



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

Psh. No.588/23

Review Panel, appointed by the President of the Procurement Review Body (PRB), Pursuant to the article 105, article 106, and 117 of the Law on Public Procurement of the Republic of Kosova (LPP), composed of: Agon Ramadani - President, Vjosa Gradinaj Mexhuani - Member, Vedat Poterqoi - member, deciding according to the complaint of the Economic operator (EO) “Nika Pro- Ing” SH.P.K, against the decision to award with a contract, of the Ministry of Internal Affairs in the capacity of the Contracting Authority (CA), regarding with the procurement activity: “Construction of SHFMU in Pozharan, Municipality of Vitia - continuation of works” with procurement no: 214-22-8829-5-1-1, on the 11/10/2023 has issued this:

DECISION

1. Approved as partly grounded the complaint of the “Nika Pro- Ing” SH.P.K, with no.2023/588 on the 16/08/2023, while the decision of the CA Ministry of Internal Affairs, related to the procurement activity: “Construction of SHFMU in Pozharan, Municipality of Vitia - continuation of Works” with procurement no: 214-22-8829-5-1-1, is cancelled, while the procurement activity is returned to re-evaluation.
2. 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.
3. Are returned the funds deposited in the name of the tariff tax for submitting the complaint to the account of the Economic Operator “Nika Pro-Ing” SH.P.K.

REASONING

- Procedural facts and circumstances –

The Ministry of Internal Affairs (MIA) in the capacity of the Contracting Authority dated 25.08.2022 presented the Contract Notice B05, for the procurement activity with title: “Construction of SHFMU in Pozharan, Municipality of Vitia - continuation of Works” with procurement no: 214-22-8829-5-1-1.

On the 04.08.2023, the CA published B58-Notice on the Decision of the Contracting Authority with which decision it recommended with contract award “AGG Project” & “Act Ing shpk”.

On the 09.08.2023, EO “Nika PrO-Ing” LLC submitted a request for reconsideration to the CA. While on the 14.08.2023, the CA - MIA rejected the request for reconsideration of the complaining Economic Operator as unfounded.

The economic operator "Nika PrO-Ing" SH.P.K., dissatisfied with the Decision of the CA for cancellation, on the 16.08.2023 submitted a complaint to PRB, which was registered with protocol number 588/23.

For this procurement procedure, the decisions with protocol number: PSh. No. 569, 579/22 dated 17. 01. 2023, PSh. No. 74/23 dated 25. 07. 2023.

- During the preliminary review phase-

The Review Panel concluded that the appeal in this case was filed in accordance with Article 109.1 of the LPP, according to which against any decision taken by the CA, any interested party can submit a complaint to the PRB after conducting a preliminary procedure for resolving dispute in accordance with Article 108/A of this law. Since the Applicant has the status of the interested party in the sense of Article 4, paragraph 1.26, and the complaint contains the essential elements provided for in Article 111 of the cited Law, it means that it met the conditions foreseen in the sense of the cited provisions and falls under the powers of this Body, in the sense of 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 dossier and complaining claims, in relation to the procurement activity described above. Regarding this, on the 27.07.2023, the review expert submitted the evaluation reports with recommendations:

- The review expert cannot give a recommendation for the decision of the CA as there is already a decision of the review panel.

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

Answers of the CA regarding the complaining claims in the decision to reject the request for reconsideration

In response to the complaint of violations of Article 39 of the ROGPP, Clarification of the tender, the Contracting Authority, in full accordance with this article and Articles 59 and 72 of the LPP, has made a request for additional clarifications from the recommended EO for the contract dated 02.08.2023 and dated 04.08.2023 CA has accepted the requested clarifications, the clarifications are in full compliance with the LPP and other legal acts on public procurement in the Republic of Kosovo and your claim of the recommended EO for the contract is not responsible does not stand, because the complaining EO has not specified in which points the recommended EO for the contract is not responsible, this complaint claim does not stand and is rejected as unfounded. The Contracting Authority -Ministry of Internal Affairs-PPO and the new evaluation commission has acted in full harmony with the PRB Decision no. 2023/0074 and the legal regulations on public procurement in the Republic of Kosovo by treating equally and without discrimination to all EOs party to this process: Guideline No. 001/2023 for Public Procurement, Article 10. Clarification of tenders during the tender evaluation process and Article 30 Validity of the Tender, point:

