



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

Psh. No.1018/23

The Review Panel, appointed by the President of the Procurement Review Body (PRB), based on Article 105, 106, and 117 of the Law on Public Procurement of the Republic of Kosova (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: Isa Hasani - President, Vedat Poterqoi - Member and Vjosa Gradinaj-Mexhuani - Member deciding according to the complaint of EO “Alkaloid”, against the Contract Notice or the tender documents related to the procurement activity “Supply of material for Hemodialysis from EL to UCHSK” with procurement number 00220-23-12480- 1-1-1, initiated by the contracting authority (CA) University Clinical Hospital Service of Kosova, on the 21/02/2024 has issued this:

### **DECISION**

1. Approved as partly grounded the complaint of EO “Alkaloid” with no. 2023/1018, dated 15/12/2023, regarding with the procurement activity “Supply of material for Hemodialysis from EL to UCHSK” with procurement number 00220-23-12480- 1-1-1, initiated by the contracting authority (CA) University Clinical Hospital Service of Kosova.
2. Remains in force, Tender dossier/B05-Contract Notice, dated 10.11.2023, with correction of errors-Form B54-e-procurement system, dated 29.11.2023 and 6.12.2023, related to the procurement activity: “Supply of material for Hemodialysis from EL to UCHSK” for lot 1 and Lot 3, with procurement number 00220-23-12480- 1-1-1.
3. It is allowed to return the complaint’s fee in the amount deposited when submitting the complaint to the complaining EO, according to article 31.4, and the complaining economic operator is obliged to comply with article 31 point 6 of the PRB's work regulations, within a period of sixty (60) days make a request for the return of the complaint insurance, otherwise the deposit will be confiscated and these funds will go to the Budget of the Republic of Kosova.

## REASONING

### *- Procedural facts and circumstances -*

On the 10.11.2023, the University Clinical Hospital Service of Kosova in the capacity of the Contracting Authority has published the Notice for Contract B05 regarding the procurement activity with "Supply of material for Hemodialysis from EL to UCHSK", with procurement number 00220-23-12480- 1-1-1.

The contracting authority implemented an open procedure, type of contract: supply, estimated value of the contract: LOT 1 - 216,138.00 € and LOT 3 - 2,034,350.00 €.

On the 05.12.2023 EO "Alkaloid" submitted a request for reconsideration against the aforementioned decision of the CA. On the 05.12.2023, the Contracting Authority rejected the request for reconsideration as unfounded.

On the 15.12.2023, EO "Alkaloid" submitted a complaint with no: 2023/1018, against the contract notice, related to the procurement activity "Supply of material for Hemodialysis from EL to UCHSK" LOT 1 and 3 with procurement no:"00220-23-12480-1-1-1"

### *- On the preliminary review stage -*

The Review Panel has concluded that the complaint contains all the elements defined through Article 111 of the LPP and as such was submitted within the legal term in accordance with Article 109 paragraph 1 of the LPP after the preliminary procedure for resolving disputes in the sense of Article 108/A of the LPP, from the economic operator who is an interested party according to article 4 paragraph 1 sub-paragraph 26 of the LPP. In this way, the Review Panel has concluded that it is competent to review this complaint according to Article 105 of the LPP and there is no procedural obstacle to proceed with reviewing the complaint in a meritorious manner.

The response, on 06.12.2023, of the Contracting Authority-University Clinical Hospital Service of Kosova, Rejected, Request for Reconsideration of the complaining economic operator "Alkaloid". Picture Refer to expertise's report no.1018/23.

**Arsyetim:** Autoriteti Kontraktues ka zhvilluar aktivitetin e prokurimit të lartë cekur sipas LPP-së, në përputhje me dispozitat e ligjit ne fuqi dhe kërkesës nga njesia kërkuese për inicimin e procedurës së prokurimit ashtu siç është e përshkruar në LE .

