



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

Psh. No.756/23

Review Panel, appointed by the President of the Procurement Review Body (PRB), Pursuant to the article 105, article 106, and 117 of the Law on Public Procurement of the Republic of Kosovo (LPP), in the composition of Vedat Poterqoi - President, deciding according to the complaint of the Economic operator (EO) “Shkelqimi Invest SH.P.K, against the Decision on contract notice of the MUNICIPALITY OF FERIZAJ in the capacity of the Contracting Authority (CA), regarding with the procurement activity: “Supply, assembly and maintenance of air conditioners in administrative, educational and health facilities of the Municipality of Ferizaj” with procurement no: 656-23-8880-1-1-1, on the 09/11/2023, has issued this:

DECISION

1. **Approved**, as partly grounded the complaint of the EO “Shkelqimi Invest SH.P.K”. with no. 756/2023 of the 02/10/2023, regarding with the procurement activity: “Supply, assembly and maintenance of air conditioners in administrative, educational and health facilities of the Municipality of Ferizaj” with procurement no: 656-23-8880-1-1-1, while the CA is obliged to make improvements to the tender dossier and extend the deadline for bidding.
2. Within 10 days, the CA must inform the PRB about all the actions taken regarding 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.
3. The funds deposited in the name of the tariff tax for submitting the complaint to the account of the Economic Operator “Shkelqimi Invest” SH.P.K. are returned.

REASONING

- Procedural facts and circumstances –

On the 22.08.2023, Municipal Assembly of Ferizaj, in the capacity of the Contracting Authority, has published the contract notice B05 for the procurement activity with title: “Supply, assembly and maintenance of air conditioners in administrative, educational and health facilities of the Municipality of Ferizaj” with procurement no: 656-23-8880-1-1-1.

This procurement activity was carried out through an open procedure with the type of supply contract, estimated value of the contract: 250,000.00 €.

On the 27.09.2023, EO SHKELQIMI INVEST SH.P.K. submitted a request for reconsideration against the aforementioned decision of CA. On the 29.09.2023, the Contracting Authority rejected the request for reconsideration as unfounded.

On the 02.10.2023, PRB received the complaint from EO SHKELQIMI INVEST SH.P.K., with no. 756/23 related to the activity: “Supply, assembly and maintenance of air conditioners in administrative, educational and health facilities of the Municipality of Ferizaj” with procurement no: 656-23-8880-1-1-1.

-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 “SHKELQIMI INVEST SH.P.K”. are presented as follows:

The complainant claims that "the CA violated Article 60 and 64.1 of the LPP by not postponing the tender submission deadline for 10 days after the decision on the request for reconsideration, this constitutes a serious and premeditated violation because even after our warning over the phone and in system, the procurement official replies that since we have rejected the request for reconsideration, there is no need to extend the deadline. This is a serious violation of the procurement office.

The second claim (II): *The complainant claims that "The requirement of economic capacity is very specific and does not allow the possibility of EO bidding according to the free market, even the procurement law allows the possibility of submitting various evidence of economic capacity, while CA has specified only one type of evidence that limits the free market, we ask at this stage of the tendering to allow the provision of other, not too restrictive, evidence. Another request is that EO must offer at least 2 welders and 2 certified electricians for workplace safety, we*

consider that it is not necessary, First of all, it is the first time that welders are required for a climate contract, the less they have notarized certificates and are certified for safety at work. Within the 10 workers that the CA has requested, I can request that a certain number be certified for safety at work, but not that 2 welders and 2 electricians be certified because it does not coincide with the nature of the contract. Then the CA has set the request: List of work tools, trucks with a basket of 3 pieces - where one of them has a crane with a length of at least 25 m (with testing), electric van. This request is extremely heavy and does not match the nature of the tender at all, why should 3 trucks with baskets and one of them have a crane be necessary! It is the responsibility of the winning EO to assemble the air conditioners according to its possibilities, which in most cases are positions from the window, from the balconies, and very rarely there is an opportunity to do the assembly in the part where a crane must be engaged.