30.4 In justifiable and/or special situations when unexpected delays occur, implying that the evaluation process cannot be finalized within the deadline of the validity period of the tenders due to complex technical details clarified, the CA will request the EO to extend the validity of their tenders. The request for extending the validity of the tender will be made in writing and must be requested before the expiration date and must be uploaded to the system (it is important to verify that all tenders accept the request for extending the validity of the tender)

30.5 Accordingly, all tenderers will be required to also extend the validity of their tender insurance.

30.6 It is open to each EO to decide if it wants to extend the validity of the tender. EOs who decide not to extend the validity of their tenders will be rejected as "irresponsible" and thus the CA will not confiscate their Tender Security. On 13.04.2023 CA has requested from EOs party to this CA through B47 - Standard letter of request for tender clarification Continuation of tender validity for 90 days and continuation of tender insurance for 120 days is also stated in the document mentioned above, when and how the required documentation should be submitted, the quotation "Submission of the continuation of the validity of the tender, must be received by you at the electronic address through the E-procurement platform (Submission of documents to the CA). Without the response from the your response to the above questions within 5 days, your tender will be rejected." close the quote.

- CA-MIB, has acted in complete harmony with the above-mentioned articles because when the continuation was requested, you had it clarified in the standard letter the submission of the documentation, while when you made a request for access to the documents, it was explained to you how it should be done and the claim of double standards does not stand and is rejected as unfounded. The CA once again clarifies that you are a party without material legal interest because your offer is significantly higher than the offer recommended for the contract by the CA-MIB. In the implementation of Law no. 04/L-042 for Public Procurement of the Republic of Kosova, amended and supplemented by Law No. 04/L-237, Law No. 05/L-068 and Law No. 05/L-092 Article 108/A Preliminary settlement of disputes, the Ministry of Internal Affairs drew this conclusion:

Claims of the Complainant "Nika PrO Ing"

Complainant EO not satisfied with the answer received from CA dated 14. 08. 2023 submits a complaint to PRB with claims that CA has violated Article: Article 1, 6, 7, 59, 60, 69, 72 of the LPP.

- First claim (1). To be recognized as having validity (e-mail proofs and insurances and declarations)
- Second claim (2). GEO "AAG Projekt SH.P.K; AC ing SH.P.K; Euro Services Sh.P.K. he is not responsible since he did not provide the offered machinery, he is also not responsible according to the first decision of the PRB with no. 569/22 and 579/22, but it was established with the second decision of the PRB no. 2023/0074. That he did not meet the requirements according to the TD.

Findings of the review expert

The first appeal claim concerns the extension of validity, where according to the CA the complaining EO did not extend the validity. After analyzing the complaint, we came across evidence that the complaining EO sent an extension of validity through email, but not through the E-Procurement platform.

During the analysis of the documents of the case, no evidence was found that the CA notified the EO that the continuation of validity through email is unacceptable, therefore we estimate that the complaining claim on this point is grounded.

As for the claims against the EO recommended for the contract that the same is irresponsible, we clarify that this has been the subject of review through complaint 74/23, for which we have provided an answer and the expert report, as well as the decision of the PRB has been issued of 74/23.

It is worth noting that the decision of the PRB did not establish that the EO was irresponsible in that complaining case.

At the very end, we emphasize that the difference in price between the now complaining EO, and the now recommended EO is about 200,000.00 € at a lower price.

Findings of the Review Panel

In order to fully confirm the factual situation, the Review Panel administered as evidence the Review Expert's Report, the opinions of the parties regarding the review expert's report, the submissions and documents of the complaining Economic Operator and the Contracting Authority, and found that the complaint submitted by the EO "Nika PrO Ing" for the aforementioned procurement procedure is partially grounded.

