



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

Psh. No.1001/23

The Procurement Review Body through the Review Panel composed of Vjosa Gradinaj Mexhuani as President, deciding on the complaint of the economic operator "Quantix" Sh.P.K. dated 11.12.2023 against the Notice on the Decision of the Contracting Authority - Central Procurement Agency dated 21.11.2023 regarding the procurement activity entitled “Creation of the electronic process system for the needs of the Independent Media Commission E-KPM” with procurement number UA/2016-23-9009-2-1-1, on the basis of article 105 in relation to article 106 and article 117 of the LPP, after consideration in the session without the presence of the parties, on the 27.02.2024 has issued this:

DECISION

I. Approved, as partly grounded the complaint of the economic operator "Quantix" Sh.P.K. is approved as partially founded. with no. 2023/1001 dated 11.12.2023 against the Notice on the Decision of the Contracting Authority - Central Procurement Agency dated 21.11.2023 regarding the procurement activity entitled "Creation of the electronic process system for the needs of the Independent Media Commission E-KPM ” with procurement number UA/2016-23-9009-2-1-1. Whereas the Notice on the Decision of the Contracting Authority - Central Procurement Agency dated 21.11.2023 is confirmed.

II. It is allowed the return of the complaint’s fee in the deposited amount, so that the complaining economic operator is obliged to submit a request for the return of the complaint’s fee within the period of sixty (60) days after the acceptance of this decision in accordance with Article 31 paragraph 6 of the Work Regulations of PRB, under the warning that if the request is not submitted within the deadline, the deposit will be confiscated and all deposited funds will go to the budget of the Republic of Kosova.

REASONING

- Procedural facts and circumstances -

The Central Procurement Agency in the capacity of the Contracting Authority dated 04.09.2023 has published the Contract Notice B05 related to the procurement activity entitled “Creation of the electronic process system for the needs of the Independent Media Commission E-KPM” with procurement number UA/2016-23-9009-2-1-1. This procurement activity was developed through an open procedure with the type of service contract and with an estimated contract value of 250,000.00 €.

On the 21.11.2023, the Contracting Authority has published the Notice on Decision B58 through which it has awarded with contract to the economic operator "Data Prognat" Sh.P.K.

On the 27.11.2023, the complaining economic operator submitted a request for reconsideration against the Notice on Decision B58 of the Contracting Authority. Consequently, on the 30.11.2023, the Contracting Authority made a decision through which it rejected as completely unfounded the request for reconsideration of the complaining economic operator.

On the 11.12.2023, the complaining economic operator submitted to the PRB complaint no. 2023/1001.

During the preliminary examination of the complaint, the Review Panel found that the complaint contains all the elements defined through Article 111 of the LPP and as such was submitted within the legal deadline in accordance with Article 109 paragraph 1 of the LPP after the preliminary procedure for resolving disputes in meaning of Article 108/A of the LPP, from the economic operator who is an interested party 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 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.

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 subparagraph 75 of the LPP.

• Administration and evaluation of evidence -

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.

The claims of the complaining economic operator are presented through the complaint as follows:

- The first claim (I) - "The complaining EO claims that the CA acted in the contrary to the provisions of the LPP by not allowing full access to the tender documents of the recommended EO".
- The second claim (II) - "The complaining EO claims that the EO recommended for the contract does not fulfill requirements 2 and 3 of technical and professional capacity. The claim is made on the basis of assumption without contesting a specific claim or evidence".
- The third claim (III) - "The complaining EO claims that in the absence of access to financial activity data respectively".
- The fourth claim (IV) - "The complaining EO claims that the recommended EO has submitted a tender with an abnormally low price, therefore the CA has acted contrary to the provisions of the LPP by designating it as a responsible tender and recommended for contract".
- The fifth claim (V) - "The complainant claims that the CA has acted contrary to the LPP by asking for clarifications regarding the statement for maintenance, due to non-compliance".
- The sixth claim (VI) - "The complaining EO claims that the CA acted contrary to the provisions of the LPP by requesting clarifications regarding technical aspects of the technical proposal submitted by the recommended EO".
- The seventh claim (VII) - The complaining EO claims that the tenders submitted by the EOs Tech Vision Sh.p.k.; Protecht Sh.p.k.; Komtel Project Engineering Sh.p.k. have submitted tenders which are irresponsible for not meeting the criteria/requirements of the tender dossier".

