

REVIEW PANEL, appointed by the President Pursuant to the article 105 as well article 106, and 117 of the Law on Public Procurement of the Republic of Kosova no.04/L-042, amended and supplemented by Law No. 04/L-237, Law no.05/L-068, and Law no.05/L-092, composed of: Mrs. Nita Bejta – President, Mrs. Vjosa Gradinaj Mexhuani– referent, Mrs. Kimete Gashi - member, Mr. Vedat Poterqoi- member and Mr. Agon Ramadani- member, deciding on the complaint lodged by the Economic operator: “Raf II shpk-Rahovec”, against the cancellation proposal of the procurement activity with title: “Construction of the stadium of the city of Peja”, with procurement no:207-20-8083-5-1-2, initiated by the Contracting authority/Ministry of Culture, Youth and Sports (MCYS), on the 08.08.2022 has issued this:

DECISION

I. REFUSED, as ungrounded the complaint of the Economic operator: “Raf II shpk-Rahovec”, against contract notice, regarding the procurement activity with title: “Construction of the stadium of the city of Peja”, with procurement no: 207-20-8083-5-1-2, initiated by the Contracting authority/Ministry of Culture, Youth and Sports.

II. CERTIFIED the decision of the CA- Ministry of Culture, Youth and Sports for cancellation of the procurement activity with title: “Construction of the stadium of the city of Peja”, with procurement no: 207-20-8083-5-1-2.

III. Contracting authority within 10 days must inform in written the Review panel for all actions taken regarding with this procurement activity.

IV. Non-compliance with this decision obliges the Review Panel conform with the legal provisions of article 131 of the Law for Public Procurement of Kosova No.04 / L-042, Law No. 04/L-237, Law no.05/L-068, and Law no.05/L-092, to take action against the Contracting Authority.

V. Since the complaint of the complaining economic operator “Raf II shpk-Rahovec”, is refused as ungrounded, it is confiscated the insurance fee of the complaint, these funds will pass to the budget of the Republic of Kosova.

REASONING

Complaining economic operator “Raf II shpk-Rahovec, as a dissatisfied party on the 15.06.2022, has filed a complaint with no. 208/22, against the cancellation proposal of the procurement activity with title: “Construction of the stadium of the city of Peja”, with procurement no: 207-20-8083-5-1-2, initiated by the Contracting authority/Ministry of Culture, Youth and Sports, claiming that CA has acted in the contrary with:

Contracting authority has acted in the contrary with articles: 1, 6, 33, 62, 56 and 108A.

Procurement Review Body, conform article 113 and 114 of the LPP on the 27.06.2022, has authorized the procurement review expert to review the validity of all claims of the complaining party.

Procurement review expert in the report dated: 01.07.2022, in the expertise’s report has explained that:

Introductory clarification: Contracting authority – Ministry of Culture, Youth and Sports, during this procurement activity has implemented restricted procedure.

Prequalification document – First phase is published on the 02.12.2020. According to evaluation report of the applications which contains date 08.01.2021 is emphasized that it more than six suitable applications that met all the selection criteria, therefore on 11.02.2021, the Tender File - Second Phase is published and two candidates enter the short and final list. “Trema Engineering” – Tiranë and group of EO “Raf II shpk and Benita Company”, an invitation for bidding is sent to the same on the 18.03.2021.

Answer on the complaining claim nr. 1 (Article 113): after the administration and examination of the case documents against the appeal claims, we clarify that after the opening of the offers on 29.03.2021, the contracting authority did not take any action until 27.05.2022, when the notice was published to cancel the procurement activity which even now it is contested by the complainant.

CA- Ministry of Culture, Youth and Sports as a justification for the cancellation it has defined: *“a violation of the LPP has occurred or will occur in the procurement procedure, which cannot be regulated or prevented through a legal amendment of the procurement conditions”*.

The provisions of Article 41, paragraph 2 of the ROGPP, define *“the procedure for the examination, evaluation and comparison of tenders will be carried out by the CA within the shortest possible time period and not more than 30 days from the opening of the offers. Only in cases of exceptional and justified, especially for contracts of a complex nature, this period can be extended for an additional period of 20 days. The tender evaluation process will begin immediately after the end of the tender opening process and no later than 5 days after the end of the tender opening process”*.

- According to the declaration in the complaint, namely the documents of the case, it results that CA - Ministry of Culture, Youth and Sports, after the opening of the bids, did not follow the legal procedures but published the notice on the cancellation of the procurement activity, therefore it did not publish a notice on the result of the procurement activity and as a result did not the request for

reconsideration was accepted even though it was uploaded and remained unaddressed.

