



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

Psh. No.1050/23

The Review Panel, appointed by the President of 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, deciding according to the complaint of EO "Infinit " Sh.P.K. against the Decision on contract award or a design competition related to the procurement activity “Supply of information technology equipment” with procurement number "612-23-12493-5-5-8", initiated by the contracting authority (CA) - Municipal Assembly of Fushë Kosovë, on the 21/03/2024 has issued this:

DECISION

1. Refused, as ungrounded the complaint of the Economic Operator "Infinit" SH.P.K., with protocol number 2023/1050, dated 22/12/2023, related to the procurement activity with title: “Supply of information technology equipment” with procurement number "612-23-12493-5-5-8", initiated by the contracting authority (CA) - Municipal Assembly of Fushë Kosovë.
2. It is confirmed, the Notice on the Decision of the Contracting Authority, dated 06.12.2023, Municipal Assembly of Fushë Kosovë, related to the procurement activity with the data as in point 1. of the provision.
3. Ordered the confiscation of the complaint’s fee in the amount deposited by the complaining economic operator based on Article 31 par. 5 of the Rules of Procedure of the PRB, while the funds go to the budget of the Republic of Kosova.

REASONING

- Procedural facts and circumstances –

On the 06.12.2023, Municipal Assembly of Fushë Kosova, in the capacity of Contracting Authority, has published the Contract Notice related to the procurement activity entitled “Supply of information technology equipment” with procurement number: "612-23-12493-5-5-8 ", while on 06.12.2023 CA published B58 Notice on the decision of the Contracting Authority and awarded EO "Botek" SH.P.K.

This procurement activity was developed through an open procedure with the type of supply contract and with an estimated contract value of 55,550.00 euros.

On the 11.12.2023, EO "Infinit" SHPK submitted a request for reconsideration against the aforementioned decision of the CA. On the 14.12.2023, the Contracting Authority rejected the request for reconsideration as unfounded.

On the 22.12.2023, PRB received the complaint from EO "Infinit" with no. 1050/23 regarding the activity "Supply of information technology equipment" with procurement number: "612-23-12493-5-5-8".

-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.

In support of Regulation 01/2020 of the Work of the Procurement Review Body, namely Article 13 Submission of Complaints, paragraph 9 of Article 13 requires that "Complaining claims must be the same as those presented to the contracting authority".

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

CA/Evaluating Commission during the evaluation of the offers for the project in question did not act in harmony with LPP No. 04/L-042 Amended and supplemented by Law No. 04/L-237, Law No. 05/L-068 and Law No. 05/L-092, namely the aforementioned legal provisions and the Operational Instruction for public procurement. CA/procurement office on 24.11. issued the notice on the decision of the contracting authority and the standard letters for the bidding EO where our company's offer was recommended for contracts as the responsible tender with the lowest price for this procurement activity. After submitting the request for re-examination by EO

Botek shpk, the procurement office returned the matter for re-evaluation and on 06.12. has recommended for contracts the complaining EO Botek shpk. Whose offer was the third with the lowest price for this procurement activity. The finding of the CA/evaluation commission for the elimination of our offer is illegal and unjust.

After approving the complaining claims of EO Botek shpk, the CA/ MA of Fushe Kosove has eliminated the offer of our company based on the decision of PRB no. 214/22 on the grounds that we did not submit the product brochures and did not mention the offered brand. This conclusion of the CA/evaluation commission does not stand, in the invitation to tender compiled by the CA/MA of Fushe Kosova in point IV.6, it is requested to submit the following documents: IV.6) Tender form and the number of copies of the Tender and List of required documents; The tender will consist of the completed and signed documents as follows:

- a. The Tender Submission Form found in Part B of the FPO;
- b. Statement on the Technical Specifications of the offered object of the contract, which corresponds to those mentioned in Annex 1 of the FPO.
- c. Tender Security, if applicable; AND
- d. [specify any other necessary documents].

Our company has submitted/fulfilled the three above-mentioned requests, in point d the contracting authority has not specified/requested any additional documents. Likewise, in Article VI.2) of the FPO/Evaluation of tenders, tenders received in time will be examined, evaluated and compared based on the requirements set forth in this FPO. The tender is considered to be responsive when it complies with all the requirements of this FPO.

Based on the legal provisions of the law on public procurement in force, article 52.3/ 56.3 and 59.4 CA is forbidden to use non-quantifiable criteria during the evaluation of offers which were not previously specified/defined in the contract notice and in the tender file in this case in the Invitation to Bid. I quote Article 52.3 of the LPP Article 52. Notification of the criteria for contract award 3. Only the measurable criteria that are defined in advance in the tender dossier can be used for evaluation. The contracting authority may only use criteria that are directly relevant to the subject of the contract. Such criteria are but not limited to: quality, price, technical merits, aesthetics, and functional characteristics, environmental characteristics, running costs, cost effectiveness, after-sales services and technical assistance.

