



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

Psh. No.972/24

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 (LPP) composed of Batisha Ibrahim – President, Vedat Poterqoi and Kimete Gashi Brajshori – Members, deciding upon the complaint of EO “HIDROTERM A SH.P.K., against the Decision to award a contract or a design competition, the Decision to award a contract to Telekom i Kosovës SH.A in the capacity of Contracting Authority (CA) regarding the procurement activity “Modernization and expansion of optical telecommunications networks throughout the territory of Kosova” with procurement number TK-24-855-5-1-1, on the 23/12/2024, has issued this:

DECISION

1. Approved as partly grounded the complaint of the EO “HIDROTERM A SH.P.K. with no.2024/0972 of the 10/10/2024, whereas the Announcement on the decision of the CA Telecom of Kosova Sh.A. regarding the procurement activity “Modernization and expansion of optical telecommunications networks throughout the territory of Kosova”, with procurement number TK-24-855-5-1-1.
2. Cancelled the procurement activity initiated by the CA Telecom of Kosovo Sh.A. is completely according to the description of the provision I of this decision, and the findings of the Review Panel.
3. Since the complaint of the complaining economic operator HIDROTERM A SH.P.K is approved as partially grounded, the fee paid upon filing the complaint is returned to the same. The complaining economic operator is obliged to, in accordance with Article 33, point 6 of the PRB's work regulations, within a period of sixty (60) days, make a request for the return of the complaint security, 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 08.02.2024, Telecom of Kosova JSC in the capacity of the Contracting Authority has published the Contract Notice B05 regarding the procurement activity for the “Modernization and expansion of optical telecommunications networks throughout the territory of Kosova”, with procurement number TK-24-855-5-1-1.

While on the 26.09.2024, B58 published the Notice on the decision of the Contracting Authority where it awarded the contract for Lot 5 to EO “KOSOVA INFORMATION TECHNOLOGY SH.A.”

This procurement activity was conducted through an open procedure with the type of work contract and with an estimated contract value of 1,750,000.00 €.

On the 01.10.2024 EO Hidroterm A Sh.P.K., has submitted a request for reviewing against the above-mentioned decision of the CA. On the 10.10.2024 the Contracting Authority has rejected as unfounded the request for reviewing.

On the 10.10.2024 the PRB has accepted the complaint from EO Hidroterm A Sh.P.K., with no. 0972/2024 regarding the activity “Modernization and expansion of optical telecommunications networks throughout the territory of Kosova” with procurement number TK-24-855-5-1-1.

-On the preliminary review phase –

The Review Panel has found that the complaint contains all the elements set out in Article 111 of the LPP and as such has been submitted within the legal deadline in accordance with Article 109, paragraph 1 of the LPP after the preliminary procedure for the resolution of disputes in the sense of Article 108/A of the LPP, by the economic operator that is an interested party under Article 4, paragraph 1, subparagraph 26 of the LPP. In this way, the Review Panel has found that it is competent to review this complaint under Article 105 of the LPP and there is no procedural obstacle to continue with the review of the complaint on its merits.

The claims of the complaining economic operator “Hidroterm A SH.P.K are presented as follows:

First claim (I): “We have been eliminated for Lot 5 as an irresponsible operator on the grounds that in the bid validity declaration you declared the validity period from 17/09/2024 to 14/12/2024, which is 88 days, a shorter period than the requested period of 90 days. In the declaration, we have stated that we accept the extension of the validity of our bid in accordance with the request for another 90 calendar days, while as a technical error we have written the date 14/12/2024 instead of the date 16/12/2024. According to the law, it is not possible for the validity to be for 88 days but only for 90 days, so for this technical error, the CA had to give us a short time to correct them.

Second claim (II): “The EO recommended in the bid has submitted a validity of 90 days, namely from 22/03/2024 to 19/06/2024, while the extension of the first validity was made on

12/07/2024, so the CA has declared an operator who did not have validity for 25 days as the winner, violating the laws and all administrative instructions of public procurement.

Third claim (III): "Regarding the request for access to the winner's documentation, we have made a request for access requesting all the documents that are needed, and the CA has told us that all the documents have been provided on USB, but the required notes have not been and so we have been given an appointment again to receive the documentation. The CA has written to us at 09:13 via e-procurement that we can go for access from 10:00 to 10:30, taking into account how traffic develops in Pristina, we consider that this action was tendentious on the part of the CA.