- The request for reviewing contains the date 03.06.2022, a request which we do not have as a result of the fact that this procurement procedure now has the status of "Cancelled" and is inactive, this is also confirmed by the electronic letter dated 24.06.2022, letter of which we will attach to this report as evidence.

The provisions of article 111 of the LPP, among other things, also determine the conditions for accepting and handling the complaint, specifically paragraph 5, expressly defines "if the PRB finds that the complaint has been submitted in time and fulfills the conditions according to paragraph 1. of this article, the PRB will immediately to (i) appoint an expert for review according to Article 113 and (ii) form a review panel to review the claims made in the complaint" So paragraph 1.9 of Article 111, determines that the PRB must accept, respectively the complainant must have attached a copy of the decision approved by the contracting authority during the preliminary dispute resolution competition in accordance with Article 108/A.

According to what was described above, it results that the CA canceled this procurement procedure in an illegal manner (Article 62) and with a procedural violation. Therefore, our proposal for the CA - MCYS is that this procurement procedure should be re-examined and re-settled, in such a way that legal and procedural violations are avoided, namely the parties involved in this procurement procedure should be notified of the outcome of the procurement activity as provided by legal and bylaw acts.

Opinion of the Review expert

Based on the above mentioned clarification, review expert proposes the review panel that complaint of the complaining EO "Raf II" shpk, to be approved as grounded and it is obliged CA- MCYS, to return the case to be re-examined and re-settled, as obliged with provisions of the article 108/A of the LPP. This is where the first legal violations are consumed since Article 44.1 of the ROGPP defines that

Procurement Review Body notified the parties on the 30 of June 2022 with the expertise's report.

Contracting authority on the 05 of July 2022 through memo notified the PRB that doesn't agree with the opinion of the review expert.

Complaining Economic Operator on the 04 of July 2022 through memo notified the PRB that agrees with the opinion of the review expert.

The main hearing session is held on the 02 of August 2022, where were reviewed the case files, by checking and analyzing the documentation for the procurement procedure, which consists of: the authorization to initiate the procurement activity, the contract notice, the cancellation notice, the request for reconsideration, the economic operator's complaint, the procurement review expert's report, and all the submissions of the parties in the procedure.

Based on authorization, economic operator was represented by lawyer Isuf Zejna who on the hearing session of the main review presented the complaining claims against the decision of the CA on the cancellation of the procurement activity with title “Construction of the stadium of the city of Peja”. The same initially explains chronologically the flow of procurement activity: CA-MCYS on the 27.11.2020 published “Prequalification document” for restricted procedure regarding the procurement activity: “Construction of the stadium of the city of Peja”. Complaining EO submitted its application by meeting all the conditions of the prequalification document. Tender dossier from CA is published on the 11.02.2021 by sending invitation to apply two economic operators: 1. Trema Engineering 2 Sh.P.K from Tirana and 2. Group of Economic operators, Raf II sh.p.k and Benita Company. After submission of the bids on the 29.03.2021 is done the bid’s opening and reading of prices by the CA where our bid is as complaining EO was cheaper in amount of 12,599,465.00 Euro. Whereas the one of Trema Engineering 2 was in the amount of 16,712,540.12 Euro.

From submission of bids by the EO invited until 30.06.2022 CA hasn’t taken any step in publishing the notice of decision of the CA for evaluation of the bids submitted. On the 04.05.2022 Raf II Sh.P.K addressed to MCYS with a request in which requested to decide on the procurement activity initiated in 2020 and said that the legal deadlines have been exceeded, as damages are being caused by the continuation of bank guarantees for EO. On the 27.05.2022 Ministry announces that it intends to cancel the activity, while not taking responsibility for any damage as there is no signed contract with any economic operator.

On the 30.05.2022 through E-procurement platform is accepted the notice on Cancellation of the procurement activity, on the reasoning that a violation of the LPP has occurred or will occur in the procurement procedure, which cannot be regulated or prevented through a legal amendment of the procurement conditions. Within the legal deadline on the 03.06.2022 we filed a request for reviewing, but despite the waiting and in violation of any deadline CA has not returned answer on complaining claims. Coming to conclusion that CA doesn’t intend to treat the request for reviewing at all we as an operator addressed to the PRB to seek the protection of the right in this procurement activity.

