



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

Psh. no.49/23

REVIEW PANEL, appointed by the President Pursuant to the article 105 as well article 106, and 117 of the Law on Public Procurement of the Republic of Kosova no.04/L-042, amended and supplemented by Law No. 04/L-237, Law no.05/L-068, and Law no.05/L-092, composed of: Kimete Gashi- President, deciding on the complaint lodged by the Economic operator: “EL-Bau” sh.p.k with residence in Gjilan, regarding with the procurement activity with title: “Asphalting of the road Gadish” with procurement no: 651-22-11628-5-2-1, initiated by the Contracting authority (CA) Municipality of Gjilan, on the 07/06/2023 has issued this:

DECISION

1. Approved as grounded the complaint of the economic operator “EL-Bau” sh.p.k with residence in Gjilan, filed at the Procurement Review Body of the 20.01.2023 (with protocol no 49/2023), for the procurement activity: “Asphalting of the road Gadish” with procurement no: 651-22-11628-5-2-1, initiated by the Contracting authority (CA) Municipality of Gjilan.
2. **Cancelled**, the notice of the decision of the Contracting authority of the 11.01.2023, for cancellation of the above mentioned procurement activity, whereas the procurement activity with the above mentioned data is returned to re-evaluation.
3. Within a period of 10 days, the CA must inform the Review Panel of PRB, about all the actions undertaken in relation to this procurement activity, described as in the preliminary paragraph of the provision of this decision. Otherwise, the PRB has the right to take measures against the CA for non-compliance with the decision, as provided by the provisions of Article 131 of the Law on Public Procurement of Kosovo (consolidated version).

4. Since the complaint of the Economic Operator "El-Bau" sh.p.k. is approved as grounded, the complaint fee will be returned to the amount deposited when the complaint was submitted.

5. The complaining economic operator is required to, in accordance with Article 31 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 the 11.01.2023, the Municipality of Gjilan, in the capacity of the Contracting Authority, published the Notice on the decision of the contracting authority to cancel the procurement activity entitled: "Asphalting of the roads in the village of Gadish", with the procurement no: 651-22-11628-5-2-1.

On the 16.01.2023, the Economic Operator "El-Bau" sh.p.k. submitted a request for reconsideration to the CA-Municipality of Gjilan, on the 18.01.2023, it rejected the request for reconsideration as unfounded and certified the notice on the decision of the contracting authority published on the electronic procurement platform dated 11.01.2023.

On the 22.12.2022, the Economic Operator "El-Bau" sh.p.k. filed a complaint at the PRB, with protocol number 49/2023, against the notification on the CA's decision to cancel the procurement activity described above.

The contracting authority has implemented an open procedure, type of contract: work, estimated value of the contract: 100,000.00 €

Complaint was exercised in accordance with Article 109.1 of the LPP, according to which against any decision taken by the contracting authority, any interested party has the right to submit a complaint to the PRB. Since the EO has applied for reconsideration, it means that its actions refer to Article 108/A at the same time, since according to paragraph 1 of Article 109, it is provided that, quoted: "The complaint must be submitted only after conducting a procedure preliminary resolution of the dispute in accordance with Article 108/A of this law". Therefore, the PRB considers that the Complaint fulfills the prerequisites in terms of the provisions now cited in relation to Article 111, and the same falls under its powers in terms of Article 105, of the LPP.

The Procurement Review Body has notified the parties on the 2 of February 2023 with the expertise's report. CA – Municipality of Gjilan, dated 06.02.2023, has stated that it agrees with the review expert's opinion, while on the 02.06.2023 EO "El-Bau" sh.p.k., has stated that it does not agree with the review expert's opinion.

- Administration and evaluation of evidence -

Based on the facts cited above, the PRB has engaged the review expert in accordance with Article 111, paragraph 5 of the LPP, with the duty that the same in the sense of Article 113 in relation to Article 114, of the cited Law, make the initial review of file and complaint claims, regarding the procurement activity described above. Regarding this, on the 02.01.2023, the review expert submitted the evaluation report with the following recommendations:

- The complaint of EO "El-Bau" sh.p.k., with headquarters in Gjilan, is partially approved as grounded,

- Remains in force the notice on the decision of the CA dated 11.01.2023.