Referring to the claims as above, the complaining economic operator considers that the Contracting Authority acted in violation of Article 1, 7, 10, 11, 59, 60 and 69 of the LPP. The complaining economic operator has asked the Review Panel to approve the complaint so that the matter is returned to re-evaluation.

The contracting authority in the decision regarding the request for reconsideration dated 30.11.2023 CA rejected as Unfounded the complaining claims with any evidence and convincing argument because in our capacity as CA we acted in accordance with article 1 of the LPP the EO recommended for the contract is the EO that has met all the criteria and conditions of the TD also offered the cheapest price. Under no circumstances did the CA act contrary to Article 10 and 11 because the complaining EO was given access immediately after submitting the request. Regarding the claims for articles 6 and 7 that the recommended EO has fulfilled all the conditions and criteria set in the TD and the contract notice, also regarding the technical proposal for the project, this was not a request of the TD and as such was not part of of evaluation by the bid evaluation commission, thus acting in harmony with article 56.3 regarding abnormally low prices. Also, the economic operator has responded and clarified in detail what program it has and how they will work to improve this program further as requested in the specifications and the evaluation commission has considered the quoted answer as acceptable and in harmony with TD requirements. We remind you once again that this part of the technical specifications and implementation time of the project that you have referred to (as the dynamic plan) has been requested to be fulfilled in a written statement which the EO in question has attached and which

you have access to. Regarding the other claim for abnormally low prices, the CA has followed procedures according to Article 61 of the LPP and has agreed with the explanations provided. Therefore, on the basis of what was said above, CPA as CA on behalf of the independent media agency requests from PRB that the complaint be rejected as unfounded and that the decision of the CA remains in force.

Relying on article 111 paragraph 5 related to articles 113 and 114 of the LPP, the Review Panel on 18.12.2023 engaged the review expert, while on the 19.12.2023 it engaged the technical expert to do the initial review of the file and the complaints. On 28.12.2023, the Review Expert's Report was received with the following recommendations: "the complaint should be approved as partially founded and the decision of the CA should remain in force".

Regarding the first complaint (I), the examining expert presented in his report the findings as follows: "The complainant on 23.11.2023 via email requested access to the tender documents of all EOs that participated in this activity and in the evaluation report including all documents related to the evaluation. On the same day, the CA via email informed the complaining EOs that they can access the CA from 2:30 p.m. The complaining EO again dated 24.11.2023 sent an email regarding access. The review and technical expert have verified that the complaining EO in its tender has submitted the request for business secret signed and sealed. The review and technical expert clarify that the CA has acted in accordance with the principles and provisions of the LPP by providing reasonable access to the complaining EO and at the same time has implemented the requirements of Article 11, keeping as secret the information classified as business secret information by the recommended EO. However, the CA during the classification of information according to the request of the recommended EO had to do the analysis in the sense that contracts and references issued by a public authority should not be classified as confidential business information. This is because out of the 12 contracts in the list of contracts, 10 of them are concluded between EOs recommended for contracts with public institutions. Therefore, the appeal claim is partially founded". Regarding the second complaint (II), the review expert presented the following findings in his report: "The review and technical expert clarify that in relation to the complaint about the non-fulfillment of the requirements related to the staff, in accordance with requirements number 2 and 3 of the tender dossier, namely the required evidence, the recommended EO, as explained in detail above, has submitted the list of staff and the relevant evidence to fulfill the requirements. Consequently, the complaining claim at this point is unfounded". Regarding the third (III) complaining claim, the review expert presented the following findings in his report: "The review and technical expert clarify that in relation to the requirements on the economic situation and financial, namely the economic and financial capacity, CA has not defined any requirements in the tender file and contract notice. Therefore, the appeal claim at this point is unfounded". Regarding the fourth claim (IV) of the complaint, the review expert presented in his report the findings as follows: "The review and technical expert clarify that in relation to the abnormally low prices found according to the criteria of Article 41.3 of the RrPP, the CA has implemented the inter partes procedure in accordance with Article 41.2 of the RrPP. Further, the recommended complaining EO has submitted clarifications where it has broken down the pre-calculated costs for all elements of the offer. In accordance with Article 41.10, CA after receiving clarifications from the recommended