Referring to the claims as above, EO Hidroterm A Sh.P.K., considers that the Contracting Authority has acted in violation of Article 1, 6, 7, 30, 60. 61 of the LPP. Finally, we ask you as the contracting authority to issue: Decision, The request for reconsideration is approved as grounded and on our part, The notification and decision of the CA are canceled, Reconsideration - Our finding regarding the technical error and other procedures is accepted.

Response to the request for Reconsideration: "Claim 1. Technical error of the validity of the bid. Regarding the "detailed statement and the facts presented, refer to the attached complaint/request for re-consideration. The contracting authority finds that the above claim of the complaining economic operator "Hidroterm A" ShPK, DOES NOT HOLD, due to the fact that the economic operator CONFIRMS itself that it was a technical error caused by YOU. Also, referring to your "clarification" regarding the dominance of the statement and what was written, specified by you, we clarify that you have specified the dates yourself "our validity will be until 14.12.2024,.."
Complaint claim 2. The economic operator declared the winner did not have validity. Regarding the "detailed statement and the facts presented, refer to the attached complaint/request for review. The contracting authority finds that the above claim of the complaining economic operator "Hidroterm A" ShPK, DOES NOT HOLD, due to the fact that the request for extension of the validity period of tenders and tender security (first time) was addressed to all economic operators participating in this procurement activity, while the case was suspended by the PRB as a result of the complaints, some of which have continued and some have not. While the request for extension of the validity period of tenders and tender security (second time), is addressed only to economic operators who have extended the validity the first time. Therefore, if what you are saying is applied, all economic operators would be irresponsible, including you. Complaint claim 3. Request for access to the documentation of the announcement of the winner Regarding the detailed statement and the facts presented, refer to the attached complaint/request for re-examination. The contracting authority finds that the above claim of the complaining economic operator "Hidroterm A" Shpk, DOES NOT STAND, because the contracting authority has acted in a responsible manner towards your request for access. In a way, you contradict yourself when you state that "... the response of the contracting authority has been immediate and tendentious". Here we want to clarify that the contracting authority has offered you immediate access, and the only tendency has been to provide access as soon as possible because the volume of documentation has been large, starting from the fact that you have not specified exactly which documents you wish to have access to. Note: Verification of the documentation received from

you via USB is your responsibility to verify whether all the required documents are present or not. We should also inform you that your reaction for the "missing" documentation on the USB was made at 20:54 on Friday, 27.09.2024 through the e-procurement platform. On the first working day, you were given another immediate opportunity to "recover" the "missing" documentation, and I believe this clearly shows that there is no other tendency other than to serve you on legal grounds. The contracting authority, based on Article 108/A of the LPP, and the reasons stated above, decided as in the provision of this decision.

Based on Article 111 paragraph 5 in connection with Articles 113 and 114 of the LPP, the Review Panel on 17/10/2024 authorized the review expert to conduct the initial review of the file and claims according to the complaint with no. 0972/2024, while on 28/10/2024 the expert report with no. 2024/0972 was submitted 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 approved as partially grounded, while the decision of the CA remains in force.

The expertise report has been duly accepted by all procedural parties. The Contracting Authority has agreed with the expert's recommendation, while the EO has not agreed with the review expert's recommendation.

The review panel has assessed that the conditions have been met to decide on this case without a hearing session within the meaning 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 and 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 establish the factual situation, the review panel has administered as evidence the expert report, the opinions of the parties regarding the expert report, the complainant's submissions and documents, the letters and documents of the contracting authority, the relevant documents related to the procurement activity, as well as all evidence proposed by the procedural parties.