EO not satisfied with the decision of the Contracting Authority submits a complaint to the PRB, on the grounds that the legal provisions of the LPP have been violated,

The review expert clarifies that the contacting authority, after accepting the offers in the E-procurement system, has formed a commission for evaluating the offers, which has found that there are errors in the list of price descriptions - pre-calculations and pre-measures, and that this error according to the evaluation commission in this stage is irreparable. On the date: 11.01.2023, the responsible procurement official publishes in the e-procurement system, the notice on the decision of the CA, which completely cancels the procurement activity in question.

The review expert, after analyzing the pre-measure, noticed that the CA did not give the formula in all the positions of the pre-measure, specifically side no. 3 and consequently is not calculated at all.

The review expert clarifies that the complaining EO noticed and intervened in advance by calculating the total of side no. 3 of the pre-measure, while the second EO in a row has set the price in wing no. 3 but as a result of the error in the pre-measurement formula, the total was not calculated and in this way the EOs, who did not notice it, were not equal in this procurement activity.

The review expert comes to the conclusion that the CA-Municipality of Gjilan, when drafting the tender file, specifically the pre-measure, did not act in harmony with Article 27 of the LPP and at the same time clarifies that this procurement activity should be canceled because the tender file was drafted in violation of Article 27 of the LPP, specifically in violation of Article 47.14 of the ROGPP, quote:

47.14 The contracting authority should take a similar non-limiting approach when it discovers that the tender dossier it has issued may have certain deficiencies or may be less clear on some points. This, however, should not under any circumstances lead to any defacto changes in the technical and other requirements of the tender file. If the contracting authority comes to the conclusion that the planned tender is in fact inappropriate then it will not be possible to "repair" the tender file by means of additional information or clarifications. The only approach available in such situations is to cancel the tender and start another procedure based on an amended tender file as well as the final decision-making, not completed within the legal deadlines, citing that:

issuing the notice on the decision of the CA will be carried out within the shortest period of time, no more than 30 days from the opening of offers. From the process of opening the tender on 05.12.2022 and until issuing the decision to cancel the activity, it took 37 days.

The review expert for the claim cited above, estimates that it is due to the fact that according to Article 41.2 of the ROGPP, the evaluation of the offers will last no more than 30 days and must start within 5 days after the opening of the offers.

The complaining EO claims that after accepting the decision dated 11.01.2022 for the cancellation of the procurement activity: Asphaltting of roads in the village of Gadish, access to official documents was requested from the CA. After the approval of the request by the CA for access to official documents, the complaining EO considers that: access to the tender files was not allowed as provided in article 10 and 11 of the LPP, on the grounds that a request for business secrets was submitted. EO claims that EO "Company Zuka" and EO "Tali" have not identified/referenced documents or information as business secrets in any of their requests, and the Contracting Authority has not asked the EO to fill in the form of Anex. 3.

The review expert related to this claim clarifies that the two EOs for which the complaining EO has claimed submitted requests for business secrets, which in their requests, have defined all the requests on economic and financial opportunities and the requests on technical and professional skills.

Regarding this claim, the review expert clarifies that this claim of the complaining EO stands, due to the fact that not all evidence of technical and professional capacity can be qualified as business secrets.

Annex 3 Request for business secret

To: Municipal Assembly-Gjilan

(hereinafter "Contracting Authority")

Bearing in mind that "Company Zuka Commerce" sh.p.k., fulfilling the requirements of the tender file under no. of the above-mentioned procurement, paragraph 8 and 9 of the Information for the Tenderer has sent the confidential business information, as follows:

Financial offer, document on economic and financial situation and document on technical and professional opportunities.

Annex 3 Request for business secret

To: Municipal Assembly - Gjilan (hereinafter "Contracting Authority")

Bearing in mind that further "Economic Operator fulfilling the requirements of the tender file under the above-mentioned procurement no., Paragraph 8 and 9 of the Information for Tenderers has sent the confidential business information, as follows:

Financial offer, document on economic and financial situation and document on technical and professional opportunities.

