



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

Psh. No.1066/23

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) in the composition of: Vedat Poterqoi - President, Isa Hasani - Member and Vjosa Gradinaj-Mexhuani - Member deciding according to the complaint of EO “ARMENDI BAU” SH.P.K”, against the Contract award Notice or the or of a design competition of the "Municipality of Istog" in the capacity of the Contracting Authority (CA) related to the procurement activity “Repair of local roads of order IV and remediation of the condition from floods” with procurement number 633-23-2733-1-1-1, on the 20/02/2024 has issued this:

DECISION

1. The complaint of EO “Armendi Bau” SH. P.K.- Istog with no. 2023/649, dated 04/09/2023, related to the procurement activity “Repair of local roads of order IV and remediation of the condition from floods” with procurement number 633-23-2733-1-1-1, initiated by the Contracting authority - Municipality of Istog, on the part of this Panel, it is considered as a judged case (Res Judicata) since the complaining claims have been dealt with in the PSh Decision. no. 2023/0649 dated 20.11.2023, where the object of the dispute and the parties are the same, therefore this case is considered as a "Res Judicata" adjudicated case.
2. Cancelled the award notice announced by the CA, while the procurement activity is returned to re-evaluation.
3. ORDERED The Contracting Authority - Municipality of Istog to implement within 5 (five) days the decision of the PRB with number: PSh. no. 2023/0649 dated 10.11.2^23, related to the procurement activity with title: “Repair of local roads of order IV and remediation of the condition from floods” with procurement number 633-23-2733-1-1-1, and notify PRB
4. Failure to comply with this order within five days will force the Review Panel to act in accordance with Article 131 of the LPP and at the same time request from the PPRC, the cancellation of the license for the procurement manager of the CA / Municipality of Istog, in

accordance with article 25 paragraph 8 and 9 of the LPP.

5. It is allowed to return the fee paid by filing a complaint. The complaining economic operator is required to, in accordance with Article 33 point 6 of the PRB's work regulations, within sixty (60) days make a request for the return of the complaint insurance, otherwise the deposit will be confiscated and these funds will be transferred to The budget of the Republic of Kosova.

REASONING

- Procedural facts and circumstances -

On 27.03.2023, the "Municipality of Istog" as the Contracting Authority has published the contract notice for the procurement activity with title "Repair of local roads of order IV and remediation of the condition from floods" with procurement number 633-23-2733-1-1-1. Meanwhile, on the 18.12.2023, the notice was published on the decision of the CA, with which it awarded with contract the EO "Shkëmbi ShPC".

This procurement activity was developed through an open procedure with the type of contract for work and with an estimated contract value of 350,000.00 €.

On the 22.12.2023, EO "Armendi Bau" SH.P.K.- Istog, submitted a request for reconsideration against the aforementioned decision of CA. On the 27.12.2023, the Contracting Authority rejected as unfounded the request for reconsideration.

On the 29.12.2023, PRB received the complaint from EO "Armendi Bau" SH.P.K.- Istog with no. 1066/23 related to the activity "Repair of IV local roads and remediation of the situation from floods" with procurement number 633-23-2733-1-1-1.

- On the preliminary review stage -

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.

The claims of the complaining economic operator "ARMENDI BAU" SH.P.K. are presented as follows:

On the 27.12.2023, we received a standard letter for the eliminated [tender] [candidate], where some unacceptable reasons for elimination were mentioned. Referring to the tender dossier and contract notice, these reasons do not stand because we have fully met the required conditions and criteria, also the EO announced as the winner does not meet the required conditions and is

irresponsible, in which case the CA Municipality of Istog violated the Public Procurement Law in its entirety when it announced the winner of an irresponsible EO.