EO is convinced that the offer should be treated the same as other tenders. Therefore, the CA has acted in accordance with article 1 and 6 of the LPP and article 41.10 of the RrPP, again the complaining claim at this point is unfounded". Regarding the fifth claim (V) of the complaint, the review expert presented the following findings in his report: "The review and technical expert first clarify that it is evident that the EO recommended for the contract has given two different deadlines in two documents regarding with the maintenance period. The term of 24 months in the statement for maintenance and the term of 12 months in the dynamic plan. Since the two stated maintenance terms fulfill the minimum term of 12 months specified in the tender dossier, then the clarification of the CA is in function of clarifying the information given in the tender of the recommended EO. Therefore, the review expert". Regarding the sixth claim (VI) of the complaint, the review expert has presented the following findings in his report: "The review and technical expert clarify that based on the fact that the CA in the contract notice and tender dossier did not specify a request for the delivery of technical proposals, the clarifications of the CA are in function of elaborating the solutions that must be implemented and it is clear that the EOs must fulfill all the technical specifications presented in the tender dossier during the implementation phase. However, in accordance with article 56, paragraph 3 of the LPP, the tenderer cannot be disqualified or excluded from the procedure based on any requirement or criterion that is not mentioned in the contract notice and in the tender dossier, therefore the complaining claim is unfounded at this point". Regarding the seventh (VII) complaint claim, the examining expert presented in his report the findings as follows: "Regarding the complaint claims of the complaining EO for the tenders of the EO Tech Vision Sh.p.k.; Protecht Sh.p.k.; Komtel Project Engineering Sh.p.k., the review and technical expert clarify that according to the notice on the decision of the CA dated 21.11.2023, the aforementioned EOs have been eliminated and they have not submitted a request for reconsideration to the CA, therefore they are not party with a material interest in this procurement activity. Therefore, the complaints regarding the tenders of these EOs are not allowed".

According to the above, the reviewing and technical expert handled all the claims of the complaining economic operator in a professional and objective manner. The argumentation of the review expert is detailed, understandable and based on the relevant documents that refer to the procurement activity. The findings of the expert can be confirmed through the tender dossier as well as the documents with which the tenderer has bid. Moreover, the findings of the review expert are also based on the relevant provisions of the LPP and RRPP. Consequently, the Review Panel has given full confidence to the findings of the review expert.

-Findings of the Review Panel -

The review panel independently and objectively, conscientiously and professionally evaluated all the evidence of the case. In this way, it was found that the Contracting Authority did not act in the contrary to the provisions to be claimed by the complaining economic operator.

Based on the factual situation established as above, the Review Panel has given full confidence to the findings and recommendations in the review expert's report. and technical In this particular 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 circumstantial evidence, it was

