



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

Psh. No.559/23

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 Kosova (Law no. 04/L-042, supplemented and amended by Law 04/L-237, Law 05/L-068, supplemented and Law 05/L-092) in the composition of Vjosa Gradinaj-Mexhuani President, Isa Hasani and Vedat Poterqoi -Members, deciding according to the complaint of EO "Pylla" SH.P.K., against the Decision on contract award related to the procurement activity "Supply of wood and pellets" with procurement number 651-23-4592-1 -1-1, initiated by the contracting authority (CA) - Municipality of Gjilan, on the 17/11/2023, has issued this:

DECISION

1. Approved, as partly grounded the complaint of the EO "Pylla" SH.P.K., with no. 559/2023 of the 09/08/2023, regarding with the procurement activity: "Supply of wood and pellets" with procurement number 651-23-4592-1 -1-1, initiated by the contracting authority (CA) - Municipality of Gjilan, while the decision of the CA to award with contract the date of 25.07.2023 remains in force.
2. Since the complaint of the complaining economic operator EO is approved as partially based, the complaint fee is returned to the amount deposited when the complaint was submitted. 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 15.05.2023, the Municipality of Gjilan, in the capacity of the Contracting Authority, has published the contract notice for the procurement activity entitled: "Supply of wood and pellets" with no. of procurement: 651-23-4592-1-1-1. While on the 29.06. 2023, the CA has published B58 - Notice on the decision of the CA.

The economic operator "Pylla" submitted the request for reconsideration on the 03.07.2023, while the CA on the 10.07.2023 partially approved the request for reconsideration.

After the reassessment, on the 25.07.2023, the CA published B58 - Notice on the decision of the CA.

EO "Pylla" SH.P.K. on the 28.07.2023 submitted a request for reconsideration, while CA on 02.08.2023 rejected the request for reconsideration of the complaining EO.

Dissatisfied with the CA's decision, EO "Pylla" SH.P.K., on 09.08.2023, submitted a complaint to PRB, with protocol number 2023/0559, against the contract award notice of the Contracting Authority related to the activity of the procurement described above.

-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.

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

Claim *The complainant claims that "The Contracting Authority Municipality of Gjilan - The Procurement Department did not respect Article 7 of the LPP."* ***The second claim (II) and fourth (IV):*** *The complainant claims that "The Contracting Authority Municipality of Gjilan - The Procurement Department has not respected article 59 and article 72 of the LPP."* ***Third claim (III):*** *The complainant claims that "the Contracting Authority Municipality of Gjilan - the Procurement Department has not respected article 62 points 1 and 1.1 of Fifth Claim (V):* *The Complainant claims that "the Contracting Authority Municipality of Gjilan - Procurement Department did not respect Article 69 of the LPP."*

Referring to the claims as above, EO "Pylla" SH.P.K., considers that the Contracting Authority has acted in violation of Article 7, 59, 62, 69 and 72 of the LPP by asking the Review Panel in

PRB to approve the complaint as based, cancel the notification on the decision of the CA and return the procurement activity to re-evaluation.

Relying on article 111 paragraph 5 related to articles 113 and 114 of the LPP, the Review Panel dated 11/08/2023 has authorized the review expert to conduct the initial review of the dossier and claims according to complaint no. 559/23, while on 17/08/2023 the expert's report with no. 2023/0559 with the following recommendations: "Based on the aforementioned clarifications, the review expert proposes to the review panel that the complaint of the complaining EO be rejected as unfounded and that the decision of the CA remain in force".

