



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

Psh. No.752/23

The Procurement Review Body through the Review Panel composed of Vjosa Gradinaj Mexhuani as President, Isa Hasani and Vedat Poterqoi as a member, deciding on the complaint of the economic operator “N.T.P. Gresa Commerce” against the Notice on the Decision dated 13.09.2023 of the Contracting Authority - Municipality of Suhareka regarding the procurement activity with title “Supply of wood and pellets for heating” with procurement no.624-23-6986-1-1-1, based on Article 105 in relation to Article 106 and Article 117 of the LPP, after consideration in the hearing session without the presence of the parties, on the 21.11.2023, has issued this:

DECISION

1. Refused, as ungrounded the complaint of the EO “N.T.P. Gresa Commerce” with no. 752/2023 of the 02.10.2023, against the Notice on the Decision dated 13.09.2023 of the Contracting Authority - Municipality of Suhareka regarding the procurement activity with title “Supply of wood and pellets for heating” with procurement no. 624-23-6986-1-1-1..
2. Confirmed the Notice on the Decision of the Contracting Authority dated 13.09.2023 related to the procurement activity with the data as in point I of the provision.
3. The confiscation of the complaint’s fee is ordered 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 -

The Municipality of Suhareka, in the capacity of the Contracting Authority, on the 08.07.2022, has published the Contract Notice B05 related to the procurement activity with title "Supply of wood and pellets for heating" with procurement no.624-23-6986-1-1-1.

This procurement activity was developed through an open procedure with the type of contract for supply and with an estimated contract value of 970,200.00 €.

On the 13.09.2023, the Contracting Authority has published the Notice on Decision B58 through which it has awarded a contract to the economic operator "N.T.P. Burimi".

On the 18.09.2023, the complaining economic operator submitted a request for reconsideration against the Notice on the Decision of the Contracting Authority. Consequently, on the 21.09.2023, the Contracting Authority made a decision through which it rejected as unfounded the request for reconsideration of the complaining economic operator.

The Complaining Economic Operator on the 02.10.2023 submitted to PRB complaint no. 2023/0752.

The panel found in advance that there are no elements to prevent the conflict of interest, as required in terms of Article 11 of the Regulation on the Work of PRB, therefore it considered all the documents of this matter, including all the acts and actions of the parties and considered that there is a need to convene a public hearing with the parties in order to evaluate the case fairly. (held on 17.11.2023), as provided by paragraph 2, of article 24 of the cited Regulation. The statements of the parties, the administered evidence and the expert's explanations have been recorded in the minutes of this session, in which case it is established that both parties have stood behind their claims, while the representative of the CA has stated that he does not agree with the findings of the reviewing expert. In the context of the comprehensive analysis of the documents of this subject, the Review Panel creates his/her independent opinion by finding that:

- Administration and evaluation of evidence -

In order to fully verify the factual situation, the review panel administered as evidence the report of the review expert, the opinions of the parties regarding the report of the expert, the submissions and documents of the complaining economic operator, the letters and documents of the contracting authority, the relevant documents related to the activity of procurement as well as all the evidence proposed by the procedural parties.

The main (fundamental) claims of the complaining economic operator regarding the references contested by the CA regarding the works performed for the projects highlighted by the CA in the standard letter B42, he declares that he has fulfilled them due to the fact that the projects were completed before the deadline by fulfilling the contract 100% and in some 130% (+/-30% indicative amount). In the request for reconsideration, we explained in detail our complaints, while in the decision of the CA for the partial approval of the request for reconsideration, the same took into account the reference to the 8 Martyrs Primary School - in Kralan and the