Regarding the claims of EO Hidroterm A Sh.P.K., the review expert through report no. 2024/0972 has assessed as follows:

First finding (I): "The review expert clarifies that the CA has eliminated the complaining EO for Lot 5 with the justification that the economic operator has made the declaration for the extension of the validity of the bid from 17/09/2024 to 14/12/2024, i.e. only for 88 days and not 90 days as requested. The complaining EO claims that this omission is a technical error and that the CA should have asked the complaining operator to correct the error in a short time. After raising this claim, the expert analyzed the document attached to the e-procurement, as a declaration for the extension of validity, which, among other things, states that the extension of the validity of the bid in accordance with the request is accepted for another 90 calendar days, while the date specified in this declaration until when this validity will continue is December 14, 2024, which according to calculations per day is only postponed for 88 days. Also, the expert explains that at

the same time, the tender security was also uploaded to the e-procurement platform within a period of 90 days. In the specific case, the review expert explains that the complaining EO has submitted a valid tender security according to the requirements of the CA and in the declaration of validity it is also stated that the offer is valid for 90 days, the tender security according to the required period is considered to be of great importance as provided for in Article 28, point 1 of the Public Procurement Regulation. However, taking into account that this complaint claim has no impact on the final result and based on the award criteria determined according to the tender dossier, the expert clarifies that in this specific case the CA has acted in accordance with Articles 1 and 6 of the LPP by recommending for the contract the responsible economic operator with the lowest price. From what we have explained, we consider that this claim raised is partially founded.

Second finding (II): “The expert explains that according to Article 30.4 of the Public Procurement Regulation, when we are dealing with activities that could not be finalized within the validity period of the tenders for certain reasons, then it is the Contracting Authority that must request in writing through the e-procurement system, from all economic operators to extend the validity of the tender. Therefore, economic operators must respond to the request of the CA, since this request has been submitted by the authority itself. In the case where the CA has not submitted the request on time according to the regulation, before the expiry date of the validity period, then in the specific case, according to the expert, economic operators cannot be eliminated for not taking certain actions, when the fault of not submitting the request on time lies with the contracting authority. The CA has submitted the request for the extension of the validity of the bid on 08/07/2024 and the recommended EO has responded to this request on 12/07/2024. The same request has also been addressed to the complaining operator and the same has responded to this request on 14/07/2024. We consider that this claim is unfounded.

Third finding (III): “Regarding the claim that the CA’s actions were biased towards the economic operator, delaying access to the recommended operator’s documents, the review expert is not professionally called upon to provide any finding as to whether these claims are valid or not. The expert clarifies that the CA must always act in accordance with Articles 10 and 11 of the Public Procurement Law, enabling operators who submit a request for access to the recommended operator’s documents, by providing them with access to these documents as provided for by the law.

According to the above, the review expert has professionally and objectively addressed the claims of the complaining economic operator Hidroterm A Sh.P.K. The argumentation in the expert's report is quite detailed, understandable and fully based on the relevant documents referring to the procurement activity. The findings in the expert report can be confirmed through the tender dossier and the documents with which the tenderers have submitted their bids. Consequently, the Review Panel, regarding the claims of the complaining economic operator, has given full credence to the expert report. In this way, it has been found that the claims of the complaining economic operator Hidroterm A Sh.P.K. are partially founded.

- Findings of the Review Panel -

The Review Panel has independently and objectively, with due diligence and professional care, assessed all the evidence in the case. In this way, it has been found that the Contracting Authority has not acted in accordance with the legal provisions on public procurement and the requirements of the Tender Dossier regarding the procurement activity “Modernization and expansion of optical telecommunications networks throughout the territory of Kosova” with procurement number TK-24-855-5-1-1.

The review panel, after administering and evaluating the evidence, fully ascertaining the factual situation, relying on the LPP as the applicable material law, after reviewing the complaint claims, taking into account all the case files and the recommendations of the review expert, the review panel has submitted official questions via email to the review expert requesting quote " Please can you clarify claim no. 2 of the complaint regarding the days that the complaining EO and the recommended EO have been without bid validity". And the response from the expert is quote : " According to your request regarding case number 972/24, I am explaining once again that the complaining EO - Hidorterm had validity for 90 days, from 22/03/2024 to 19/06/2024, while the extension was made on 14/07/2024, after the request of the CA, so for the period 19/06/2024 to 14/07/2024 for this operator, no evidence of continued validity has been seen, because as I have explained in the expert report, the CA has not acted according to the Public Procurement Regulation to request all bidding operators to extend the validity of their bid. The same thing happened with the recommended EO - Kosova Information Technology, this operator had a validity of 90 days, from 22/03/2024 to 19/06/2024, while after the request of the CA, the extension was made from 12/07/2024. So, on the dates 19/06/2024-12/07/2024, there was no evidence of the extension of validity for this operator either. So, the CA did not act according to the LPP and the RRPP, by requesting the bidding operators through the system to extend the validity of the offers. In this case, when the same rule applied to all operators, and while the fault was with the CA itself, I, as an expert, have explained that the elimination of economic operators by citing the CA's failure to act properly is not at all right, Therefore, I have requested equal treatment of all participating operators, which have extended the validity only after the request made by the CA. From these findings, it has been found that the complaint of the Economic Operator Hidroterm A Sh.P.K., should be approved as partially grounded on the grounds that neither this complaining EO nor the other bidders had validity for a period until the CA sent them a letter for extension of the validity of the bid and tender security.

