



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

Psh. No.590/23

Review Panel, appointed by the President of the 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) composed of: Agon Ramadani - President, deciding according to the complaint of the EO “Adnan A. Bala B.I.”. against the contract notice or with tender documents, regarding with the procurement activity: “Supply of medical equipment” with procurement no: 10/220/70050/00000/0731-23-6982-1-1-1, initiated by the contracting authority (CA) - "SHEIKH ZAYED" Hospital, on the 26/10/2023 has issued this:

DECISION

1. **Approved**, as grounded the complaint of the EO “Adnan A. Bala” B.I, with no.2023/590 on the 16/08/2023, regarding with the procurement activity: “Supply of medical equipment” with procurement no: 10/220/70050/00000/0731-23-6982-1-1-1, initiated by the contracting authority (CA) - "SHEIKH ZAYED" Hospital.
2. **Cancelled**, the contract notice related to the procurement activity: regarding with the procurement activity: “Supply of medical equipment” with procurement no: 10/220/70050/00000/0731-23-6982-1-1-1, initiated by the contracting authority (CA) - "SHEIKH ZAYED" Hospital.
3. Within 10 days, the CA must inform the PRB about all the actions undertaken in relation to 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 the LPP.
4. Since the complaint of the complaining EO is approved as grounded, the complainant’s fee is returned to the amount deposited when the complaint was submitted.
5. The complaining EO is obliged, in accordance with Article 31 point 6 of the PRB's Rules of Procedure, within sixty (60) days to 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 –

The “SHEIKH ZAYED” Hospital in the capacity of the Contracting Authority dated 07.07.2023 presented the Contract Notice B05, for the procurement activity with title: “Supply of medical equipment” with procurement no: 10/220/70050/00000/0731-23-6982-1-1-1.

The deadline for submitting offers is 18.08.2023.

On the 12.08.2023, EO “Adnan Bala” B.I submitted a request for reconsideration to CA. Whereas on the 15.08.2023, CA rejected the request for reconsideration of the complaining Economic Operator as ungrounded.

The economic operator “Adnan Bala” B.I, dissatisfied with the Decision of the CA, on the 16.08.2023 submitted a complaint to the PRB, which was registered with protocol number 590/23.

- During the preliminary review phase-

The PRB has determined that the complaints contain all the elements defined through Article 111 of the LPP and as such were submitted within the legal deadline according to 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 economic operators who are interested parties according to article 4 paragraph 1 subsection 26 of the LPP. In this way, the Review Panel has concluded that it is competent to review these complaints according to Article 105 of the LPP.

The Review Panel has also concluded that there are no circumstances of conflict of interest in the sense of Article 11 of Regulation no. 01/2020 of the Work of the Procurement Review Body related to article 4 paragraph 1 under paragraph 75 of the LPP.

Based on the actions described above, the PRB has appointed the Review Panel and has also appointed the evaluation expert, as provided by article 111, paragraph 5 of the LPP, with the duty that the same in the sense of article 113 of the cited Law, to do the initial review of the file and complaining claims, in relation to the procurement activity described above. Regarding this, on 11.09.2023, the review expert submitted the evaluation reports with recommendations:

- The complaint of the complaining EO is approved as grounded,
- To annul the decision of the CA and to extend the deadline for bidding.

The expertise’s report has been duly accepted by all procedural parties. The Contracting Authority has notified the Review Panel that it does not agree with the recommendations of the expert, while the Complaining Economic Operator has announced that it partially agrees with the recommendations of the review expert.

- Evaluation and administration of evidence –

The Review Panel analyzed all the documents of this case, including all the acts and/or actions of the parties, as described above (procedural facts and circumstances), there are no elements to

prevent the conflict of interest, as required in terms of Article 11 of Regulation on the Work of the PRB, related to paragraph 1.75, article 4 of the LPP and at the same time analyzed all the documents of this matter, including all acts and actions of the parties and considered that there is no need to convene a hearing with the parties, as long as the submissions of parties and their actions, constitute a sufficient basis to decide on the merits as provided by paragraph 1, article 24 of the PRB Working Regulation, and that there is no need to request the contracting authority and/or the complainant to provide additional information and/or explanations, in the sense of paragraph 3, of article 116 of the LPP.