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

The Review Panel has assessed that the conditions have been met to decide on this case without a hearing in the sense of Article 24 paragraph 1 of the Rules of Procedure of the PRB, taking into account that the claims of the parties and their submissions, the evidence as well as the 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 regarding 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 "Pylla" SH.P.K., the review expert through report no. 2023/0559 assessed as follows:

The first complaining claim (I) is unfounded since *"The Expert emphasizes that, among other things, the purpose of this article is that the contracting authorities will treat all economic operators equally without discrimination and with transparency, during the conduct of the procedures of procurement. The claim of the complaining EO regarding the violation of this article was mentioned only superficially without specifying what was not in harmony with article 7 of the LPP. The expert clarifies that during the examination of the case, it was not observed that the CA has taken any action that contradicts Article 7 of the LPP."*

The second (II) complainin claim and the fourth (IV) complaining claim are unfounded since *"The expert emphasizes that the purpose of Article 59 is Examination, evaluation and comparison of tenders, initially the contracting authority established an evaluation commission, after accepting the request for reconsideration and returned the subject to re-evaluation, established a commission for re-evaluation. The expert points out that the purpose of Article 72 is (possibility of clarification) Documentation and additional information: When the information or documentation to be submitted by economic operators is or appears to be incomplete or incorrect, or when specific documents are missing, the contracting authorities may require economic operators to submit, complete, clarify or complete the appropriate information or*

documentation within a certain time limit, provided that such requests are made in full accordance with the principles of equal treatment and transparency. Providing information that missing or the provision of information will be applied only to documents whose existence is fixed, before the deadline for the submission of tenders, and can be objectively verified.

See the claim of the complaining EO, the same claims that the declared winning EO did not meet the conditions of the tender because:

- 1. Has not presented any references other than the list of references.*
- 2. Has not presented evidence on the intended mechanism other than the list of the mechanism*
- 3. Also, the winning EO has not met the criterion of the technical staff, where it has submitted only a list of workers and has not submitted the contracts signed and sealed by the parties as requested.*
- 4. The same claims that the offer of the complaining EO did not exceed the budget, because the same emphasizes that it offered per cubic meter, which is €77.00 per cubic meter, which means that 1 cubic meter of wood = 1.43 meters of space.*

The expert clarifies that the first three claims are unfounded because when the list of contracts is submitted according to article 59 and article 72 of the LPP as well as based on guide no. 001/2023 for public procurement, specifically article 10, the clarification of tenders during the tender evaluation process, respectively in the first line of this table it is written that the reference/certificate of acceptance from the list of presented contracts is missing Clarifying information may be requested 69. The EO announced as the winner, as the complaining EO has also mentioned, submitted the lists and CA based on article 59 and 72 as well as based on guide no. 001/2023 for public procurement. Specifically, Article 10 clarification of tenders during the evaluation process has also requested the evidence for the list of contracts for the list of machinery and for the list of workers. During the evaluation, the CA was obliged to request the evidence that was presented with the three lists because it was an offer with the cheapest price from all the bidders, the financial offer was 382,455.70, while the offer of the complaining EO was 453,761.00, the difference in price was over 71,000.00 €. Therefore, since the lists were submitted during the bidding, the requests for evidence within the lists presented by the CA were in harmony with article 59 and 72 as well as guide no. 001/2023 for public procurement. As for the claim no. 4 of the complaining EO that it did not exceed the planned budget, because the same emphasizes that it has bid per cubic meter, which is 77.00 € per cubic meter, which means that 1 cubic meter of wood = 1.43 meters of space, the expert explains that in the description of the price, the same description was defined for all bidders and the complaining EO bid at the price of m3 as it was foreseen and as if they bid to all other bidders, but the same one was at a price above 71,000.00 €, which is higher than the bid declared the winner. Therefore, the Expert concludes that the claim of the complaining EO does not stand, because the CA acted in harmony with article 59 and 72 of the LPP”.

The third complaining claim (III) is unfounded since *"The expert emphasizes that the purpose of article 62 is that the same article clarifies when a procurement activity should be canceled*

which will not result in the award of the contract as well as par. 1.1 indicates the cases where a violation of the LPP has occurred and cannot be regulated or prevented through a legal amendment, including cases where a provision of this law requires the cancellation of the procurement activity. The complaining EO claims that the winning EO has not met the criteria set by CN and TD and the same claims that if the offer of the complaining EO has exceeded the anticipated budget, the procurement activity should be cancelled. The expert clarifies that the claim of the complaining EO does not stand because the EO declared winner, as explained in the preliminary claim, has met the criteria set forth by CN and TD. and offered at a cheaper price, as was explained in the preliminary claim (2 and 4 related to the violations of article 59 and 72).