found that the first complaint claim is partially founded, while the other complaint claims are unfounded in facts and convincing arguments. Regarding the first claim, review and technical experts have verified that the recommended EO has submitted the request to keep information classified as business secrets, signing and sealing it. They explained that the Contracting Authority acted in accordance with the law, providing reasonable access to the complainant and also respected the requirements for the protection of information as business secrets. However, during the classification of information according to the request of the complainant, the Experts clarify that the CA should have separately analyzed the contracts and references issued for the EO recommended by the public authority, not classifying them as secret business information. This is because of the 12 contracts in the list of contracts, 10 of them are related to economic operators recommended for contracts with public institutions. Therefore, the appeal claim is found to be partially founded. In this regard, the Panel clarifies that the CA is obliged to act in accordance with the requirements of Article 11 of the Law on Public Procurement, especially paragraph 4 cited 4. The Contracting Authority, if it has classified an element of information as business secret information according to paragraph 3 of of this article, must prepare a "cleaned" version of the document to be included in the published material for interested parties, ensuring that such business secret elements are removed or deleted. due to a request of the relevant economic operator. He must also attach a notice explaining that the purged document is an exact copy of the original after removing trade secret information. Regarding the second claim, the reviewing experts concluded that the recommended Economic Operator (EO) has fulfilled the requirements for staff, submitting the staff list and relevant evidence. Therefore, the claim at this point is judged unfounded. Regarding the third claim, the review panel found that the Contracting Authority did not define requirements for the economic and financial situation in the tender file. Therefore, the claim in this case has been assessed as unfounded as well. Regarding the fourth claim, the experts concluded that the CA has implemented the appropriate procedure for low prices according to the criteria of the Public Procurement Regulation (RrPP). According to them, the action of the CA is in accordance with the applicable law and procedures, making the economic operator's claim unfounded. Regarding the fifth claim, the review panel assessed that the explanation provided by the CA for the different maintenance deadlines is in accordance with the information presented in the tender dossier. Therefore, the claim is also found to be unfounded at this point. Regarding the sixth claim, the experts clarify that the CA has not defined a requirement for the submission of technical proposals in the contract notice and the tender file, while according to the law, the tenderer cannot be disqualified due to a requirement that is not specified in the notice . Therefore, the claim at this point is judged to be unfounded. Regarding the seventh claim, the review panel found that the EOs Tech Vision LLC, Protecht LLC; Komtel Project Engineering Sh.p.k. have been eliminated from the procurement process and have not submitted a request for reconsideration to the CA. Therefore, the claims of these EOs are inadmissible, as they have no legal right to challenge the decision of the CA in this matter.

The panel also clarifies that in view of the requirements of the contracting authority which are specified in the tender file 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 file" when he rejected the offer of the complaining EO as unfounded. The panel in accordance with Article 1 and 6 of the LPP also took into account the fact that the offer of the recommended EO contains a significantly lower price or more than 100% than the offer of the complainant. Therefore, after the administration and evaluation of the evidence, the complete ascertainment of the factual situation, relying on the LPP as applicable material law, taking into account all the documents of the case and the recommendations of the review and technical expert, it has been found that the complaint of the Economic Operator should to be approved as partially based, while the Notice on the Decision of the Contracting Authority - Central Procurement Agency dated 21.11.2023 regarding the procurement activity entitled "Creation of the electronic process system for the needs of the Independent Media Commission E-KPM" must be confirmed " with procurement number UA/2016-23-9009-2-1-1. However, it should also be noted that CA bears the responsibility according to Article 24.2 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 decision as in point II of the provision to return the funds to the complaining operator was taken based on article 31, paragraph 4 and paragraph 6 of the PRB Work Regulations, in the context of article 118 of the Public Procurement Law. This decision is convincingly argued, relying on the relevant facts and legal provisions. Based on the argumentation described above, it has been proven that the Contracting Authority has partially denied the right of the complaining operator to have unhindered and full access to public documents, in accordance with Article 10 and 11 of the LPP. This fact has also been confirmed by the review experts.

Due to the lack of sufficient reasons to defend this restriction, the complaining operator has chosen to turn to the PRB to present his/her complaint and to protect his/her interests in this procurement activity, since the same according to the decision of CA had been successful but at a higher price. The review panel, in this regard, has expressed its concern about such omissions. This argument, based on the legal bases and facts of the case, emphasizes the importance of respecting the rights of economic operators and preventing similar actions of the Contracting Authority in the future. If these omissions are repeated, the PRB has the right to take the necessary measures to guarantee the implementation of the law and to protect the rights of all interested parties in the procurement procedures.

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.

From what was said above, based on article 1, 6 and 117 of the LPP, 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 – **Central Procurement Agency;**

1x1 EO – **Quantix L.L.C;**

1x1 Archive of the PRB;

1x1 For publication on the website of the PRB.