reference Supply of pellets issued by MA Klinë. While the other two references issued by Haxhi Zeka University have not been taken into account. Also, in the rejection decision, the contracting authority has added a reason for elimination where it has mentioned that the reference issued by the Municipality of Prizren "Supply of firewood" cannot be taken into account because it has not been completed within three years from the date of publication of the contract notice. The references issued by Haxhi Zeka University have been terminated regardless of the contract termination deadline. These contracts were supply and they end with the fulfillment of the supply quantity. We explain to the review panel that the contract: Supply of pellets for central heating for MTHM's business faculty - framework contract - Haxhi Zeka University", signed in 2021, has been completed and then UHZ has published the contract notice for the next activity entitled "Supply of pellets for central heating in UHZ"-Framework contract-Haxhi Zeka University", in 2022, i.e. after the end of the contract signed in 2021. For the same procurement activity, we have been declared the winner and we have again signed the contract entitled "Supply of pellets for central heating in UHZ". This contract has also been fulfilled and now CA-Haxhi Zeka University has again published the announcement on the decision on the procurement activity "SUPPLY OF PELLETS FOR CENTRAL HEATING IN UHZ- FRAMEWORK CONTRACT", where again we have been recommended for the contract and we have signed the contract. So the references issued by Haxhi Zeka University clearly show that the activities for which the references were issued have been completed because new subsequent contracts have been signed, while for previous contracts $\pm 30\%$ cannot be requested and applied legally when the contracting authority has entered in the contractual relationship with the new contract of the same nature and with this it is clearly understood that the previous contracts have ended. (As evidence, we are presenting to the panel the aforementioned contracts for the years 2021-2022 where these contracts have been fulfilled and the signed contract of 2023). The application of $\pm 30\%$ is a permitted option that is within the competence of the CA in case there is a need to use $\pm 30\%$, while the application of $+30\%$ of the indicative quantities is not mandatory, but $\pm 30\%$ it is like a threshold or ceiling of indicative quantities. This means that 70% of the indicative quantities is the threshold, while 130% is the ceiling of the possibility of using the indicative quantities. From these facts it is understood that the references issued by UHZ are valid and had to be taken into account by the CA. We also clarify that even if the contracts/references of the Municipality of Prizren and the reference issued by the private company Haxha Kom are not counted, we reach the value of 1,451,840.00 euros, while to this amount when the values of the above-mentioned references are added, we also exceed more value for contracts completed in the last three years. Also, for the reference issued by the Haxha Kom company, we have also presented the bank transactions and sales books, where it is clear that the contract has been fully fulfilled, therefore this reference had to be taken into account.

CA representative: The complainant is irresponsible because he did not provide evidence according to the DT in the amount of 1,400,000.00 euros, regarding the contract with Haxhi Zeka University in the list of contracts, the EO has offered that this activity of the EO for supply ends on 18.04.2024 and then the commission during the evaluation of the offers does not have compatibility between the list and the reference that the EO offered, and this comes out as incomplete. As for the reference with Haxhi Zeka, the EO has submitted a request for reconsideration and the CA has reviewed the request of the EO and on the basis of the

documents that EO has provided for bank transactions, while the same, apart from a payment that it has on 03.04.2023 in the amount of 2400 euros, it has not presented any others. As for the reference, the supply of pellets for central heating in U. Haxhi Zeka has been unacceptable since it is clearly written in the reference that this ends on 29.09.2023. As for the list of EO projects that he has uploaded in his offer, where the ordinal number is number 8, 9 and 10, the list of pellet projects that EO has offered, CA has sent the standard letter to provide us with references for the activities of completed, but he has not provided us with the references that the CA has requested. Also with the list of completed wood projects with the municipality of Prizren with serial number 1, this reference is out of date since the issued date of the reference is on 26.05.2020, while the CA contract notice was dated 11.07.2023, all references are received from 11.07.2020 to 11.07.2023. Therefore, this reference provided by the EO IS UNCONVINCED. According to the list, it is number 2, number 3, number 4, number 5, number 6, 11, 12, 13, 14, 15, while also for the list of wood, 3 and 4 are accepted, which reach the value of 1,180,866.86 € Referring to the claims as above, the complaining economic operator considers that the Contracting Authority acted in violation of article 1, 6, 7, 59, 60, 69 and 72 of the LPP as well as article 54 paragraph 54.10 of the RRPP. The complaining economic operator has asked the PRB Review Panel to approve the complaint as well-founded so that the case is returned for re-evaluation.

