliminated. The complaining EO has filed claims against their elimination by the CA, as well as against the recommended Group of Economic Operators (GOE).

First, we clarify the claims of the recommended GOE, in which the first claim was not presented in the request for reconsideration, but it is presented in the appeal. Therefore, in accordance with the work regulation of the PRB no. 01/2020, article 19.1, the review is continued.

First finding (I): The review expert regarding the first claim of the complaining EO clarifies that the recommended GOE has attached the validity of the offer dated 16.10.2023 for another 60 days, in accordance with the request of the CA submitted on 12.10. 2023, as such this claim of the complaining EO is not found to be founded. The examining expert regarding the second claim of the complaining EO clarifies that this claim has been and has been dealt with, where in the last decision PSH.NR 588/2023 dt. 11.10.2023, the review panel finds that after clarifying with the requesting unit, it remains at the discretion of the CA.

Second finding (II): The review expert regarding the second claim of the complaining EO clarifies that this claim has been and has been dealt with, where in the last decision PSH 588/2023 dated 11.10.2023, the review panel finds that after the clarification with the requesting unit, remains at the discretion of the CA.

The third finding (III): Regarding the third claim, the Reviewing Expert clarifies that, the last decision 588/2023 dt 11.10.2023 as found that after the clarifications, it remains at the discretion of the CA to handle it and considers it as a judged issue .

Fourth finding (IV): The review expert regarding the reasons for the elimination of the complaining EO clarifies that this claim was and has been dealt with by the PSH Decision. no. 569-579/22 dt. 17.01.2023.

Fifth finding (V): The review expert regarding the fifth claim clarifies that this claim was and was dealt with by the RP Decision. no. 569-579/22 dt. 17.01.2023. In conclusion, since the claims of the complaining EO against the recommended GOE were dealt with and judged earlier by the review panel, where for the same claims the last decision of P.SH. no. 588/2023 dt. 11.10.2023 found that clarifications should be requested in the reassessment where the evaluation of the clarifications remains the responsibility of the contracting authority, for which the CA in the reassessment respected the above-mentioned decision then as such, I consider that this case is rejected as unfounded, and the decision of the CA remains in force.

The expertise's report has been duly accepted by all procedural parties. CA declares that it agrees with the recommendations of the review expert's report, while EO does not agree with the review expert's report.

The review panel has assessed that the conditions have been met to decide on this case without a hearing in the sense of 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 as well as the expert's report reviewers provide sufficient data to decide on the merits of the case.

- Findings of the Review Panel -

The Working Regulation of the Public Review Body no. 83/20, dated 03.03.2020, which is published on the PRB Website, with article 20, paragraph 2 of the Regulation, defines the requirements for the Contracting Authority and the Economic Operator, that all information and notices must be submitted and communicated through the public communication platform, if this is possible.

Based on the papers of this case, the Panel considers that regarding the issue in the present case, there is no need to convene a hearing with the parties, in the sense of Article 24 paragraph 1 of the Rules of Procedure of the PRB, taking into account the fact that the claims of the parties and their submissions, evidence as well as the review expert's report provide sufficient data to decide on the merits.

The review panel assesses that the Report of the review expert, drawn up at the request of the Panel regarding the dispute in this matter of the public procurement activity, contains the essential elements of such a document as provided by the provision of article 113 related to article 114 of the LPP, according to who is required by the review expert to review all procurement documentation, including all complaining claims and provide the Panel and all disputing parties with an independent and professional assessment of the procurement activity and the validity of the complaining claims.

However, it should be emphasized the legal fact 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 eventual evidence, taking into account the nature of eventual violations, the flow, nature and purpose of the procurement activity, therefore the fact that in which cases and for what, the Panel relies or not, the expert's report and/or any of the recommendations, belongs to its independent and professional judgment/ thanks, just as these responsibilities are addressed in terms of article 98, 99 related to article 105 of the Public Procurement Law.

The review panel, with the aim of fully verifying the factual situation, has administered as evidence: the Review Expert's Report, the Economic Operator's complaint, the Notice on the Contract, the Notice on the Decision of the Contracting Authority, to reward the EO with contracts for the procurement activity, the Report of the Evaluation of the Evaluation Commission of the CA, the Decision of the Contracting Authority regarding the Request for reconsideration.

The panel assesses that the review expert's report has dealt with the claims of the complaining Economic Operator in a professional and objective manner, the report is based entirely on the relevant documents that refer to the procurement activity. The findings in the expert's report can be confirmed through the tender file as well as the documents with which the tenderers have offered. The Review Panel regarding the claims of the complaining economic operator has given full confidence to the expert's report, according to which all the complaining claims of the complaining Economic Operator have been found to be unfounded.

The Review Panel, based on the findings of the review expert, considers that the complainant failed to prove with concrete evidence that there was a legal violation by the Contracting Authority during the development of the said procurement activity. Therefore, the Review Panel has assessed that the Contracting Authority has acted in accordance with the legal provisions for public procurement and the requirements of the Tender Dossier by recommending the administratively responsible economic operator with the lowest price for the contract, related to the procurement activity entitled: "Construction SHFMU in Pozharan - Municipality of Vitia - continuation of works", procurement number: 214-22-8829-5-1-1. Consequently, the Review Panel has decided to reject the complaint of the Economic Operator: "NIKA PrO-Ing SH.P.K.", and has certified the Decision of CA -B58 dated 26.10.2023, Contracting Authority, Ministry of Internal Affairs regarding the procurement activity .

It is also worth noting that based on the basic principles of the LPP in accordance with article 1 and 6 of the LPP (economical use of the budget), in this case the review panel notes that the complaining EO is at a significantly higher price, has bid in the value; 939,993.07 euros, until the EO recommended for awarding the contract has bid in the value; 743,609.12 euros, decision of the CA, dated 26.10.2023.

On the other hand, the panel finds that it is the responsibility of the contracting authority based on article 59, paragraph 4 of the LPP, it can consider a tender as responsible if it contains small deviations that cannot cause material changes, therefore the review panel based on his responsibilities in article 104 paragraph 4 of the LPP, decided, based on the general interest and the sensitive category that the procurement activity is related to the construction of schools that is related to the education of children and taking as a basis the possible consequences of actions or measures in all interests that may be harmed, including the public interest.

The Review Panel emphasizes that each contracting authority (at the central and local level) enjoys autonomy in procurement planning (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 the specific case has have the right to also decide on the EO recommended for the award of 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 contracting authority are executed in compliance with complete with this law".

Based on the fact of the rejection of the EO complaint, the review panel decided to confiscate the complaint fee in the amount deposited by the complaining economic operator based on Article 31 par. 5 of the Rules of Procedure of the PRB, while the funds go to the budget of the Republic of Kosova.

The Review Panel has decided in accordance with the legal powers in the sense of Article 104 paragraph 1 in relation to Article 103 and Article 105 of the LPP for the implementation of the procurement review procedure in a fast, fair, non-discriminatory manner, with the aim of resolving legal and effective of the subject. Therefore, the Review Panel based its findings on the relevant provisions of the LPP, which foresee and regulate such situations, which may appear during a procurement activity.

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. Isa Hasani

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 INTERNAL AFFAIRS;**

1x1 EO – **“NIKA PrO- Ing SH.P.K;**

1x1 Archive of the PRB;

1x1 For publication on the website of the PRB.