AK ka pranuar përgjigje për këtë kërkes nga njesia kërkuese si më poshtë :

**Në bazë të vendimit nr 124/VIII/2023 i dates 21.08.2023 me nr. protokolli 05-5106 të nxjerr nga Ministria e shendetsise me te cilin plotesohet dhe ndryshohet lista esenciale e aprovuar me vendim nr 87/V/2023 me Nr protokolli 05-3113 te dates 22.05.2023 .**

**Ku ne ket vendim eshte e percaktuar si specifik per dializatoret te jane me sterilizim me avull (steam High Flux polysulfone dializer haemadialyzer ),steam sterilization (gjeni te bashkangjitur vendimin se bashku me listen esenciale.**

**Ne Listen esenciale te aprovuar ne gusht te vitit 2023 dhe Nentor te vitit 2023 metoda e sterilizimit eshte Steam sterilization (pra sterilizim me avull).**

**Përfundim:** Në bazë të arsyeve të lartcekura Autoriteti Kontraktuesi SHSKUK-së e refuzon këtë kërkesë për rishqyrtim si të **pa bazuar.**

*Për ne të gjithë Operatorët Ekonomik janë të rëndësishëm dhe të barabartë.*

**Kundër këtij vendimi pala e pa kënaqur mund të parashtroj ankesë pranë OSHP-së.**

The claims of the complaining economic operator "Alkaloid" are presented as follows:

"Request unit - Violates Articles 7 and 28 of the LPP (Favorable technical specifications) Compilation of mandatory technical specifications by the request unit for lot 1 items LOT 1 and LOT 3, respectively the claim of the complaining EO quote:" In Annex 1 in DT - Mandatory technical specifications in Lot 1 and Lot 3, you have described the products you claim to procure, noting that the products that can be offered must be "Steam Sterilization" with Steam Sterilization, thus eliminating all other sterilization methods such as those with sterilization with Dry Heat, Gamma sterilization and E-Beam Sterilization, thus limiting the competition and favoring only manufacturers that produce Dialyzers with Steam Sterilization and that their number is very small compared to world-renowned manufacturers for the production of Dialyzers with Gamma Sterilization such as: B Braun, Nipro, Nikkiso, Asahi Kasei, etc., thus violating Article 28 of the LPP - Technical Specifications. The reasoning of the CA-SHSCUK that for the drafting of the technical specifications were based on the Essential List does not hold because this specification has been in the LE since 2003 and is adapted to the specifications of only one Fresenius Medical Care company which had a monopoly until the year 2017, when, after complaints, the technical specification for dialyzers was changed, which enabled wider participation of bidders with different manufacturers, with which contracts were concluded with much lower prices for the same services. To prove that AK-SHSCUK did not refer to the

Essential List during the processing of TD in the same Lots, the Ultrafiltration coefficient was required to be greater than or equal to 40 for Lot 1 and greater than or equal to 50 for Lot 3. which is not in accordance with the Essential List where for the product required for Lot 1 the Ultrafiltration coefficient is 50 while for Lot 3 this coefficient in EL is 55.

*- 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.

Relying on article 111 paragraph 5 related to articles 113 and 114 of the LPP, the Review Panel dated 28.12.2023 has authorized the review expert to conduct the initial review of the complaint and claims according to complaint no. 1018/2023, while on 05.01.2024 the review expert's report with no. 2023/1018 with the following recommendations: Based on the above-mentioned clarifications, the review and technical expert proposes to the review panel that the complaint of the complaining EO be approved as well-founded, the CA make improvements to the tender dossier and extend the deadline for bidding.