The review panel independently and objectively, conscientiously and professionally evaluated all the evidence of the case. The Review Panel considers that the actions and acts of the CA do not coincide with the basic features of the LPP, which are efficiency, equal treatment of the parties, economy, and also considering the nature of this activity, all these circumstances have influenced that RP came to the conclusion that the best solution would be for the activity to be reassessed by proving the factual situation in accordance with the legislation in force in relation to the complaining claims presented in the complaint.

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 for this procurement procedure, a decision was made by the review panel of the PRB with protocol number 74/23, where the review panel obliged the CA to apply the legal provisions of the LPP during the reassessment, confirming the appeal claims in accordance with articles 72 as and 59 of the LPP, in principle based on the general interest and the sensitive category that the procurement activity has to do with the construction of schools that is related to the education of children as well as treating all participating EOs equally since the last expertise presented new facts, arguments and research compared to expertise 569-579/22, with which, in connection with the expertise no. 74/23, the expert considered that the request related to the certificates is fulfilled, in which case the CA agreed, while in relation to the fact that the complainant has now raised as an issue, the RP finds that this is left to the responsibility of the CA - to prove the fulfillment of the relevant criterion, therefore it can be considered as a matter judged by the panel.

As for the complaining claim against the EO recommended for the contract, that the requirement regarding the equipment has not been met, specifically the request “The economic operator must offer as evidence that he owns this equipment: Grader 5.2-8 tons, while the EO recommended in his offer presented the 10-ton Grader, PSH in this regard assesses that the presented equipment, based on the expertise reports and data presented so far, is outside the specific requirements of the DT, which means outside the criteria defined in the TD, however based on article 59., paragraph 4 of the LPP, clearly specifies that:

“The contracting authority will consider a tender as responsive only if the tender in question is in compliance with all the requirements set forth in the contract notice and in the tender dossier. Notwithstanding the foregoing, the contracting authority may consider a tender as responsive if: (i) it contains only errors or ambiguities which can be corrected without changing the material condition or aspect of the tender in question, or (ii) it contains only minor deviations that cannot cause material changes or deviations from the characteristics, conditions, and other requirements set forth in the contract notice and in the tender file; provided that, any such deviation shall be quantified, as far as possible, and taken into account during the evaluation and comparison of tenders.”

So finally regarding this point, RP finds that the above provision clearly specifies that the "Contracting Authority" can consider a tender as responsible if it contains small deviations..., so in this case it remains the full responsibility of the CA (as the provision also determines), that in cooperation with the requesting unit and the relevant departments, clearly prove whether the equipment offered can be considered as a minor deviation, this through the actions taken by forming a professional commission which during the re-evaluation will deal with this point and issue a reasoned, reasoned notice in accordance with the provision that provides that such deviation, if: *"(ii) contains only minor deviations that cannot cause material changes or deviations from the characteristics, conditions, and other requirements set forth in the contract notice and in the tender dossier; provided that, any such deviation is quantified, as much as possible, and to be taken into account during the evaluation and comparison of tenders”*.

The review panel assesses that regarding the other claim of the complainant regarding the issue of validity, the PS supports the review expert's opinion regarding this issue, therefore without the need to repeat the same, this claim is classified as based on the expert's report on this point.

Regarding Article 105, taking into account the requirement of Article 104, paragraph 1, of the cited Law according to which, quoted: “The procurement review procedure will be implemented and carried out in a fast, fair and non-discriminatory manner, which aims at the fair, legal and effective resolution of the matter...” 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.

The review panel also clarifies that the contracting authorities are obliged to ensure that public funds and public resources are used in the most economical way, simultaneously taking into consideration the purpose and subject of the procurement, as provided in Article 6 of the LPP, the contracting authority Article 1 of the LPP should also be taken into consideration, as it is

known that the purpose of this law is to ensure the most efficient, transparent and fair way of using public funds and resources, as well as Article 7 of the LPP, which defines equality in treatment and non-discrimination where CA will treat economic operators equally and non-discriminatory and will act transparently.

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.

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 6 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

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 – **MINISTRY OF INTERNAL AFFAIRS;**

1x1 EO – **NIKA PrO- Ing SH.P.K.;**

1x1 Archive of the PRB;

1x1 For publication on the website of the PRB.