Relying on article 111 paragraph 5 in relation to articles 113 and 114 of the LPP, the Review Panel in PRB on 09.10.2023 engaged the review expert to conduct the initial review of the claims of the complaining economic operator. On 25.10.2023, the Expert's Report was received with the following recommendations: *"the complaint of the complaining EO should be approved as grounded, the contract award notice should be canceled and it is recommended that the matter be reassessed"*.

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.

Regarding the claims of the complaining economic operator, the reviewing expert presented the following findings in his report:

"The review expert, after analyzing and examining the documents of the case, clarifies that, as regards the first and third claims related to the references which the CA during the evaluation eliminates as reasons, in the request for reconsideration, it takes them as well-founded, as well as the request for partially based reconsideration is approved. The Reviewing Expert regarding the second claim clarifies that, the contract which expires on 28.11.2023, AK - Municipality of Klinë, AK has initiated procurement activity ahead of time in order to secure it with a contract, for the reason that the estimated amount has been spent before of the end of the contract and in E-procurement we see the new contract for the same activity from the same authority, as claimed by the EO complainant, so the contract in the list says that it is completed, also in the reference it is specified that almost the amount +30% has already been spent, and as such CA - Klinë has continued with new procurement activity, therefore from the clarifications above I consider that

this reference should be taken for granted, the claim of the complaining EO is found to be grounded. The examining expert regarding the claim clarifies that this claim was not presented in the request for reconsideration, due to the fact that this contract from the Haxha Kom company was initially taken for granted because the same offer has attached several bank transactions, record books . and as such, since the CA considers that there is not enough evidence, then during the re-evaluation process I can ask for clarifications, in accordance with Article 72 of the LPP. From the CA's calculations, the value is 1,180,866.86 if the references of Haxha Kom and the Municipality of Klina are added, then the complaining EO exceeds the value of 1,400,000.00 euros. As such, since the complaining EO has offered the lowest price, and the criterion is the lowest price, then I find that the CA must reevaluate the procurement activity in accordance with the legal provisions of the LPP, GPP and RPP, due to the fact that The complaining EO after these clarifications in the revaluation should have been responsible with the lowest price” however, on 21.11.2023, the expert clarified for the panel that after the official confirmation of UHZ, regarding the references, the same confirms that they are completed with the dates: SUPPLY OF PELLETS FOR CENTRAL HEATING FOR THE FACULTY OF BUSINESS AND MTHM- FRAMEWORK CONTRACT identification number: uhz-21-496-1-2-1-22.08.2022 - which is taken for granted while SUPPLY OF PELLETS FOR CENTRAL HEATING IN UHZ-- CONTRACT FRAME PROCUREMENT NO. uhz-22- 8819-1-2-1 ended on 28.10.2023, is not taken for granted, due to the fact that the contract notification date is 10.07.2023. As such, we have analyzed the list of contracts once again by adding the reference of Haxha Com -213,958 euros as well as the reference of UHZ dated 22.08.2022 -49,800 euros, the total of references is 1,348,241.86 euros, while the criterion required by the CA is 1,400,000.00 euro, therefore according to the clarifications and based on the arguments of the EO, the complainant does not meet the criteria regarding the list of contracts, therefore I recommend that the decision of the CA remain in force.

According to the above, the review expert handled all the claims of the complaining economic operator in a professional and objective manner.