*Evaluation of the review expert through report no. 2023/1018, of the complaining claims of the complaining EO, as follows;*

The technical expert, after analyzing and reviewing the case documents, clarifies that, as far as the technical specifications for LOT 1 and LOT 3 are concerned, there are two decisions of the essential list of drugs (LEB): 1. LEB Decision of the Ministry of Health dated 22/05/23, no. protocol 05-3113, in the Hemodialyses Materials table, in the CAPILLARY DIALYSER type specification, in addition to Steam Sterilization, Gamma Rays (1.6 and 1.8) also appear. 2. Whereas, in the LEB Decision of the Ministry of Health dated 21/08/23, we amend the decision, no. protocol 05-5106, in the Hemodialyses Materials table, in the Capillary Dialyser type specification is only Steam Sterilization, ie Gamma Rays (1.6 and 1.8) have been removed. Also, it is worth noting that the technical specifications required by the CA for ultrafiltration coefficients for LOT 1 is required to be greater than or equal to 40, while for LOT 3 it is required to be greater than or equal to 50. Where this request for both LOTs 1 and 3 contradicts the LEB, since the ultrafiltration coefficient for LOT 1 is 50, while for LOT 3 it is 55. In conclusion, the Decision of the MoH for LEB, Date 22/05/ 23, no. protocol 05-3113 allows equivalence / space for EO; whereas the Decision of the MoH for LEB, dated 21/08/23, amends decision no. protocol 05-5106, limits the number of EO applications, therefore, as long as the AK allows equivalence to the ultrafiltration coefficient, which in LEB is limited, then as such, I consider that even the steam sterilization part should be allowed the space to be offered as well with the E-Beam Sterilization, Dry Heat, and Gamma methods, due to the fact that it expands competition and respects Article 7 of the LPP. As such, according to the clarifications above, the technical expert recommends that the complaint of the complaining EO be approved for the technical specifications for LOT 1 and 3.

The expertise's report has been duly accepted by all procedural parties. CA declares that it disagrees with the recommendations of the review expert's report, while EO agrees with the expert's report.

*- Findings of the Review Panel -*

The Work Regulations of the Public Review Body, which is published on the PRB website, with Article 20, paragraph 2 of the Regulations, defines the requirements for the Contracting Authority and the Economic Operator, that all information and notifications must be submitted and communicated through the public communication platform, if this is possible.

Based on the papers of this case, the Panel considers that regarding the issue in the present case, there is no need to convene a hearing with the parties, in the sense of Article 24 paragraph 1 of the Rules of Procedure of the PRB, taking into account the fact that the claims of the parties and their submissions, evidence as well as the review expert's report provide sufficient data to decide on the merits.

The review panel assesses that the Report of the review expert, drawn up at the request of the Panel regarding the dispute in this matter of the public procurement activity, contains the essential elements of such a document as provided by the provision of article 113 related to article 114 of the LPP, according to who is required by the expert to review all procurement documentation, including all appeal claims and provide the Panel and all disputing parties with an independent and professional assessment of the procurement activity and the validity of the complaining claims.

However, it should be emphasized the legal fact 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 eventual evidence, taking into account the nature of eventual violations, the flow, nature and purpose of the procurement activity, therefore the fact that in which cases and for what, the Panel relies or not, the expert's report and/or any of the recommendations, belongs to its independent and professional judgment/ thanks, just as these responsibilities are addressed in terms of article 98, 99 related to article 105 of the Public Procurement Law.

The panel assesses that the review expert's report has handled the claims of the complaining economic operator in a professional and objective manner, the report is based entirely on the relevant documents that refer to the procurement activity, through the tender file. The Review Panel regarding the claims of the complaining economic operator, which have been evaluated according to the expert's report, notes that the review expert has identified the legal acts on the basis of which the criteria have been set in the tender file, where it is clarified, regarding the technical specifications for LOT 1 and LOT 3, there are two decisions of the essential drug list (LEB): 1. LEB Decision of the Ministry of Health dated 22/05/23, no. protocol 05-3113, in the Hemodialyses Materials table, in the CAPILLARY DIALYSER type specification, in addition to Steam Sterilization, Gamma Rays (1.6 and 1.8) also appear. 2. Whereas, in the LEB Decision of the Ministry of Health dated 21/08/23, we amend the decision, no. protocol 05-5106, in the Hemodialyses Materials table, in the Capillary Dialyser type specification is only Steam

Sterilization, ie Gamma Rays (1.6 and 1.8) have been removed. And for this, the complaint is considered partially based, but the final recommendation does not coincide with the legislation that regulates the issue in question, which UCHSK must implement.