I quote Article 56.3 of the LPP Article 56 General Provisions on the Selection of Participants and the Awarding of Contracts 3. The tenderer, during open procedures, or the candidate, during limited procedures and competitive procedures with negotiations, will not be disqualified or excluded from the procedures such on the basis of any requirement or criterion that is not mentioned in the contract notice and in the tender file. I quote article 59.4 of the LPP 4. The contracting authority will consider a tender as responsible only if the tender in question is in compliance with all the requirements set forth in the contract notice and in the tender file. The CA in its decision refers to the decision of PRB no. 214/22 which was issued on 20.06.2022. and cannot be paralleled and compared with this contract which was signed in the AQP on

30.10.2023. and has different terms from the contract which was in force until 30.08.2023. on the basis of which case no. was issued and was the basis for consideration. 214/22. The terms of the contract which was in force when the aforementioned decision was issued were different from the criteria/requirements presented in the invitation to tender.

Evaluation of the review expert through report no. 2023/1050, of the complaint claims of EO "Infinit" Sh.P.K. complainant, as follows;

Complaining claims: Regarding the claim of the complaining EO regarding the evaluation of offers by the CA, the reviewing expert explains that the CA has applied for an invitation to tender on the basis of the framework contract which was signed by CPA with no. UA/2016-23-6106-111/C403-C420 in which CA - Municipality of Fushe Kosovë is also a part. Based on the technical specification, part of this contract, a request for the supply of equipment has been sent, which is uploaded to the E-procurement system. Administering the evidence: the FPO, the basic contract of the CPA, the commission's evaluation, the requests for reconsideration and Annex 1 technical specifications, the review expert as regards the part where the complaining EO refers to the fact that the criteria established in the FPO have not been respected, assesses that during the phase of qualification of the EO, which procedure was developed by CPA, all EOs who have met the criteria of professional suitability requirements, requirements on economic and financial status and requirements on technical and/or professional opportunities are qualified, therefore the claim that the criteria have not been respected does not stand because the qualification of EO was done in the first phase by CPA.

According to Article 1.2 of the basic contract "This public framework agreement is not a contract in itself, but defines the terms and conditions for the auxiliary contracts". This is in accordance with article 54.22 a), b), c) of RRPP 001/2022. Every FPO will be realized based on article 4.2, 4.3 of the Basic Contract. The reviewing expert also clarifies that in the basic contract the technical specifications are required: "Note: The columns on the right "minimum technical specification provided" must be filled in accurately and clearly and each information must match the catalog you provide. So every information filled in by you must be in the catalog so that it can be verified during the evaluation.

- For each product, you must specify the name of the model you offer. In the first column of each product under - Manufacturer - Brand name -, you must write the name of the model including the name of the manufacturer and the exact name of the model you are offering". So according to the review expert, the offer of the complaining EO does not meet the requirements of the basic contract and the specifications of the FPO, taking into account that the technical specification was not submitted in the offer according to the requirements given in the price list, but only the price list was filled in, not clarifying which "brand" was offered with the offer.

Based on RRUOPP article 10.1 The following examples are not the only cases. Depending on the case presented, the CA must act in accordance with Article 72 and Article 59 of the LPP. The technical specification for the offered goods and the catalog are missing ("technical specification" - CA determines the minimum and maximum requirements of a product, while the EO must submit the detailed specification of the offered goods. Reject the tender without

requesting further information - in accordance with the article 28 of the LPP. Therefore, based on the above clarifications, the review expert assesses that the claim of the complaining EO on this point is unfounded.

Relying on article 111 paragraph 5 related to articles 113 and 114 of the LPP, the Review Panel dated 05.01.2024 has authorized the review expert to conduct the initial review of the dossier and claims according to complaint no. 1050/23, while on 10.01.2024 the review expert's report with no. 2023/1050 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 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 declares that it agrees with the recommendations of the review expert's report, while EO has declared that it does not agree with the report of the review expert.

- 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 matter 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 complaining 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 dealt with 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. 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. The Review Panel regarding the claims of the complaining economic operator has given full confidence to the Review Expert's Report, according to which the complaining claims of the complaining Economic Operator have been assessed as unfounded.

The Review Panel, based on the findings of the review expert, considers that the complainant failed to prove with concrete evidence that there was a legal violation by the Contracting Authority during the development of the procurement activity in question. Therefore, the Review Panel has assessed that the Contracting Authority has acted in accordance with the legal provisions for public procurement and the requirements of the Tender Dossier regarding the procurement activity entitled "Supply of information technology equipment" with procurement number: "612-23-12493 -5-5-8", initiated by the contracting authority (CA) - Fushë Kosovë Municipal Assembly. Consequently, the Review Panel has decided to reject the complaint of the Economic Operator "Infinit" SH.P.K., and has certified the Decision of CA -B58 dated 06.12.2023, Contracting Authority, Municipality of Fushë Kosova, regarding the procurement activity.

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 of the Economic Operator must be rejected as unfounded. Consequently, the Review Panel has decided that the Notice on the Decision of the Contracting Authority - Municipal Assembly of Fushë Kosovë regarding the procurement activity entitled "Supply of information technology equipment" with no. of procurement: "612-23-12493-5-5-8" to remain in force.

Based on the fact of the rejection of the EO complaint, the review panel decided to confiscate the complaint fee in the amount deposited by the complaining economic operator based on Article 31 par. 5 of the Rules of Procedure of the PRB, while the funds go to the budget of the Republic of Kosova.

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, 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.

From what was said above, it was decided as in the provision of this decision.

President of the Review Panel

Mr.Isa Hasani

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- FUSHË KOSOVA;**

1x1 EO – "INFINITT " SH.P.K.;

1x1 Archive of the PRB;

1x1 For publication on the website of the PRB.