The third claim (III): *The complainant claims that "This part has to do with some ambiguities and once requests for changes to the price description. Part A, position 14 has the Description Supply of devices for removing birds from electric poles, this request may be urgent but it does not coincide with the nature of this tender, it is not at all related to the nature of air conditioning, as a result of these omissions also in the file are looking for staff for electricians or welders who do not belong to this nature. Part B position 1 has this description Assembly with air conditioner holder, it is not clear whether it is just the assembly of the air conditioner holders or the assembly of the air conditioner together with the holder, because the air conditioner assembly is also mentioned in part C position 12. Part C, position no. 2 says Gas filling of climates, and the type of gas is not specified. Part C. position 3 to 10, has to do with Maintenance of pipes, cables, etc. but for us it is unclear what can be maintained there! The cable and pipes as parts are mentioned in the supply together with the air conditioner, we do not know what these positions mean and when they can be used. Part C, position 14, again, it is the maintenance of devices for the removal of birds, as mentioned above, but here it is maintenance, so we request the removal of this criterion and position. Then the contract is the framework and the request for air conditioning from time to time for sure and we do not believe that there is a need for three baskets to be engaged for the assembly of air conditioners in one day. In any case, a basket is sufficient for any eventuality and not 3. The EO must meet this requirement to be certified for safety and health at work, the air conditioning staff has experience in installing air conditioners, therefore the limitation of this requirement is very strange. At the end of this request, he writes Electric van, this request is also very strange, or as a request left from some dossier that had to do with electrical issues".*

Referring to the claims as above, EO SHKELQIMI INVEST SH.P.K., considers that the Contracting Authority has acted in violation of Article 1, 7, 17.12, 17.15, 4.3.c, 60, 64.1 of the LPP of the Regulation on Public Procurement by requesting by the Review Panel in the PRB to approve the complaint as grounded and to correct the procedure, since omissions were made that should not have been made.

Relying on article 111 paragraph 5 related to articles 113 and 114 of the LPP, the Review Panel dated 06/10/2023 has authorized the review expert to conduct the initial review of the file and claims according to complaint no. 756/23, while on 15/10/2023 the review expert's report with

no. 2023/0756 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 approved as partially based, the CA make improvements to the tender file and extend the deadline for bidding"* .

The expertise report has been duly accepted by all procedural parties. CA disagrees with the recommendations of the review expert's report, while EO has stated that it agrees with the review expert's report, affirming and citing: *We agree that the matter should be corrected because the criteria are discriminatory, and we request that it be approved in its entirety as grounded.*

-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 SHKELQIMIINVEST SH.P.K., the review expert through report no. 2023/0756 assessed as follows:

The first complaint claim (I) is unfounded since *"the complaining EO claims that the CA has violated Article 60 and 64.1 of the LPP by not postponing the tender submission deadline for 10 days after the decision to reject the request for reconsideration. The complaining EO submitted the request for reconsideration to the CA on 27.09.2023, with the same complaints as in this complaint. The CA on 27.09.2023 has published the decision to reject the request for reconsideration, with the legal advice on the possibility of appealing against the decision to the PRB. At the beginning, the expert clarifies that the complaining EO mistakenly refers to the articles of the LPP, since the articles and content to which it refers are the articles of Regulation 001/2022 on Public Procurement (RPP). Regarding the substantive part of the claim, in article 63.1.1 point b, of the RrPP it is stated: "Whenever the rejection of the request is related to contract notices, tender documents, the contracting authority continues with the procurement activity by evaluating and considering the reasons of rejection and the circumstances in which the procurement activity is located. Therefore, based on the fact that the request for reconsideration is related to the contract notice and the tender documents, as well as the CA's decision to reject the request for reconsideration, the CA has acted in accordance with Article 63.1.1 of the RrPP. Consequently, the appeal claim at this point is unfounded"*.

The second complaining claim (II) is grounded on the fact that *"the complaining EO claims that the economic capacity requirement is very specific and does not allow the possibility of bidding due to the fact that the CA has specified only one type of evidence that limits competition." The CA in the notice for the contract and tender dossier has specified the request for economic and financial capacity as follows: "The audit report and audited statements by a licensed and reputable audit company for the years (2020, 2021 and 2022), where it is required that the turnover of the EO or the group is not less than 300,000.00 euros. For this request as documentary evidence is requested: " Copies of income statements and management reports*

certified by a reputable licensed auditing company for the years (2020, 2021 and 2022) (attach the notarized copy of the Auditing license) or the Declarations submitted to the Tax Administration of Kosovo. In relation to the request on the economic and financial situation, in article 68, paragraph 1, of the LPP, it is determined [...] in general, economic operators are allowed to fulfill this request by presenting, if it is important and necessary, one or more of the following references: 1.1. the relevant report or reports from one or more banks; 1.2. evidence of an insurance policy issued by a recognized licensed insurance company; 1.3. certified copies of one or more balance sheets or extracts from balance sheets if the publication of such balance sheets is required under the law in the place of establishment of the economic operator; or 1.4. copies of financial reports and management reports certified by a recognized licensed auditing firm or an independent licensed auditor; or 1.5. Annual Tax Declarations submitted to the Tax Administration of Kosovo" The expert clarifies that in accordance with the above article, for the fulfillment of the minimum requirement of economic/financial condition, EOs are allowed to submit one of the documentary evidences of article 68, paragraph 1, hence the definition of only two references is contrary to the aforementioned provision. Consequently, the appeal claim is grounded".

