



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

Psh. No.476/23

Review Panel, appointed by the President of the PRB, pursuant to the 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), composed of: Agon Ramadani - President, Vjosa Gradinaj - Mexhuani and Vedat Poterqoi - members, deciding according to the complaint of the EO “Via Egnatia SH.P.K.”, against the contract notice or with the tender documents related to the procurement activity “Summer and winter road maintenance” with procurement number 615-23-4993-2-1-1, initiated by the contracting authority (CA) - Municipality of Podujeva, on the 08/09/2023 has issued this:

DECISION

- 1. Approved** as partly grounded the complaint of the “Via Egnatia SH.P.K.” with no.476/2023 of the 10/07/2023, regarding with the procurement activity: “Summer and winter road maintenance” with procurement number 615-23-4993-2-1-1, initiated by the contracting authority (CA) - Municipality of Podujeva.
2. It is cancelled the contract notice related to the procurement activity “Summer and winter road maintenance” with procurement number 615-23-4993-2-1-1, initiated by the contracting authority (CA) - Municipality of Podujeva. The CA is obliged to make the necessary improvements in the tender dossier according to the reasons given by the review panel.
3. Within a period of 10 days, the CA must inform the PRB about all the actions undertaken in relation to this procurement activity, 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 LPP.
4. Since the complaint of the complaining EO is approved as partially grounded, the complaint’s fee is returned to the amount deposited at the time of filing the complaint.
5. The complaining EO is obliged, in accordance with article 31 point 6 of the PRB's Rules of Procedure, within sixty (60) days to make a request for the return of the complaint insurance, otherwise the deposit will be confiscated, and these funds pass the Budget of the Republic of Kosova.

REASONING

- Procedural facts and circumstances -

On the 22.05.2023, the Municipality of Podujeva, in its capacity as CA, has published the Contract Notice for the procurement activity: "Summer and winter road maintenance" with procurement no. 615-23-4993-2-1-1.

On the 27.06.2023, at the CA was submitted a request for reconsideration from EO "Via Egnatia SH.P.K." which by decision dated 30. 06. 2023 the CA has been rejected.

Dated 10.07.2023 EO "Via Egnatia SH.P.K." filed a complaint at the PRB with number 2023/0476 (protocol number).

During the preliminary review phase

The Review Panel concluded that the complaint in the present case was exercised in accordance with Article 109.1 of the LPP, according to which against any decision taken by the CA, any interested party can submit a complaint to the PRB only after leading a preliminary procedure for resolving the dispute in accordance with Article 108/A of this law. Since the applicant has the status of the interested party in the sense of Article 4, paragraph 1.26, and the complaint also contains the essential elements provided for in Article 111 of the cited Law, it means that the complaint fulfills the conditions foreseen in terms of the provisions of cited and falls under his powers in terms of Article 105 of the LPP.

Based on the actions described above, the PRB has appointed the Review Panel and has also appointed the evaluation expert, as provided by Article 111, paragraph 5 of the LPP, with the duty that the same in the sense of Article 113 of the cited Law, to do the initial review of the dossier and complaining claims, in relation to the procurement activity described above. In this regard, on the 21. 07. 2023, the review expert submitted the evaluation reports with recommendations:

- The complaint of the complaining EO to be approved as partially grounded;
- To correct the tender dossier in accordance with Article 51 of the LPP and Article 54 of the RRPP 001/2022

Clarifications of the review expert

Clarification: The complaining EO in claim 1 has claimed that the CA has violated articles 7, 27, 51 and 69 of the LPP but has not elaborated its claims and the alleged violations, therefore the examination of the claims will be done by the claim 2.

Answer to Claim No. 1 and 2: Regarding the claims of the complaining EO for setting restrictive criteria and not setting some necessary requirements for the nature of the project, as well as the claims that CA violated Article 27 of the LPP and Article 17 of the RRPP 001/2022, the review expert took as the basis of review RRPP 001/2023, the LPP as well as all the documents uploaded in e-procurement and the previous practices of CAs in the Republic of Kosova for similar Procurement activities.

Regarding the claim of the complaining EO that has to do with the violations of the LPP Article 27A Division of contracts into lots, the review expert explains that according to Article 9 of the LPP Determination of the needs that must be met - the MAO of the CA must make a formal assessment of needs to be met,

This assessment determines (i) the exact type and size of the special needs of the contracting authority that the proposed procurement is expected to meet; (ii) the estimated value, the proposed type and the content conditions of the public contract that will be the subject of the planned procurement; (iii) the proposed functional specifications of each facility to be covered by such contract;

If, after the assessment of the needs, the MAO decides that the assessment of the needs justifies the exercise of the procurement activity, the MAO sends a copy of this assessment to the MFO of the contracting authority.