The fifth claim (V) of the complaint is unfounded since "The expert emphasizes that the purpose of this article is related to technical and professional ability. The complaining EO claims that CA did not have the right to request additional information regarding the submitted lists which were examined in claim 2 and 4 of this expertise, the same claims do not stand as explained in the claims mentioned above (claim 2 and 4 of this report)".

According to the above, the review expert handled the claims of the complaining economic operator in a professional and objective manner. The argumentation in the expert's report is based entirely on the relevant documents that refer to the procurement activity. The findings in the expert's report can be confirmed through the tender file as well as the documents with which the tenderers have offered. Consequently, the Review Panel regarding the claims of the complaining economic operator has given full confidence to the expert's report.

- Findings of the Review Panel -

The review panel independently and objectively, conscientiously and professionally evaluated all the evidence of the case. The review panel after the administration and assessment of the evidence, the complete ascertainment of the factual situation, relying on the LPP as applicable material law, after reviewing the appeal claims, taking into account all the documents of the case and the recommendations of the review expert, has found that the complaint must be rejected as unfounded.

Consequently, the Review Panel has decided to validate the Notice on the Decision of the Contracting Authority regarding the procurement activity entitled "Supply of wood and pellets" with procurement number 651-23-4592-1-1-1, as it has been assessed that the Authority The contractor has acted in accordance with the legal provisions of the LPP and no violations have been found that the complaining EO claimed when submitting the complaint to the PRB. *The EO declared winner, as mentioned by the complaining EO, had submitted the lists, while the CA based on article 59 and 72 as well as based on guide no. 001/2023 for public procurement, specifically article 10 clarification of tenders during the evaluation process, has also requested evidence for the list of contracts for the list of machinery and for the list of workers. CA during the evaluation was obliged to ask for the evidence that was presented with the three lists because it was the offer with the cheapest price from all the bidders, the financial offer was 382,455.70 while the offer of the complaining EO was 453,761.00, the price difference was over 71,000.00€,*

while after the assessment by the expert, the same has concluded that the recommended EO has offered in accordance with the tender dossier.

Based on the above, including the complaint statements and the findings of the review expert, the Complainant has stated that the recommended person had completed his offer in the three lists specified above, the Panel according to its independent judgment always proceeding from the logical and principled aspect, considers that each bidder should take care of his bid in time by completing it with all the relevant documents required in the TD, however this is allowed according to the LPP and RPP and GPP as referred to above based on the mentioned norms, therefore the panel considers them as partially based claims and thus even though the final result of this activity does not change, it decided as in point two of this decision.

Among other things, it is worth noting that in connection with this procurement activity, the complaining party, as it has claimed in its complaint, based on the price given in the offer, is outside the estimated value, while the complaint claim in which the complaining EO declares that he did not bid with the given price, as if the same had been classified as based then again this would mean a material change as well as in case of price correction the same would be considered irresponsible for the fact that it would exceed the threshold of allowed of 2%, as provided by the legislation in force.

Based on the above, 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 do not constitute a sufficient basis for the procurement activity to return to re-evaluation because otherwise it will conflict with the scope of the LPP and the argumentative basis of the appeal 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 without a contested legal basis for re-evaluation is not 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 by requiring that the decisions of such individuals and the legal and factual basis for such decisions, not be influenced by personal interests, be characterized by non-discrimination and a high degree of transparency and be in accordance with the procedural and essential requirements of this law".

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.

For point I of the decision, it was decided based on article 117 of the LPP in relation to article 29 and 31 paragraph 6 of the PRB Work Regulations.

For point II of the decision, it was decided based on article 131 of the LPP in relation to article 29 paragraph 3 of the PRB Work Regulations.

For point III of the decision, it was decided based on article 31 paragraph 5 of the PRB Work Regulations related 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

Mrs. Vjosa Gradinaj

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 – **MUNICIPAL ASSEMBLY- GJILAN**;
1x1 EO – “Pylla ” SH.P.K.”;
1x1 Archive of the PRB;
1x1 For publication on the website of the PRB.