The reasons for our elimination according to the CA of the municipality of Istog are that: Group of Economic Operators ARMENDI BAUSH.P.K.; Company Zuka Commerce Sh.p.k., Rr. Shpend Kukiqi no. 50, 31000, Suhogërle Istog According to the decision of the CA of the procurement unit of the municipality of Istog dated 17.07.2023, the statement of the participants in the consortium signed and sealed by all the participants of the group, after competing as a group of operators who participated and did not comply with article 71 of the LPP, point b of article 26 of the Public Procurement Regulation no. 001/2022, which We quote: If a tender is submitted by such a group, the group must submit together with its tender a statement signed by each of the members, confirming their participation in the group and that they do not participate in any other group participating in the same procurement procedures under the same Contracting Authority for the same Activity. All Contracting Authorities must include this condition in their tender dossiers. In the event that a member participates in several groups, each of the relevant groups will be considered ineligible - not responsible for regulation number 001/2022 dated 20.10.2022, Article 26.1. point b. Submits a declaration signed by each of the members, confirming their participation in the group and that they are not participating individually and/or in other groups in the same procurement procedure (the electronic declaration can be signed using the advanced electronic signature if is applicable.

These claims do not stand because we as a consortium in our offer have submitted the consortium agreement (to our offer refer to File with the name 1. Consortium Agreement), where we have made a written statement that we are participating in the group as a member of the consortium and jointly we are responsible for fulfilling this procurement activity. Also, in the request of the CA dated 3.07.2023, we are asked: *"After you have expressed competition in the procurement activity as a group of operators for the activity: "Repair of local roads of order IV and remediation of the situation from floods" with no. proc. 633-023-012-111, since the activity in question is in the evaluation phase by the evaluation committee, before the recommendation of the responsible offer by the evaluation committee and the decision by the procurement office, it asks you as a group to declare with a separate statement about the joint obligations according to the agreement and separately" we have responded with separate declarations that our obligations are joint and according to the consortium agreement and we have sent you the Declarations signed and sealed by the members of the consortium as requested by the CA, where we declare that as a member of the consortium we are responsible for the realization of this contract, and we also declare that we are participating in this activity as a consortium (Armendi Bau- as a leader and Company Zuka Commerce- as a member of the consortium). In this case, our elimination for this reason is completely unfounded and in contradiction with the LPP where the Municipality of Istog has violated the LPP, Article 7 Equality in Treatment / Non-Discrimination. Likewise, in point 10 of the guide for public procurement no. 001/2023, it is written textually **"The statement signed by each member for confirmation of participation is missing", while we as EO with statements in the consortium agreement confirm the participation. (To our offer, refer to File with the name 1. Consortium Agreement)***

Also, even after the decision of the PRB - number PRB 2023/0649, the Contracting Authority did not ask for any clarifications, and did not implement the decision of the PRB, and at the same time based on the access to official documents that were provided to us by the CA Municipality of Istog, we noticed that the Contracting Authority, the Municipality of Istog, nor the company that sent a letter to the successful tenderer at all, did not use Article 72 to clarify the claims of our company, which the PRB in the assessment made based on at the same time, it has made the company irresponsible regarding our claims.

Referring to the claims as above, "ARMENDI BAU" SHPK considers that the Contracting Authority has violated Article 6, 7, 59, 65, 66, 68, 69 AND 72 of the LPP. Proposing to cancel B58 - notice on the decision of the contracting authority, dated: 27.12.2023, Subject entitled: Repair of local roads of order IV and remediation of the condition from floods" with procurement number 633-23-2733-1-1-1 send it back for re-evaluation and with a recommendation to declare our Consortium the winner, since we claim that the CA has not implemented the PRB's decision.

CA's response to the request for reconsideration. "The Contracting Authority - Municipality of Istog the Request for Reconsideration dismissed as unfounded, in the attachment you have the standard letter with the statue for the eliminated tenderer which you have accepted together with the Decision of the Contracting Authority on the result of the procurement after the Re-evaluation by the Re-evaluation committee and approved by the Procurement office. Group of Economic Operators ARMENDI BAU SH.P.K.; Company Zuka Commerce Sh.p.k., Rr. Shpend Kukiqi no. 50, 31000, Suhogërllë Istog According to the decision of the CA of the procurement unit of the municipality of Istog dated 17.07.2023, the statement of the participants in the consortium signed and sealed by all the participants of the group was not presented in the Consortium agreement, as that competed as a group of operators who participated and did not respect article 71 of the LPP point b of article 26 of the Public Procurement regulation no. 001/2022 which We quote: *If a tender is submitted by such a group, the group must submit with its tender a statement signed by each member confirming their participation in the group and that they do not participate in any other participating group. in the same procurement procedures before the same Contracting Authority for the same Activity. All Contracting Authorities must include this condition in their tender dossiers. In case a member participates in several groups, each of the respective groups will be considered ineligible-not responsible for regulation number 001/2022 dated 20.10.2022, Article 26.1. point b. Submits a declaration signed by each of the members, confirming their participation in the group and that they are not participating individually and/or in other groups in the same procurement procedure (the electronic declaration can be signed using the advanced electronic signature if is applicable. If you believe that the Contracting Authority, during the public procurement procedure, has violated the LPP or the applicable rules, you have the right to submit a complaint to the Contracting Authority, based on Article 108/A of Law No. 04/L- 042 on Public Procurement of the Republic of Kosovo, amended and supplemented by Law No. 04/L-237, Law No. 05/L-068 and Law No. 05/L-092.*