As evidence that the contracting authority has agreed with paragraphs 1. to 4. of this article, the MAO and the MFO will prepare and sign a "Declaration of Needs and Determination for the Availability of Funds".

According to the requirements of the LPP, the CA has also uploaded the statement of needs and availability of funds to e-procurement and the same has been approved in accordance with the requirements of the LPP.

The review expert assesses that according to the LPP and RRPP 13.2 In the case of contracts consisting of a series of homogeneous or heterogeneous works, goods or services, the contract can be divided into lots (parts) "So it is at the discretion of the CA which can to determine the needs in accordance with Article 9 and therefore the claim of the complaining EO that they had to be divided into LOT is ungrounded.

2. Regarding the part of the claim where the complaining EO contests the request a) Project manager - Dip engineer. of Communication - minimum 5 years of work experience after graduation. Have evidence that he has managed at least 1 (one) project from the required field. It must be set in writing and signed by him and the company.

Contents of the tender dossier Annex 1 Basic concepts of maintenance contracts

Road network maintenance includes routine and periodic maintenance tasks. Routine maintenance consists of tasks that are necessary to maintain the functioning of the road (such as sweeping, washing, trimming bushes, etc.).

The review expert assesses that the claim of the complaining EO that it was necessary to request Ing. of construction has been clarified above according to article 9 of the LPP and from the technical specification and technical description in annex 1 of the tender dossier, the subject of the tender is clear and according to the expert's assessment, the CA has not established discriminatory criteria for this point because the demand Eng. of Communication is a requirement that can be met by the vast majority of the EO, there are enough graduates in the required direction in the labor market and according to the technical specification Annex 1, the

Traffic Management Plan has been requested, which includes requirements that are mainly related to traffic. Also, the requirement for evidence of the management of at least one project is a minimum requirement that is in accordance with Article 9 of the LPP, Tender dossier, Technical Specification Annex 1 (pages 25, 26 of TD).

Also, the review expert assesses that the complaining EO during the request for clarification to the CA dated 13.06.2023 on this point stated "Why is not even a construction engineer possible" that he agreed with the request and is in the contrary to what is claimed in the complaint submitted to the PRB.

Therefore, the review expert assesses that the claim for this part is not grounded.

3. Regarding the part of the claim that concerns the request "A graduate engineer or bachelor of Agriculture (plant protection management) with at least 5 years of work experience in the profession.

Have at least 1 leading reference of the same nature). It must be specified in writing and signed by the engineer and the company".

Contents of the tender dossier Annex 1 Basic concepts of maintenance contracts

Road network maintenance includes routine and periodic maintenance tasks. Routine maintenance consists of tasks that are necessary to maintain the functioning of the road (such as sweeping, washing, trimming bushes, etc.).

The technical specifications attached to the TD are for winter maintenance and in no case describe specific requirements for summer maintenance.

The review expert assesses that the CA has not been able to objectively justify the request for an Agricultural Engineer (Plant Protection) while in the technical specification there is no description of this request except for a sentence in the preamble and pre-calculation.

Therefore, based on the technical specification of the TD, the technical specification, the description of the services, the pre-measure and the pre-calculation, the reviewing expert assesses that the request 9.1 & 9.2 - b) is not in accordance with the RRPP Article 17. Paragraph 17 as well as Article 25 paragraph 6, therefore assesses that the claim for this part it is grounded.

4. As for the part of the claim of the complaining EO that has to do with the price list, the review expert explains that the CA in the e-procurement system has uploaded the pre-measure which has two pages (sheets) which are dedicated to the offer financial while the rest are street names. The price list is part of the tender file and therefore also part of the contract according to Article 4 of the draft contract, part of the tender dossier. EOs should be careful when completing the price list. The claim of the EO that it is impossible to tender with two lists does not hold because the e-procurement system allows the pre-measure to be uploaded with several pages as it is also uploaded by the CA, but that the EOs that are part of the procurement activity have the opportunity also of completing the offer and of the scenario in (pdf) which most EOs do.

In addition, EOs that bid must also fill in the tender submission form, which includes the total price and is read during the opening.

The CA on the front of the city and the villages has described three tables named as (A, B, C) which are summarized in total. The fact that all EOs have the same access to pre-measures proves that it has nothing to do with discrimination. The CA, in order to facilitate bidding for EOs interested in participating in this procurement activity, can also place a page (Excel sheet) as a recapitulation of the two prices (city and village).

Therefore, based on the explanations given, the review expert at this point considers that the claim is partially grounded.

5. Regarding the claims of the complaining EO in relation to Annex 7. the table of equipment that the EO must possess point 1

Special tanker truck with a complete mechanism for washing the streets with a volume of over 7000 liters. (The tank truck must have the mechanism for washing from the front and from the back with workers, and request No. 4 of Annex 7 "Special truck (tank) with complete mechanization (suction, unblocking) for cleaning and de-clogging of water reservoirs of atmospheric sewage to be with a volume of over 10,000 liters".