Considering the reasoning of the CA on the decision for cancellation we consider that the same is not in accordance with LPP and CA has exceeded the legal deadline to use the number of bids as justification for cancellation of the procurement activity. In the relevant case, the condition of Article 62 for this tender to be canceled has not been met.

CA's reasoning that the criterion of Article 37.5 of ROGPP has not been met is baseless because the authority had the opportunity and time to make this cancellation when only two responsive applications were submitted. Since CA decided to continue with request to submit the bids as full including financial ones and because were opened the financial bids, this reasoning of CA is no longer valid and in accordance with Law.

Also the Law on Public Procurement is decisive as to the reasons for the termination of the procurement activities, and it can only be done when a violation of the current Law has occurred. For all of us who are lawyers and understand the hierarchy of legal norms,

we understand that a Rule and Operational Guide is not Law. Laws are approved only by the body authorized by the Constitution, in this case the Assembly of Kosova.

in his final speech the representative of EO declared: you will come across many cases where the KRPP with its own rules has exceeded the legal authorizations and has issued regulations which are not necessarily in accordance with the law. You will also face cases when the CA opens the bids and then when it does not like the winning bid, it decides to cancel it by referring to its own mistakes, as is the case now with the Ministry of Culture. Therefore, in order to establish order in public procurement, you must put an end to the abuse of legal provisions and the discretion of official persons. the stadium case is your best case to set the standard that contracting authorities cannot cancel procurement activities just because the winner is not a company they wanted. Therefore, after handling all the evidence of the parties, I propose to the review panel to approve the EO's complaint as partially founded, to force the CA to continue with the evaluation of the offers and the completion of the procurement activity.

Then the representative took the floor according to the authorization of the contracting authority Mr. Egzon Zariqi who declared: on the 04.05.2022 I accepted a memo from operator RAf II SHPK, owner Haxhi Bytyqi who raised a question on what is the status of this procedure and that in the wake of the letter we accept as notice and the possibility of a lawsuit from the operator presented above.

On the 26.05.2022 I informed the company that: I have analyzed in details the restricted procedure, where I noticed that from the opening day a violation occurred which is implemented by article 62 point 1.1 where such violation couldn't be amended. Based on ROGPP, for the restricted procedure is specified clearly in point 37.5 that: in case CA performs a procurement activity by using a restricted procedure, and in case accepts less than 3 requests for participation CA should cancel the procedure and return the requests accepted as un-opened with clarification, that less than 3 requests for participation were accepted. This violation is easily verified based on form B12- opening record are only 2 bidders.

In the memo of the 26.05.2022 are presented other details which make it impossible the continuation of the procedure, where the foreseen financial means for this project for three years they do not take up even 1% of the project value (concretely only 0.24% of this project). As well the detail that doesn't exist any single document from requesting unit for readiness of payment of the project and no document that completes the Declaration of Availability of Means.

After cancellation of the procedure, itself the electronic system (e-procurement) the access to the platform becomes impossible and within this time economic operator Raf II, raises the request for reviewing in the procedure a request which remained untreated by the CA.

Immediately after the automatic notice that it is filed a complaint in PRB regarding the case Construction of stadium of Peja, on the 16.06.2022 with a detailed memo we informed the MAO that when the documents are presented to the review expert to be filed all clarification by the CA.

Based on article 115, namely point 1 on the 05.07.2022, CA- files a memo for disagreeing with the expertise of the review expert of the case " Renovation of the stadium of the City of Peja 207-20-8083-5-2-1 (207-20-116-2-5-1).

Details that I presented above as violation, in the report it is continued with additional clarification why in this procedure there is a violation which can't be amended: in case where CA, would come out with the Notice on the decision of the Contracting authority (would be respected article 44.1 of the ROGPP), shows up other violation where based on article 44. Termination of procurement procedure, namely point 44.5 exactly point (v). In the introductory clarification of the expert he presents that based on the evaluation report of the bids there are 6 suitable bids, whereas on the second stage was continued with 2 candidates for the short list.

If CA has continued with two bids are we dealing with violation of ROGPP, namely article 44.5 at point five (v). Number of qualified candidates in restricted procedure or competitive with negotiations is less than 3?

The expert during the expertise presents that CA-MCYS has presented violation of ROGPP namely article 41.2 Procedure for examination, evaluation and comparison of tenders will be done by the CA with the shortest time possible and not more than 30 days from the bid's opening. Only in exceptional and justified cases, this period can be extended for an additional period of 20 days. Process of evaluation of tender will begin immediately after completion of the process of opening of the tender and not later than 5 days after completion of the process of the opening of tenders. My question for the expert is, in case when evaluation procedure, examination and comparison of tenders is not completed within the deadline defined in article 42.1 of the ROGPP, what is the form of amendment of time limits?