Consequently, the Review Panel has decided regarding the procurement activity Modernization and expansion of optical telecommunications networks throughout the territory of Kosovo with procurement number TK-24-855-5-1-1 to cancel it in its entirety due to the fact that there was a break in the validity of the bids, and while the validity of the bids and the continuation of the provision of the bid is retroactive, where the PPRC interpretation is also cited as "Article 30.3 of the Public Procurement Regulation, strictly requires that the bid be valid until the award and signing of the contract." , where according to Article 30 of the RRPP, the request for extension of validity must be made in writing and must be raised in the system so that all operators accept the request for extension of the validity of the tender. The review panel, as well as in the description of the response from the review expert, has noted that the CA has not acted in accordance with Article 30, paragraph 30.4 of the RRPP, because the request from the CA to the participating EO

for this activity for extension of the validity period of the bid, and the insurance is over 20 days after the expiration of these two documents (the validity of the bid, tender security), and such a thing can be verified in this procurement activity on the electronic e-procurement platform.

The Review Panel issues a warning to the Responsible Procurement Officer at the CA, TELEKOMI I KOSOVËS JSC for non-implementation of the LPP, RRPP, specifically Article 30, paragraph 30.4 and 5, in the future if the cited provisions are not implemented, a procedure for the revocation of the procurement certificate will be initiated against the same due to violations of the above cited articles.

The evaluation panel, in its independent assessment in accordance with Article 105, taking into account the requirement of Article 104, paragraph 1, of the cited Law, according to which, quoted: “The procurement review procedure shall be implemented and carried out in a prompt, fair and non-discriminatory manner, aiming at the fair, lawful and effective resolution of the case...” and in accordance with Article 1, 6 of the LPP, according to which, the purpose of this Law is, inter alia, quoted: “...to ensure the integrity and accountability of public officials, civil servants and other persons who carry out or are involved in a procurement activity by requiring that the decisions of such individuals and the legal and factual basis for such decisions are not influenced by personal interests, are characterized by non-discrimination and a high degree of transparency and are in accordance with the procedural and substantive requirements of this Law”.

The Review Panel has decided in accordance with the legal competences within the meaning of Article 104, paragraph 1, in conjunction with Article 103, Article 105 and Article 117 of the LPP to implement the procurement review procedure in a prompt, fair, non-discriminatory manner, with the aim of resolving the case legally and effectively. Therefore, the Review Panel based its findings on the relevant provisions of the LPP, which foresee and regulate such situations, which may arise during a procurement activity.

Point I of the decision was decided based on Article 117 of the LPP in conjunction with Article 29 and 31 paragraph of the PRB Work Regulations.

Point II of the decision was decided based on Article 131 of the LPP in conjunction with Article 29 paragraph 3 of the PRB Work Regulations.

Point III of the decision was decided based on Article 31 paragraph 4 and paragraph 6 of the PRB Work Regulations in conjunction with Article 118 of the LPP.

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

President of the Review Panel

Mrs. Batisha Ibrahim

Legal advice:

An appeal is not allowed against this decision, but the dissatisfied party can appeal to the Commercial Court, to the Department for Administrative Affairs for annulment of the decision within 30 days from the date of acceptance of the decision.

Decision to be submitted to:

1x1 CA – **TELECOM OF KOSOVA SH.A;**

1x1 EO – **“HIDROTERM A SH.P.K”;**

1x1 Archive of the PRB;