Claims of Complainant "Adnan Bala" B.I

- The first claim (I) - Complaint claims that the mandatory technical specifications have been fully adapted to a certain manufacturer and this is a violation of Article 28 and 7 of the LPP, because they are favorable and discriminatory specifications for other manufacturers and EO that express interest in bidding through the open procedure, the goal of which is competition and equal treatment. In the clarifications provided by the CA, it does not allow other EOs to participate in the tender. LOT 2 - Supply of medical equipment. Position 2- GPS postural lab - Apparatus for examination and analysis of posture for static analysis in the frontal and sagittal plane of the body as well as for foot support. Mandatory technical specifications for GPS postural lab - Apparatus for examination and analysis of posture for static analysis in the frontal and sagittal plane of the body as well as for foot support are favorable for any given EO because all the technical parameters required in the tender file of they completely match the product - the model mentioned below, so they are only copy/past.
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- The second claim (II) - Position 3 and 4 are from the manufacturer Turmed, so they are only copy/past, Position 4 from the CA and position 4 from the identical Manufacturer.
- The third claim (II) - Mandatory technical specifications for position 2 are favorable for a certain EO because all the technical parameters required in the tender file match the product as a whole - mentioned above. So the CA has mentioned in the Clarification "Refer to DT", so it is not possible to offer because the CA has favored this manufacturer and the manufacturer has said only one authorization for Kosova, while no other dealer has the right to give authorization for

Kosova. Even other positions such as 5, 6 and 7 are compiled for certain manufacturers, so they are identical. Article 7 - Equality in treatment/non-discrimination- This article is the basic principle of Public Procurement, where it states that the Contracting Authority must treat economic operators equally and non-discriminatory and will act in a transparent manner. Likewise, the contracting authority will not execute any aspect of the procurement activity in a way that reduces or eliminates competition between economic operators or that discriminates against one or more economic operators. The request unit - Violates Article 28 of the LPP The compilation of mandatory technical specifications by the request unit for these positions, contradicts Article 28 Paragraph 2 of the LPP "The contracting authority will compile the technical specifications in such a way that they should be in accordance with the purpose of the procurement and directed towards ensuring the best possible access for all interested economic operators and tenderers. The contracting authority is specifically forbidden to draw up technical specifications that favor or discriminate against one or more economic operators".

Also, this technical compilation by the request unit is discriminatory for all other producers because they have no opportunity to compete in relation to technical conditions of competition/equal treatment, so the technical specifications must define, in a non-discriminatory manner. As a party with a material interest in this procurement activity, we ask the request unit to modify the mandatory technical specifications for this supply, in order to enable competition between manufacturers for the product you are looking for, since this is an open procedure and the purpose of The contracting authority according to the LPP is the equal treatment of the participating EO to achieve the goal - the Principle of Economy. Therefore, this principle is achieved only when the technical terms, as in the case in question, enable maximum competition between the Economic Operators and not when it is known in advance which producer and product will be declared the winner of the tender. So with these technical specifications as they are now, it is impossible for other EOs to participate because CA has compiled technical specifications in such a way that the favored EO is guaranteed to win and be recommended for contracts in this tender regardless of the price of the offer.

Findings of the review expert

- The first finding (I) - The review/technical expert clarifies that the complaining EO "Adnan A. Bala B.I.", in his complaint, has complaint claims related to the requirements set in the tender file and in the contract notice, for which the same requested requests for additional information for Lot 2 and Lot 3, related to the requests for which he requested clarifications, he received a negative response and the same submits a complaint to PRB, claiming that the requests are favorable and discriminatory for EOs who express interest in this procurement activity. The reviewing expert clarifies that the complaining EO, dissatisfied with the decision of the CA, in accordance with Article 108/A, filed a complaint with the claim that the CA did not respect the legal provisions of the LPP. The expert The technical expert explains that the complaining EO claims that CA has not respected the legal provisions of the LPP. The technical expert, after analyzing the evidence provided by the complaining EO, estimates that in positions 1 and 2 the specifications have been adapted to the manufacturer Aspel. Positions 3 and 4 are also adapted to the manufacturer Turmed, i.e. the 4-bed model for emergency patients TM C-3033. Also,

positions 5, 6, 7 are compiled for the manufacturers specified as above and are adapted to this manufacturer. The technical expert assesses that the claims of the complaining EO stand for position 1.2.3.4.5.6.7 and that these requirements should be removed from the tender file, due to the fact that they are adapted to the manufacturers Aspel and Turmed. The reviewing/Technical expert as an additional clarification recommends to the CA that during the improvement of the requirements of the tender dossier, act in harmony with Article 53.7 of the LPP.