I presented above that based on the Budget Law for MCYS the only budget allocation for this budget code is 30,000.00 Euro, or better to say we have only 0.24% of the general budget of the contract.

Concerning the financial means and budget allocation, CA-MCYS gave explanation that in the memo presented to the PRB and memos presented to the complaining EO does not exist any document from the Sports Department that has a financial readiness for the estimated value of the contract in the Declaration of the Availability of means for the year 2022 and further and within the planning of procurement and Budget Law, namely the MCYS for 2022 and further has not financial readiness of covering this project (exists only one budget allocation 30,000.00 Euro/ where it is know the estimated value is 12 million).

Although the review expert presented that CA-MCYS has done violation since it did not issue a decision, but continued directly with cancellation, this should be disregarded since based on article 8 Declaration of needs and determination of availability of funds of ROGPP, namely point 8.7 persons who have authority to sign contracts are obliged, before publishing the form B58 "Notice on decision of the contracting authority" to re assure that financial information have not been changed substantially.

Based on the memo filed on the 16.06.2022 at the electronic official PRB email I am issuing conclusion that:

Review expert is in opposition with article 114 of the LPP, at the responsibilities of the review expert and contracting authorities, where at point 3 he is obliged to equip the review panel, complainant and Head of the CA with a written evaluation on the procurement activity and the validity of all complaining claims included in the complaint.

The review expert all the basis for cancellation of this procedure supports at the point which is in opposition with article 108/A preliminary dispute settlement, where emphasizes that the request for reviewing was untreated: here the expert is notified from

PPRC the reason why this procedure remained untreated because CA-MCYS didn't have access to that document, when it is known that the system is programmed in such way that doesn't allow access after cancellation of the procedure.

In his last words he declares: based on what was said above to the review panel we propose: the review panel should accept the report of the review expert, where should be disregarded proposals from his side since the same has selectively addressed only some of the aspects raised in this complaint and none of the documents presented by CA – MCYS.

To be discarded as ungrounded the complaint of EO Raf II under the legal reasoning: That in the procurement procedure "Construction of the stadium in the City of Peja" has occurred a violation of Law in the procurement procedure, which can't be regulated or prevented through a law amendment of the procurement conditions, including cases where a disposition of the Law requires cancellation of a procurement activity. That CA-MCYS doesn't have budget means that cover the estimated value (12.9 million Euro) the application can be found in article 8.7 of ROGPP and article 26 paragraph 4.2 of the LPP.

At the hearing session for the main review the review expert through his word addressed also in written stated: through report I have proposed that CA to return the case to reviewing, since CA through this procurement procedure has consumed procedural and legal violation which we treated and explained through the report.

According to article 49 of the ROGPP restricted procedure, is procedure with two stages, where only EO that meet the qualification requirements are invited to bid, first stage- prequalification and second stage is the awarding of contract or qualification stage. In paragraph 4 of the same article is emphasized that there is no public opening of the requests for participation, before the publishing of the evaluation report of the bids.

So CA has applied restricted procedure first stage prequalification document has published on the 02.12.2020. As a submission date and opening of the prequalification application is 24.12.2020 through the evaluation report of the 29.01.2021 is emphasized that there were more than 6 suitable bids which met all the selection criteria, while as candidates for the short list were qualified 2 operators including the complainant, on the 08.02.2021, was issued the tender dossier- second stage- the invitation to bid for 2 EO qualified by the CA itself. With this was consumed the first legal violation.

ROGPP which was in force at the time when CA initiated this procurement procedure namely article 44.5 determines that procurement procedure after the bid's opening should be cancelled for one of the reasons point V "when the number of qualified candidates in the restricted procedure with negotiation is less than 3, so CA should have cancelled the procurement procedure and not to proceed with the second stage in sending invitation for bidding of two candidates".

Despite this on the 29.03.2021 opens the two bids and until 27.05.2022 when publishes the notice of cancellation doesn't take any action.

In the cancellation notice is emphasized that a violation of the law occurred, and it is not given any reason as obliged with provision of article 44 of the ROGPP.