The third claim (III) of the complaint is grounded on the fact that *"the complaining EO claims that the requirements regarding the technical and professional capacity related to the staff are unnecessary and specific amounts that do not coincide with the activity. The CA in the notification for the contract and tender file has specified the requirements for the technical and professional capacity as follows: "The economic operator must provide evidence that he has a staff of at least 10 workers"; "EO must offer at least 2 welders and 2 certified electricians for workplace safety", "Graduate electrical engineer (or master)". For the same requirements, the required documentary evidence is: "Original staff list stamped and signed by the economic operator evidenced by contracts or agreements on engagement." ; "The EO must provide all employee certificates notarized in the original - employment contracts or engagement agreements A graduate electrical engineer (or master), substantiated by a university degree (certified-original copy) and a valid employment contract or employment agreement."* In order to clarify this claim, the expert asked the CA: *in the past, in how many cases was there a need for welders in the assembly of air conditioners. In the answer given by the CA, it is stated that we had the need for welding in all the cases of air conditioning assembly before in the Municipality facility. Therefore, the expert considers that based on the assessment of the CA's needs, the demand for welders in this activity is reasonable, therefore, at this point, the complaining claim is unfounded. Whereas, for the part where it is required that 2 welders and 2 electricians be certified for safety in the workplace, the expert clarifies that the determination of measures to improve the level of safety and health of employees at work is a requirement defined by Law No. . 04/L-161 on Safety and Health at Work, where in article 9, paragraph 1 it is determined that every employer is obliged to charge one or more employees to carry out activities from safety and health at work. Therefore, the requirement that both welders and electricians be certified for workplace safety is not proportionate and may be discriminatory to the complaining EO and other EOs that express interest in participating in this procurement activity. According to the clarification above, the complaining claim is grounded on this point".*

The fourth claim (IV) is grounded since *"the complaining EO claims that the requirement of technical and professional capacity for the equipment (tools) is exaggerated and not clearly defined. The CA in the notice for the contract and tender file has specified the requirements for technical and professional capacity as follows: "List of work tools, trucks with 3 baskets - where one of them has a crane with a length of at least 25 m (with testing). electric van. For this request, as documentary evidence, the following is requested: "The list of working tools (signed and sealed), the economic operator for these vehicles must provide the list of working tools signed and sealed in the original certified with the traffic books. In case the EO does not own the equipment, I must offer the equipment rental agreement. The agreement must be in the name of this project with the validity of the duration of this contract, signed and sealed by both parties and notarized" CA in the answer given regarding the request for pickup trucks, clarifies that intervention with pick-up trucks to install or service air conditioners is necessary in all cases of intervention for all municipal facilities since the height to be reached by ladder is not possible and in the past the implementation of the contract for the installation of air conditioners has failed precisely because of the lack of this position. The expert, in relation to this point, clarifies that in accordance with Article 51 of the LPP, CA determines the selection criteria that an EO must fulfill to be considered qualified, however, the selection criteria should be limited only to the criteria necessary to ensure that EOs possessing the necessary professional and technical skills to fulfill the terms of the relevant contract will be considered qualified to receive a contract. However, in article 69 of the LPP, paragraph 4, it is stated: in the procedures that lead to the awarding of the public contract in which the provision of services is included, the CA may ask the EO to provide data that proves their ability to provide these services; in particular, data may be required relating to skills, efficiency, capacity, experience and reliability. Data regarding the technical capabilities of EOs may be submitted through one or more of the following means, according to the type, quantity and purpose of the services to be supplied: 4.5. the report on the tools, establishments or technical equipment that are available to the EO for the realization of services. In this sense, the determination of the CA for 3 trucks with a basket is not proportional to the subject of the contract, taking into account the circumstances that in a framework contract in which the quantities are not defined, it cannot be possible that the need arises on each day for intervention in three different locations. As for the "electric van" part of the request, such wording is unclear and allows for different interpretations by the parties, as well as such a request is unnecessary considering the subject of the contract and the possibility of conducting electrical tests through mobile devices (handheld devices). Therefore, according to the above clarification, the complaining claim at this point is grounded.*

The fifth claim (V) is grounded since *"the complaining EO claims that the description of the requirements in the preliminary measure document is incomplete, repeated and that the position that has nothing to do with this activity has been entered. CA in the document "Precalculation of climates" has established the positions that are required to be supplied or the services that are necessary in the implementation of the contract. In total there are 35 positions placed in 3 parts for the purpose of weighting the prices. In part A, among other things, the position with serial number 14 is presented - Supply and installation of devices for the removal of birds on public lighting poles with specifications of the device: Current strength: 220VAC Durability 10 (ten) years, Ultrasound power 120 dB, Working temperature"-40 to 60 (C°), Protective surface: about*