The review expert at the end of the evaluation of the complaining claims, clarifies that the complaint is partially based on the procedural violations that were clarified above, while the main claim related to the cancellation of this procurement activity does not stand for the fact that during the compilation of the tender file the provisions of Article 27 of the LPP and Article 47.14 of the ROGPP have not been respected.

REVIEW EXPERT'S OPINION

Based on the aforementioned clarifications, the review expert proposes to the review panel that the complaint of EO "EI-Bau" be approved as partially grounded, while the decision of the CA to cancel the procurement activity remains in force.

Convocation of the hearing session with the parties

On the 2 of April 2023, the review panel held a hearing in which all documents in the case were reviewed and analyzed.

During the presentation at the session, the representative of the complaining EO declares: In the capacity of the representative of the company EI Bau Sh.p.k., I will try to be concise in the presentation of this final word, convinced that you have analyzed all the documentation found in the memos of the matter in this case, therefore we reconfirm that we completely stand by the statements and claims presented in the complaint dated 20.01.2023 as well as the response to the Review Expert Report No. 49/23 of dt. 02.02.2023, considering that the CA's justification for the cancellation of the procurement activity is unstable and unfounded, because, with the contested decision, an incorrect verification of the factual situation and erroneous application of the provision of the material law was made, specifically Article 62 par.1.1 of LPP No. 04/L-042. The erroneous reflection of the factual situation that does not coincide with reality is presented by raising versions with unfounded assumptions in order to confuse the factual situation by fabricating false facts to cancel the activity while the process was in the phase of awarding the contract, on the grounds that perhaps an irreparable error has occurred in the list of description – pre-measure and pre-calculation.

For your attention, I find it necessary to briefly point out that the grounds for annulment on which the CA was called do not stand in the manner presented because the truth is quite different from what is reflected in the contested decision of the CA. Because there is no error in PART C, the form for the submission of the offer (premeasurement and precalculation) which is part of the tender file, but it contains all the relevant information, clearly and accurately described related to the subject of the contract in question, enabling interested EOs to have accurate knowledge for the preparation of tenders without requesting additional information. This fact is confirmed by the relevant evidence, the form in excel format for the submission of the offer (pre-measure and pre-calculation), for which according to the legislation in force at the time of the development of this activity, Article 18.3 of the ROGPP it is determined that the bidder declares that he has checked and accepts all tender conditions and submits his financial offer.

Therefore, since the reasoning given by the CA for canceling the procurement activity under the pretext that something illegal has allegedly happened that cannot be repaired cannot be proven with any relevant evidence, the factual situation and the unexplained circumstances will reflect as follows:

1. The form for the submission of the offer (parameter and precalculation) for the activity in question is composed of four parts separated from each other in separate parameters, starting from: the first part ARM 1; the second part KRAHU 2; the third part KRAHU 3, as well as the last part, the total recapitulation for the three parts of the paramasses - wings (In addition, refer to the paramasses that we have brought as evidence).

2. Each part/front of the bid submission form, SIDE 1, SIDE 2 and SIDE

3. contains all relevant information, clearly and accurately described related to the description of works, materials, units, quantities and price for each position and each part/wing including the total recapitulation for each wing, enabled interested EOs to have accurate knowledge for the preparation of tenders without errors and without requesting additional information.

3. The last part of the bid submission form is the Recapitulation in three columns for SIDE 1, SIDE 2 and SIDE 3, related to the presentation of the prize won by the recapitulation of each part/wing and the presentation of the total price won by the recapitulation of the three parts /arms. As we clarified in the complaint, in the total recapitulation regarding wing 3 there was a small technical omission inherited from past activities because in the column of the total price that was obtained by collecting the recapitulation price of each wing, the formula for automatic calculation was missing also for the recapitulation of wing three, but without any problem it was possible to add plus wing three so that the total price is calculated through the formula automatically. However, this technical omission has not prevented/made it impossible for the EO to do the calculation in technical/manual form as is usually done by the EO as a safety and vigilance measure to avoid errors in the calculation, thus disqualification for arithmetic errors more than 2% of total value. This is how we have acted and in this sense our offer has no error or discrepancy between the price from the recapitulations separately for each wing and the total price that has been won from the recapitulation prices for all three wings. Moreover, since there are no rules and legal provisions that limit the way EO calculates their financial offer, it remains in the responsibility, discretion and vigilance of EO how they calculate their financial offer.