This is where the first legal violations are consumed since Article 44.1 of the ROGPP defines that “In case of decision for cancellation of the procurement procedure of the CA, immediately should prepare and publish the form B58 “Notice on the cancellation of CA” where are presented factual and legal basis for cancellation of the PA”

Whereas paragraph 2 of the same article defines: After expiry of the deadline for filing and reviewing the complaint will be prepared notice on cancellation of the procurement activity regardless from type of procedure”. In the same memo PPRC, writes date 03.06.2022 as a date when complainant files a request for reviewing, whereas CA didn’t issue any decision as obliged with provisions of article 108/A of the LPP.

Therefore my proposal was the case to be re-examined and re-settled in order that CA to correct legal and procedural violation, whereas now except this proposal to the review panel I propose in the sense of article 8.2 of the Rules for filing a request and complaint, to request from PPRC to proceed with procedures defined in paragraph 8 article 25 of the LPP, since not issuing a decision towards the request for reviewing and other legal violation are considered grievous violation.

Review panel after reviewing the case files, reviewing the complaining claims of the complaining EO, ascertainties, concrete analysis and recommendation of the review expert, statements of the parties in the procedure, discussion and screening the evidence entirely during the hearing session of the main review, explains:

Since the review expert raised the issue of accepting and treating the complaint, defining that were not met the criterion for the same, Review panel initially explains that the complaint of the complaining EO is within legal deadline and acceptable for reviewing based on article 108/A paragraph 6 of the LPP. The same gives deadline of three (3) days to the CA for reviewing the request for reconsideration of the EO and in specific justified cases this deadline can be extended more than three (3) additional days, when this deadline passes comes the right to file a complaint at the PRB and within ten (10) days according to article 109 paragraph 2 of the LPP.

Considering the fact that the review expert his opinion case of the case be re-examined and re-settled is supported in the acceptance of the complaint for not reviewing the case the CA the request made for reconsideration and emphasizes that that legal violations can be avoided, RP does not rely on the review expert's opinion for making a decision regarding the complaining claims of the complaining EO.

Regarding the complaining claim of the complaining EO that CA illegally canceled the procurement activity and there are no legal and bylaw violations, The review panel finds that the LPP has foreseen only the maximum number of candidates who are invited for the tender and that on the basis of Article 56 for the General Provisions on the Selection of Participants and Awarding of Contracts, paragraph 2 which regulates the limited procedure which was used in this activity determines that “*if the number of candidates exceeds the number six (6) then the contracting authority will invite only the six most qualified candidates to submit a tender*”. Moreover, in the same paragraph, the Law gives explicit authorization to the KRPP for issuing public procurement rules and establishing a procedure in detail during selection in limited procedures and says: KRPP will ensure that such procedure is: (i) in compliance with international best practices, (ii) ensures adequate competition and transparency, (iii) applies the principle of non-

discrimination, and (iv) is otherwise in compliance with the applicable provisions of this law.

Therefore, the PSH finds that article 37.5 of the ROGPP, derived from the PPRC, meets all the conditions specified in article 56, paragraph 2.2, and at the same time is in full compliance with the LPP, therefore it is considered an integral part of the Law. For this reason, the RP finds that the violation of article 37 paragraph 5 of the ROGPP, which states that *“in case CA performs a procurement activity by using a restricted procedure, and in case accepts less than 3 requests for participation CA should cancel the procedure and return the requests accepted as un-opened with clarification, that less than 3 requests for participation were accepted”*. Is legal violation of the CA which can't be regulated because in the second stage are invited only two economic operators. moreover, the CA with the minutes dated 29.03.2021 contrary to the law and in an unauthorized manner opened the offers, thus violating the second part of the same paragraph where it is stated that the accepted requests must be returned unopened therefore, taking into account all these legal violations, as well as from the verification of the facts, it appears that CA has not taken any action for eighteen (18) months, the cancellation of this activity was confirmed in terms of article 62 paragraph 1.1 of the LPP.

The decision regarding the confiscation of the fee was given in accordance with Article 31 paragraph 1 and 2 of the PRB Work Regulations.

Review panel conform article 117 of the LPP, and based on the evidence presented above decided as in the provision of this decision.

Legal advice:

Aggrieved party can not appeal against this decision, but it can file charges for damage compensation within 30 days, after the receipt of this decision with the lawsuit In the Basic Court In Prishtina at the Department for Administrative Affairs.

President of the Review Panel

Mrs. Nita Bejta

Decision to be submitted to:

1x1 CA –MCYS

1x1 EO – “RAF II” shpk

1x1 Archive of the PRB

1x1 For publication on the website of the PRB.