400m2. Also in part C, position 14- Maintenance of devices is placed as in the aforementioned position. In order to clarify this claim, the expert asked the CA what is the reason for the inclusion of position 14 - Supply and installation of devices for the removal of birds on public lighting poles, in this procurement activity. In the answer given by the CA, it is stated that the inclusion of this position in this procurement activity was done because it is necessary that at the moment of the installation of the air conditioners, the installation of devices for the removal of birds should also be done, since the upper floors of the municipal buildings are continuous there is a problem of this nature and we have found it necessary to link these positions due to the fact that the same machinery is used and in order not to create additional costs but to save the Municipality's budget. In relation to this point, the expert clarifies that the reasoning given by the CA shows that there is no functional connection between the main subject of this activity, which is the supply and maintenance of air conditioners, and the positions for the supply and maintenance of poultry equipment, however, the CA has decided to include in order to use the funds in the most economical way. Therefore, the claim at this point is unfounded. Regarding the ambiguities of the positions in the price form, the expert asked the CA where the difference is between the position in part B - 1. Mounting with air conditioner holder and the position in part C - 12. Moving, carrying and mounting of the air conditioner . CA has responded to the position in part B - 1. Installation with air conditioner holder - means the placement and installation of new air conditioners, while part C - 12. Moving, carrying and mounting of air conditioners, means the removal, carrying and eventual installation of used air conditioners. but that it is necessary to change its location. In relation to this point, the expert notes that in part A CA has set position 5 Supply and installation of 24 inverter air conditioners for cooling and heating, therefore, in addition to supply, monitoring is also included in the position, while according to the explanation of CA also in part B, namely position 1 means the installation of new air conditioners. In this case, there is a risk of damage to the budget due to the duplication of a service in more than one position. Further, in part C, in positions from 2 to 10, it is not clear the service that must be performed, respectively, the type of gas is not specified, and in the maintenance of cables and sensors, it is not clear whether replacement in case of damage or only repair is included. . Consequently, the complaining claim on this point is grounded.

According to the above, the review expert has handled in a professional and objective manner the claims of the complaining economic operator EO SHKELQIMIINVEST SH.P.K., The argumentation in the report of the review expert is quite detailed, understandable and fully based on the relevant documents referred to procurement activity. Consequently, the Review Panel regarding the claims of the complaining economic operator has forgiven the trust in the review expert's report. In this case, the Review Panel has also taken into consideration the answer given by the complaining EO. In this way, it has been found that the claims of the complaining economic operator EO SHKELQIMIINVEST SH.P.K. are partially grounded.

-Findings of the Review Panel -

Based on the documents of this case and the primary purpose of the complaint, the Panel considered that regarding the issue in the present case, there is no need to convene a hearing with the parties, as long as the submissions of the parties and their actions constitute a sufficient basis

to decide in terms of meritorious. In this case, the Review Panel based its findings mainly on the relevant provisions of the LPP, which foresee and regulate such situations, which may arise during a procurement activity, such as the Complaint in this case.

The Review Panel, analyzing the documents of this case and the actions taken by the parties, their statements and the evidence administered during the course of this procurement activity, considers that the findings of the review expert and his opinion are acceptable and that the Panel is right considered his Report on the occasion of the decision without the need for the same to be repeated again. His report on the occasion of the establishment without the need for the same to be repeated again. Consequently, the Review Panel has decided to partially cancel and approve the complaint of the complaining EO Shkelqimi Invest SH.P.K., while obliging AK - Municipality of Ferizaj related to the procurement activity "Supply, installation and maintenance of air conditioners in administrative, educational and health facilities of the Municipality of Ferizaj ” with procurement number 656-23-8880-1-1-1, to make improvements to the tender file and extend the deadline for bidding.

The panel is always based on the fact that each CA, at any level (local or central), exercises complete institutional independence regarding budget planning and planning the initiation of a procurement activity, but the CA, based on the fact that it presents a public entity, it is necessarily required that the acts and actions taken during the phases of the procurement activity conform to the legal provisions of the LPP, specifically Article 24.2 and Article 51.

The Review Panel has decided in accordance with the legal powers in the sense of Article 104 paragraph 1 in relation to Article 103, Article 105 and Article 117 of the LPP for the implementation of the procurement review procedure in a fast, fair, non-discriminatory manner, in order to legal and effective resolution of the case. 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.

Regarding the appeal fee, it was decided in accordance with article 31, paragraph 4 and 6 of the PRB Work Regulations, in relation to article 118 of the LPP.

From what was said above, it was 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 FERIZAJ;**
- 1x1 EO – **“Shkelqimi Invest SH.P.K.”;**
- 1x1 Archive of the PRB;
- 1x1 For publication on the website of the PRB.