Therefore, in arbitrary decisions like this, it results that the cancellation of the procurement activity was done by presenting a wrong reflection of the factual situation that does not coincide with reality under any circumstances, but by raising versions with baseless assumptions through the fabrication of false facts to 'used as a pretext for canceling the activity in order to create disadvantages to our detriment by denying us the legal right to be rewarded with a contract.

To argue even more that the cancellation of the activity is not based on the factual situation and has no legal support, it is proven by the fact that, apart from the fact that there is no rule that defines/limits the way EOs calculate their financial offer as we stated above , moreover, in the

tender dossier there was no specified criterion for the way of calculating the financial offer from EO. In this sense, any disqualification that has no legal support is unfair and illegal. Even more worrying for us as EO is the fact that this technical omission has been present and is still present in other future activities, but it has never happened that CA cancels any procurement activity for this reason.

A concrete example is the procurement activity entitled: "Supply of Hygienic - Sanitary material" with no. 651-23-394-1-1-1, which ended with the contract award.

So, since the issuance of the decision to cancel the activity was preceded by a wrong reflection of the factual situation that does not coincide with reality, it follows that the provision of Article 62 par.1.1 has been unfairly applied. Moreover, the reasoning for canceling the procurement activity by referring to assumptions and imagining unrealistic situations is unstable and in flagrant contradiction with the content and situations defined by the provision of Article 62 of the LPP, due to the fact that in the case concretely, no legal violation occurred. The basis of the presented reasoning represents the desire and intention of the initiator of the activity, and not the request and the intention of this law, because the reasoning for cancellation does not find support even in any of the criteria defined in the tender dossier.

Therefore, with this logic of the practice of canceling activities not based on the law, if you do not take concrete measures to avoid legal deviations, do not be surprised that one day the CA Municipality of Gjilan will cancel the activities even for spelling mistakes.

On the other hand, regarding the assessment of the reviewing expert who surprisingly finds that the tender dossier was drawn up in violation of Article 27 of the LPP and Article 47.14 of the ROGPP, I can only say that his assessment is not objective, right and as such is not based on the factual situation and legal requirements, since there is not even the minimum real assessment.

I hope that this assessment of the expert arises from the lack of experience in drafting expertise in the field of public procurement, and not from any other intention to create ambiguity and manipulate the truth by misleading the review panel to decide in favor of the CA -'s. Because the expert, before raising versions with unfounded assumptions that confuse the factual situation, should have analyzed and reviewed PART C in its entirety, The form for submitting the offer, which is the main part of the tender. If he were to act in this way, he would without a doubt notice that the pre-measure meets all the legal requirements since, in its four parts, it contains all the relevant information, described in a clear and precise manner related to the subject of the contract in question, enabling interested EOs to have accurate knowledge about the preparation of tenders without requesting additional information.

In this way, unfounded assumptions would not be raised by confusing the factual and legal situation in order to give the impression in order to convince the review panel that something illegal happened, which did not happen. This is due to the fact that not a single error occurred in the first instance. We are convinced that the panel is also aware that it is not considered a mistake, the lack of the automatic formula for calculation in the first measure as it happened in the total recapitulation in relation to the result of recapitulation three, since it was possible to add the plus side three without any problem to count towards the total prize won from the three-arm

recaps. Also, this is not the only way to calculate and calculate the offer because the calculation is done in a technical form as usually happens by the EO as a measure of security and vigilance to avoid errors in the calculation. Even more so when there is no rule that defines/limits the way EOs calculate their financial offer, and moreover in the tender dossier there was no specified criteria for the way the EOs calculate the financial offer.

Given that the expert's evaluations are not objective and have no factual and legal support, we consider that the panel should not take them for granted or acceptable and they should not have an impact on the decision of this case.

Also, in this process, Article 40.3 of the ROGPP was violated by the CA, because the evaluation process was not completed within the legal deadline (30 days from the deadline stipulated in the law, but it lasted about 37 days) without giving any explanation for the reasons for the extension. This claim has been confirmed as well-founded by the examining expert.