Relying on article 111 paragraph 5 related to articles 113 and 114 of the LPP, the Review Panel dated 03.01.2024 has authorized the expert to conduct the initial review of the file and claims according to complaint no. 1066/23, while on 05.01.2024 the expert's report with no. 2023/1066 with the following recommendations: Based on the above-mentioned clarifications, the review expert proposes to the review panel that the matter be treated as a matter judged according to the preliminary decisions of the PRB.

The expertise's report has been duly accepted by all procedural parties. CA about the recommendations of the review expert's report, "The contracting authority has not responded to the expert's report. While EO partially agrees 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 review expert's report provide sufficient data to decide on the merits of the case.

- 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.

Regarding the claims of EO "ARMENDIBAU" SH.P.K., the review expert through report no. 2023/1066 assessed as follows:

Procurement activity entitled: "Repair of local roads of order IV and remediation of the condition from floods" with procurement number 633-23-2733-1-1-1", initiated by the Contracting Authority (CA) — "Municipality of Istog", started with the publication of the notice for the contract dated 27.03.2023, the opening of offers was made on the 19.05.2023, the notice on decision B58- Revaluation is published on 18.12.2023.

The complaining EO is eliminated on the grounds that it has not completed the declaration defined according to article 26.1 point B of regulation 001/2022 for public procurement.

Further, the complaining EO claims that the CA did not respect the decision of the review panel with no. 2023/0649 dt. 20.11.2023, as well as violated article 6,7,59,65,66,68,69,72 of the LPP.

Regarding the reason for the elimination of the complaining EO, the Reviewing Expert explains that, in the decision of PSH.2023/0649 dt. 20.11.2023, the complaining EO has already been declared irresponsible, and as such, regarding the claim of the complaining EO, I consider that it is a judged matter.

on the electronic platform, a request which must be specified in the tender file. The fact that the complaining EO has not submitted the previous declaration in point B of Article 26 of the regulation makes this economic operator administratively irresponsible and at the same time the same is not an interested party for this procurement activity because in point 10 of the public

procurement guide no. 001/2023, in the event that an economic operator does not submit the statement cited above, the same must be eliminated without seeking further clarification. The review panel supports this finding of the review expert, therefore the complaining claim is unfounded and consequently the complaining EO is irresponsible for this procurement activity.

As far as the recommended EO is concerned, also PSH Decision no. 2023/0649 dt. 20.11.2023, declared him irresponsible, and as such it is a judged case.

Decision PSH. 2023/0649 dt: 20.11.2023

"while there is a DUD attached. Therefore, based on Article 71 of the LPP, no EO can rely on the capacities of another EO with which it does not have a consortium agreement, or has not made an agreement on the rental of equipment if it has been allowed by the Tender dossier. Consequently, the EO recommended for the contract has not fulfilled the request of the Tender dossier and is irresponsible for this procurement activity. It is worth emphasizing the fact that even with regard to the grader which appears to be defective, in the assessment procedure the CA did not do any monitoring or clarification with the EO.

In conclusion, the procurement activity in question, after the decision of the review panel with no. 2023/0649 dt. 20.11.2023, during the re-evaluation process was not respected, therefore since there are other bidders in the procedure, then as such I consider that the matter should to return to re-evaluation, in order to respect the decision of the review panel.