Findings of the Review Panel

In this case, the panel took into consideration all the complaining statements, acts and actions of CA and the expert's report and assesses that the complaint of EO "Adnan Bala B.I" is well-founded.

In fact, the Panel notes that the procurement procedure that was applied in this case is presented in detail in the review expert's report, explaining the actions taken by the parties in the comparative context with the acts in force, especially with the Public Procurement Rules.

Therefore, referring to article 104.1, of the LPP, according to which it is required that the review procedure be implemented in a fast, legal and effective manner and also analyzing in their entirety the documents of this subject in the context of this procurement process, the Panel did not consider it necessary to elaborate again in detail and unnecessarily in this case each complaint claim, as long as they are specifically singled out especially in the contested decision of the contracting authority and have been analyzed and argued by this Panel. Therefore, the Panel supports the explanations of the review expert who explained that in his expertise's report.

Therefore, based on the facts and circumstances of this case, the Review Panel finds that the Contracting Authority, in violation of the legal provisions, drafted the specifications of the tender file by drafting specifications that in principle could be discriminatory because for positions 1 and 2 the specifications were adapted to the manufacturer Aspel. Positions 3 and 4 are also adapted to the manufacturer Turmed, i.e. the 4-bed model for emergency patients TM C-3033. Also, positions 5, 6, 7 are compiled for the manufacturers specified as above and are adapted to this manufacturer.

The review panel in its independent evaluation considers that the claims of the complaining EO stand for the positions referred to based on the report of the technical and professional expert, while the CA is obliged to make the improvements in accordance with the legislation in force, enabling equivalence of products in accordance with the article 28 of the LPP, ensuring that the products in the specifications where it is possible have tolerance of completion by specifying the minimum and maximum allowed so that the specifications set consequently deviate the possibility of discrimination of the participating EOs as well as the narrowing of the competition.

- Conclusion-

Based on the above explanations, the Panel considers that the CA has acted in violation of Article 7 and 28 of the LPP and obliges the CA to act in harmony with Article 53.7 of the LPP during the improvement of the requirements of the tender file. The Review Panel in any case expects contracting authorities to act in full harmony with the goals of the LPP, to ensure the

efficient use of public funds, to promote the integrity of the procurement process and the institutional and professional culture. Although the opinion of the expert is not binding, the Panel, according to its independent opinion, has supported the expert's report in the specific case, based on the principle that its probative value is always given in relation to the evaluation, comparison and administration of all other evidence and the nature of an issue in the present case.

The review panel considers that the decision taken in this case is based on the administration of all the evidence available in this case and also considered that the response to the request for reconsideration was insufficient and not justified in accordance with Article 108/a of the LPP -, moreover, the law of administrative procedure, specifically Article 48 of the LPPA, stipulates that: "1. Reasoning provides the party with the opportunity to understand the administrative act". in this case, the panel considers that the reasoning did not contain these provisions of the relevant article: 1.3. the causes which were decisive during the evaluation of the evidence; 1.5. the reasons for which any of the parties' claims were not accepted; therefore, in this case, it is considered that point: 2. A justification that is clearly insufficient, unclear, contradictory or incomprehensible, is equivalent to its absence.

The review panel emphasizes that in making decisions it always takes into account article 6 and 1 of the LPP, where the purpose of this law is to ensure the most efficient, transparent and fair way of using public funds, public resources as well as all funds and other resources of contracting authorities. The Review Panel always starts from the fact that the contracting authorities exercise their institutional independence in the public procurement process, but it remains their explicit obligation to respect legality in the procurement process.

Regarding the appeal fee, it was decided based on article 31 paragraph 6 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

Mr. Agon Ramadani

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 – **Hospital “SHEIKH ZAYED”;**
- 1x1 EO – **Adnan A. Bala B.I.;**
- 1x1 Archive of the PRB;
- 1x1 For publication on the website of the PRB.