On the part of the CA, article 10 and 11.4 of the LPP were also violated, because despite the fact that the request for access was approved, the same was not implemented with the excuse of invoking business secrecy against the information EO- others were not classified as business secrets as defined in article 11.4 of the LPP. I want to believe that the review panel, during the main review, will notice these inconsistencies, contradictions and I believe that in its decision it will evaluate them as they deserve to be evaluated.

During the session, the representative of CA Mr. I declare: I stand behind her decision with the given reasoning. As mentioned earlier from the front. This procurement procedure of the EO has been canceled due to the fact that the CA, during the assessment phase, found that there was an error in the price description list - in advance, more precisely in the recapitulation, the arm was dissolved, therefore based on regulation 001/ 2022, its article 44 - standard forms point 44.3 where it is stated that: the purpose of standard documents is to help EOs during the preparation of offers, the declaration must contain the minimum requirements defined in the form without changing the content without introducing limitations, or additional conditions or without the inclusion of any conditions defined in the CA, in the standard forms, but the company making the declaration has the right to place the logo, company name or graffiti at the top of the page or anywhere else in the standard document. After finding such a mistake, the CA, in order to treat all EOs equally, decided to cancel this procedure since during the evaluation of the offers it found that some of the EOs noticed the mistake and corrected it by calculating the 3rd part of the recapitulation, while the other EOs did not notice this, which means that they did not calculate it since on the tender clarification page, there was no EO interested request for clarification of the tender and we as the CA did not notice it as the CA, then the CA has decided to act and treat all EOs in this procedure in an equal way. The representative of the EO mentioned that such mistakes happen at the CA, as an official who prepared this matter and today I am here to represent the CA, for a mistake that happened and it was a mistake by the requesting unit. as an official, I did not have the right to supplement or correct the pre-measure, since I am not competent to draft the pre-measure.

The head of the panel asks the representative of the CA: was there any other error in the pre-measure or did the error occur in the formula for the final calculation?

In response, the representative of the CA declares: the error was only in the final calculation for the third arm, there are no other errors.

Question for the CA, in relation to a statement that you just highlighted regarding the logo, can you explain to us what you are talking about, does that document have a signature, a seal?

In response, the representative of CA declares that it has nothing to do with any specific document, we only explained some general rules where EOs can intervene.

Next, the floor was given to the review expert Mrs. Rexhepi, who stated via email that: Today, on the 28.04.2023, via email, I received the invitation for a hearing for the main review of complaint 49/23, so I am informing you that on 02.05.2023, I am on annual leave.

Regarding the expert's report, I stand by the report and at the same time I am informing you that the EO's claim does not stand in response to the expert's report, which stated that I did not respond to all the complaining claims, because even after accepting this response, I have analyzed the complaining claims, with the result that answers have been given to all the complaining claims.

The review panel, after reviewing and analyzing all the evidence, facts and documentation presented for this procurement procedure, in the complaint and the documents of the entire procurement activity in the e-procurement system, finds that the cancellation of this procurement activity has been made in the contrary to article 62 of the LPP, making the wrong application of this provision and the material law.

The review panel clarifies that the cancellation of this procurement activity was made on the grounds that an irreparable error occurred in the list of description - premeasurement and precalculation, part C of the tender dossier.

The review panel analyzes the tender dossier, more precisely part C for which the CA has canceled this procurement activity on the grounds that there are errors that are not avoidable and finds that this part contains all the relevant information, clearly described and accurately related to the subject of the contract in question, enabling interested EOs to have accurate knowledge for the preparation of tenders without requesting additional information.

The Review Panel asks the CA to be attentive during public procurement procedures in the future, strictly respecting the Law on Public Procurement and the applicable rules, and also orders them to act in harmony with the recommendations given in this decision, otherwise the Procurement Review Body from the framework of the Review Panels, has the right to request the initiation of disciplinary measures against the responsible procurement officials.

The review panel in accordance with Article 117 of the LPP decided as in the provision of this decision.

Head of the Review Panel

Mrs. Kimete Gashi

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 Gjilan;
- 1x1 EO – “El Bau” sh.p.k with residence in Gjilan;
- 1x1 Archive of the PRB;
- 1x1 For publication on the website of the PRB.