- Finding of the Review Panel -

In fact (of course, regardless of the recommendations) the Panel notes that the procurement procedure that was applied in this case is presented in detail in the review expert's expertise report, explaining all the stages of the process and the actions taken by the parties in the comparative context with the acts in force, especially with the Public Procurement Rules. Therefore, the Panel supports the explanations of the review expert who explained in his expertise report, as well as supports the expert's recommendation that the case be returned for re-evaluation.

The panel assesses that the Contracting Authority - Municipality of Istog, the responsible official of the procurement and the re-evaluation commission during the evaluation, examination and comparison of the tenders, did not take as a basis at all the Decision of PRB no. 2023/0649 dated 20.11.2023, therefore, the complaint of the complaining EO is repeated for the second time and that the complaint in accordance with the Rules of Procedure of the PRB, specifically Article 16.2, should be treated as "Res Judicata".

Likewise, Article 105 paragraph 2.16 of the LPP clarifies: "In repeated cases with the same complaint claims, where the object of the dispute and the parties are the same, in cases that have been examined before, the President of the Review Panel treats them as cases judged "res judicata".

Based on the above-mentioned clarifications, the review expert proposes to the review panel that the contract award notice be canceled and recommends that the matter be returned to Re-

evaluation and in the re-evaluation phase, the CA respects and implements the aforementioned decision issued by the PRB. Because, according to this decision, even the complaining EO who has the complaint for the second time, but also the EO recommended for the contract by the CA for the second time, are qualified as irresponsible for this procurement activity. Therefore, the complainant as well as the EO recommended for the contract cannot now at this stage have the status of the interested party in the sense of paragraph 1.26, Article 4 (Definitions), of the LPP, according to which the interested party is the person who can prove material interest in the result of the procurement activity.

After analyzing the aforementioned documents that were available to the Review Panel, such as: Complaints of the complaining EO, reports of the review expert, decision no. 2023/0649, it is well known that the decisions of the PRB are binding on the contracting authorities and all parties in the procedure, and that against the decisions of the PRB, the parties can appeal to the competent court within the legal term with regular legal remedies, in accordance with the legal advice given in the decision.

Therefore, the Review Panel requests from the Contracting Authority (CA) Municipality of Istog to fully implement the decision of PSH no. 2023/0649 and since there are other offers, then to make the evaluation of the offers which are interested parties in accordance with Article 59 of LPP. The PRB orders the Contracting Authority (CA) - Istog Municipality to take measures to implement the aforementioned decision within five (5) days, non-compliance with this order, within five calendar days, will force the review panel to respect article 131 of the LPP and at the same time will ask the KRPP to cancel the license of the procurement manager of the Contracting Authority (CA) - Istog Municipality in accordance with article 25 paragraph 8 and 9 of the LPP.

Conclusion -

Based on the above, the Review Panel considers that the CA has acted contrary to the provisions of Article 56.3, 59 and 60 of the LPP, cited in the Complaint. 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 re-evaluated again because in the opposite will contradict the scope of the LPP and the argumentative basis of the complaining claims, which the Panel evaluates according to its independent assessment in the sense of Article 104 in relation to Article 105 of the LPP. The return of a procurement activity based on a contested legal re-evaluation is in harmony with Article 1 of the LPP, according to which, the purpose of this Law is, among others, quoted: "...to ensure the integrity and responsibility of public officials, civil servants and other persons who perform or are involved in a procurement activity, requesting that the decisions of such individuals and the legal and factual basis for such decisions, are not influenced by personal interests, are characterized by non-discrimination and with a high degree of transparency and, to be in accordance with the procedural and essential requirements of this law" Regarding Article 105, taking into account the requirement of Article 104, paragraph 1, of the cited Law according to which, quoted: "The procurement review procedure will be implemented and carried out in a fast, fair and non-discriminatory manner, which aims at the

fair, legal and effective resolution of the matter..." Therefore, the Review Panel based its findings on the relevant provisions of the LPP, which foresee and regulate such situations, which may arise during a procurement activity.

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.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 – **MUNICIPALITY OF ISTOG;**
1x1 EO – **“ARMENDI BAU SH.P.K.;**
1x1 Archive of the PRB;
1x1 For publication on the website of the PRB.