The reviewing expert assesses that the description of the works in the tender file does not define any time limit or any specific request within which the cleaning must be done, which would justify a request with such specifications. Likewise, the requirement that the truck has a mechanism for washing from the front and from the back with workers does not affect the quality or speed of the service. In addition, the service is billed based on the square meters of the surface, therefore the limitation of the mechanization and the volume of the reservoir in point 1 and 4 is also not in accordance with Article 51 of the LPP paragraph 4 (ii) Article 69 paragraph 1 of the LPP as well as article 8.4 of the OGPP.

8.4 When determining the minimum qualification requirements, the CA will pay particular attention to the development of the EO and will formulate the minimum qualification requirements in such a way as not to exclude newly established EOs who possess reasonable and sufficient economic, financial and/or skills. or technical. "Reasonable and sufficient" shall mean in relation to: i. the estimated value of the contract, and ii. fair use of public funds.

The review expert assesses that the claim at this point is grounded.

The claim related to request no. 5, Special auto sweeper up to 5 tons for sweeping city streets and sidewalks. 6, Special auto sweeper up to 3 tons for sweeping streets, sidewalks and city squares 9. Auto basket for pruning trees 12. Tractor with scythe for mowing green spaces up to 1.5 tons 15. Machine for grinding branches after pruning.

The review expert estimates that the CA at this point has requested equipment "up to" which means that EOs can offer equipment with a smaller weight, so you have been offered the widest possibility of providing equipment types.

Therefore, the review expert assesses that the requirements as above are in accordance with the RRPP and the EO's claim is not grounded.

As for request 11. Special tractor 4x4 for clearing snow up to 2 tons, the review expert assesses that the CA has not set requirements in accordance with RRPP article 8.4 point e) because it has limited competition.

Therefore, the review expert assesses that the limitation of the device as above is not in accordance with the RRPP and the EO's claim is grounded.

Answer to Claim No. 3:

The review expert assesses that the claim of the complaining EO at this point has been answered in claim 1 and 2.

Answer to Claim No. 4:

Regarding the complaining claim of the complaining EO at this point, the reviewing expert assesses that the CA, during the drafting of the tender dossier, did not fully respect the technical and professional requirements of Article 51 and 69 of the LPP as well as Article 8 of the RRPP 001/2022.

The review expert during the analysis of the tender file also noticed that in the "Health and Safety Management Plan" the CA refers to the "Laws of Albania".

Also in the technical specification of the CA Report, it refers to "Maintenance bases will be in permanent contact with the meteorological stations of Albania"

Therefore, the review expert assesses that the appeal claim for this point has also been answered in claim 1 and 2 and is grounded.

-Findings of the Review Panel-

The review panel after reviewing the case documents, reviewing the complaining claims of the complaining EO, findings, concrete analysis and recommendations of the review expert, discussions and screening the evidence as a whole clarifies:

When determining the selection criteria, the RP considers the purpose of CAs that specific contracts require professional companies due to their nature as well as the fact of specific works in accordance with the estimated value, but the RP considers that all CAs should have increased care so that the selection criteria will not have to be unduly strict leading to discrimination and restriction of competition, as well as to ensure the greatest possible competition, without risking the contracting of non-professional companies, as well as with the aim understood to filter and exclude unstable companies that cannot implement the specific contract, so the selection criteria must fulfill its objective and practically filter out unstable companies, in relation to the volume and complexity of the works foreseen in activity, but not to the extent that the established criteria lead to discrimination.

Therefore, regarding the complaining claims of the complaining EO that the Contracting Authority has discriminatory criteria in the Tender dossier, the RP relies on the report compiled by the review expert appointed by the PRB, whose duty was to review all the complaining claims and the opinion of his professional opinion is that some requirements mentioned in the complaining claims of the complaining EO, as such, may represent discrimination, therefore, through this decision, the RP obliges the CA to make the improvements in accordance with the review expert's assessment, made in his expertise report. Therefore, the justifications given by the review expert are also considered as the reasoning of the review panel, in all complaints, except for the following points, in relation to which the RP states as follows:

Regarding the request "A graduated engineer or bachelor of Agriculture (plant protection management) with at least 5 years of work experience in the profession. Have at least 1 lead reference of the same nature), RP has evidenced that CA has given sufficient justifications for the need of this engineer based on previous experiences and their needs in the current project, therefore RP supports the reasoning of CA- related to the necessity of this engineer, until this decision-making was also based on the fact that engineers can also be engaged with pre-contracts and it is not a decisive requirement that EOs have them in the regular staff, therefore being that the requirements on the manager as well as the requirements on the engineer are allowed to be engaged with a pre-contract, RP has also taken into consideration the expert's statements that these professions have a significant number of engineers in our country, it has finally been concluded that they do not constitute discriminatory requirements or restrictive.