-Findings of the Review Panel -

The review panel independently and objectively, conscientiously and professionally evaluated all the evidence of the case individually and all together. In this way, it was found that the Contracting Authority did not act contrary to the provisions to be claimed by the complaining economic operator. In the specific case, from the review expert's report, the evidence presented by the complaining economic operator, the documents of the tender dossier as well as from other circumstantial evidence, it was found that the complaining claims are ungrounded

In the specific case, from the review expert's report, the evidence presented by the complaining economic operator, the documents of the tender file as well as from other evidence of the case, it was found that on 30.08.2023 during the re-evaluation, the Contracting Authority requested additional clarifications from the complaining economic operator regarding the list of contracts submitted in the case of bidding so that references or other relevant evidence are also submitted according to the tender file. As for the reference regarding the contract with Haxhi Zeka University, it appears that this contract was concluded on 28.09.2023, while the publication of

the contract notice was made on 08.07.2023 or about eleven (11) weeks earlier. On the other hand, the request for the tender file was for contracts completed or completed (not in progress) before the date of publication of the contract notice. The Review Panel also considers that exceeding the total indicative quantities (+- 30%) in public framework contracts should not be interpreted as separate contracts from the basic contract. Public procurement contracts of any nature without distinction must be understood as executive titles (*justus titulus*) respectively as legal works through which a certain legally binding relationship is established between the contractual parties. In this regard, the framework public contract cannot be interpreted as something separate from the cases where the indicative quantities are exceeded, since the exceedance in this case can only be done for the reason that the basic contract is active (that is, it is being implemented and has not yet been completed). So it is paradoxical to say that a contract has ended as long as the contracting parties continue to realize mutual rights and obligations from that contract. Otherwise, even in the hypothetical case when an annex to the basic contract would be concluded, the annex would again share the fate of the main contract. The cases when a contract is considered concluded are defined by the Law on Obligations Relations through articles 276 to 374 and can be manifested through fulfillment, subrogation, consolidation, prescription, etc. As long as it is not argued that the contract has been concluded in one of the forms defined by the relevant law in force, such a contract cannot be interpreted as active. For these reasons, the Review Panel did not give full confidence to the reviews of the review expert, but only partially. Therefore, according to this panel, the complaining EOs do not reach the value of the contracts executed according to the request of the tender file of 1,400,000.00. because according to the two lists presented by EO complaints in the offer (the lists in the case documents) named "List of projects for wood" projects no. order 2,3 and 4 courses from "List of pellet projects", project no. ordinal 1, only the value expressed by reference has been accepted, as well as projects with no. 2, 3, 4, 5, 6, 7, 11, 12, 14, 15. While the contract with no. order 16 because it is completed after the contract notice has been announced, while the others in the absence of evidence according to the DT. Therefore, based on the requirements set in the DT by the CA, the complainant has provided convincing/argued evidence only in the amount of 1,344,183.86 euros. The Review Panel considers that the actions and acts of the CA and the evaluations of the review expert regarding the fulfillment of the conditions described above and the complaint statements in this case do not constitute a sufficient basis for this procurement activity to be re-evaluated because, this contrary to 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, whereas the return of a procurement activity without a legal contentious basis for re-evaluation, does not is in harmony with article 1 and 6 of the LPP, The panel also clarifies that in view of the requirements of the contracting authority which are specified in the tender dossier and as such are made public to all potential bidders, of course each one must be guided by the principle of care in fulfilling the formal conditions on time and within deadline. Therefore, the Review Panel assesses that the CA has acted in full compliance with Article 59 paragraph 4 of the LPP "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 dossier" when it rejected the offer of the complaining EO as irresponsible.

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.

The Review Panel requests the Contracting Authority to be attentive during the public procurement procedures, acting in full compliance with the LPP and other legislation in force for public procurement, as well as to act in harmony with the findings of this decision. Otherwise, the PRB may initiate disciplinary procedures against the responsible procurement officials.

For points I and II of the decision, it was decided based on article 117 of the LPP in relation to article 29 of the PRB Work Regulations.

For point III of the decision, it was decided based on article 118 of the LPP in relation to article 31 paragraph 5 of the PRB Work Regulations.

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 – **MUNICIPALITY OF SUHAREKA**;

1x1 EO – “**N.T.P. "GRESA – COMMERCE"**”;

1x1 Archive of the PRB;

1x1 For publication on the website of the PRB.