The panel finds that the Decision of the MOH dated 22/05/23, no. protocol 05-3113, has determined the two methods of sterilization, but that this decision was changed by the Decision of the Ministry of Health dated 08/21/23, complete amendment of the decision, no. protocol 05-5106, has determined the other methods of sterilization according to the Essential List of Medicines (LEB) for the primary, secondary and tertiary level that are covered by the budget of the Republic of Kosova, which decision has been implemented by the UCHSK, in the case of the Tender dossier and The complaining EO was not aware of these legal changes.

With Article 59- Basic health care services with Law No. 04/L-125 For Health, it has been determined that the Ministry of Health determines the list of services compiled by the technical committee appointed by the Minister of Health at the beginning of each fiscal year; approved by the Government, in accordance with the available financial resources and the health needs of the population. Likewise, article 1.19. List of health care services - defines that, The list of forms and types of health care services that are covered by the Government and co-payments 3 (including the List of medical products and consumables) which is compiled by the technical committee appointed by the Minister of Health. The list may be modified as necessary based on the assessment of the Ministry.

Article 62 The University Hospital and Clinical Service of Kosova consists of secondary and tertiary health care institutions in the public health sector, defined by the sub-legal act issued by the Ministry, in accordance with this law and with special responsibilities for implementation of this law and by-laws issued by the Ministry.

The review panel finds that, in this procurement activity, in the case of drafting the criteria of the Tender Dossier, it has only applied the law, respectively, the Decision of the Ministry of Health dated 21/08/23, supplementing the amendment of the decision, no. protocol 05-5106, which has defined other methods of sterilization according to the Essential List of Medicines (LEB) for the primary, secondary and tertiary levels that are covered by the budget of the Republic of Kosova. The panel finds that the complainant failed to prove with concrete evidence that there was a legal violation or discriminatory criteria in the Tender dossier by the Contracting Authority during the procurement activity.

The Review Panel has assessed that the Contracting Authority has acted in accordance with the legal provisions for public procurement, Law No. 04/L-125 For Health and the decision of the Ministry of Health, for the requirements of the Tender dossier, related to the procurement activity, with procurement number: 00220-23-12480-1-1-1 "therefore the Review Panel has decided to Remain in force, Tender dossier/B05-Contract Notice, dated 10.11.2023, with correction of errors-Form B54-e-procurement system, dated 29.11.2023 and 6.12.2023, related to the procurement activity "Supply with material for Hemodialysis from EL for UCHSK", for Lot 1 and Lot 3, with procurement number 00220-23-12480-1-1-1.

The review panel emphasizes that in accordance with articles 1 and 6 of the LPP, that contracting authorities exercise their institutional independence in the public procurement process, but it remains within the competences and responsibilities of this body to examine complaints and legality in the procurement process according to article 24, paragraph 2 of the LPP cited "The contracting authority is responsible for ensuring that all procurement activities of such contracting authority are executed in full compliance with 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 and Article 105 of the LPP for the implementation of the procurement review procedure in a fast, fair, non-discriminatory manner, with the aim of resolving legal and effective of the subject. 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.

The review panel in accordance with Article 117 of the LPP, as well as based on the evidence presented above, decided as in the provision of this decision.

**President of the Review Panel**

Mr.Isa Hasani

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**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 – **UNIVERSITY CLINICAL HOSPITAL SERVICE OF KOSOVA;**

1x1 EO – **“Alkaloid;**

1x1 Archive of the PRB;

1x1 For publication on the website of the PRB.