Regarding the claims of the complaining EO in relation to Annex 7. the table of equipment that the EO must possess point 1 "Special tank truck with a complete mechanism for washing the streets with a volume of over 7000 Liters." (The tank truck must have the mechanism for washing from the front and from the back with workers, and request No. 4 of Annex 7 "Special truck (tank) with complete mechanization (suction, unblocking) for cleaning and de-clogging of water reservoirs of atmospheric sewage to be with a volume of over 10,000 litres". Regarding this request, RP has come to the conclusion that although at first glance the device appears to be specific that can lead to narrowing of competition, RP finds that it does not fully agree with the opinion of the expert regarding this point due to the fact that in this case he did not argue why this request is discriminatory, therefore in this case the CA is obliged to prove once again by reviewing the requested equipment, whether there are such equipment on the market in sufficient numbers in the possession of economic operators and to justify such request in an argumentative manner, in coordination with the requesting unit, therefore it remains the full responsibility of the CA to ensure non-discrimination as well as limitation of competition.

Regarding the claims of the complaining EO regarding request 11. Special tractor 4x4 for clearing snow up to 2 tons, RP has come to the conclusion that it does not agree with the opinion of the expert regarding this point due to the fact that the same in this case did not argue why this request constitutes discrimination, while the CA has responded to the same in the expert's report "because the CA has requested machinery that is necessary for the execution of the contract and as long as there are manufacturers and the same machinery on the market, there is no limitation of capacity, because the city square has very slippery tiles and cannot be intervened

with other machinery also, the sidewalks are narrow and steep, so there is no reason to give such an opinion" therefore, in this case, PSH has taken into consideration that considering that in this request, tonnages of "up to 2 tons" are also allowed, which it means that fixed capacity was not required, but equipment with smaller tonnage was also allowed, and also equipment is enabled to be secured through leasing and not compulsory ownership, therefore this claim is classified as unfounded.

As for the part of the claim of the complaining EO that is related to the price list, the RP has considered the findings of the review expert who has clarified that the CA in the e-procurement system has loaded the pre-measure which has two pages (sheets) which are dedicated to the financial offer while the rest are street names. The price list is part of the tender dossier and therefore also part of the contract according to Article 4 of the draft contract, part of the tender file. EOs should be careful when completing the price list. The claim of the EO that it is impossible to tender with two lists does not hold because the e-procurement system allows to load the pre-measure with several pages as it is also loaded by the CA, but that the EOs part of the procurement activity have the possibility to completion of the offer and the scenario in (pdf) which most EOs do.

In addition, EOs that bid must also fill in the tender submission form, which includes the total price and is read during the opening.

The CA on the front of the city and the villages has described three tables named as (A, B, C) which are summarized in total. The fact that all EOs have the same access to pre-measures proves that it has nothing to do with discrimination.

Therefore, in relation to this claim, the RP finds that the CA, in order to facilitate the bidding for EOs interested in participating in this procurement activity, should also put a page (Excel sheet) as a recapitulation of the two prices (city and villages), which means the total bid price also based on the fact that the total price is set on the tender submission form.

-Conclusion-

The panel considers that the expertise reports contain a priori 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 complaints and provide the review panel and all parties with an independent and professional assessment of the procurement activity and the validity of the complaint 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.

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 takes care of all the documents of this matter and considers that the complaining assertions of the complaining EO compel the Panel to correct the tender dossier in accordance with Article 51 of the LPP and Article 54 of the RRPP 001/2022 as well as to extend the deadline for bidding according to the requirements of the LPP.

Therefore, acting in accordance with the powers cited above and Article 104 paragraph 4 in relation to paragraph 1, according to which the procurement review procedure will be implemented and carried out in a fast, fair and non-discriminatory manner, which aims the legal and effective resolution of the case, as well as referring to article 117 of the LPP, and in the evidence presented above, the Review Panel decided as in the provision of this decision.

Regarding the complaint's fee, the Review Panel decided in accordance with article 31 point 5 of the PRB Work Regulations, in relation to article 118 of the LPP.

President of the Review Panel

Mr. Agon Ramadani

Legal advice:

An appeal is not allowed against this decision, but the dissatisfied party can appeal to the Commercial Court, within 30 days from the date of acceptance of this decision.

Decision to be submitted to:

1x1 CA – **MUNICIPALITY OF PODUJEVA;**
1x1 EO – **VIA EGNATIA SH.P.K.;**
1x1 Archive of the PRB;
1x1 For publication on the website of the PRB.