

**Class: UP/II 034-02/06-01/159**

**Number: 354-01/05-8**

**Zagreb, 20 April 2006**

Under Article 71(7) of the Public Procurement Act (Official Gazette, No 117/01 and 92/05), Articles 7 and 8 of the Act on the State Commission for Supervision of Public Procurement Procedure and Articles 7 and 135(1) of the General Administrative Procedure Act (Official Gazette, No 117/03), the State Commission for Supervision of Public Procurement Procedure, having regard to the complaint to a direct agreement procedure in negotiating procedure without prior invitation to tender No.06-44-3514/553 for procurement of property and persons insurance services, and liability insurance services, gives the following

#### **DECISION**

1. Decision No. 05-106/1-2006 of 27 February 2006 and the decision on selection, taken by the client in a direct agreement procedure in negotiating procedure without prior invitation to tender No. 06-44-3514/553 of 13 March 2006 for procurement of property and persons insurance services, and liability insurance services, shall be annulled.
2. The reimbursement claim for all complaint procedure costs is denied.

#### **Grounds**

The client published its decision on selection of a tender in a direct agreement procedure in negotiating procedure without prior invitation to tender No. 06-44-3514/553 for procurement of property and persons insurance services, and liability insurance services in the Official Gazette – Public Procurement Advertising Section – No. 11 of 13 March 2006.

The client took the decision on selection of a tender in direct agreement procedure No. 05-106/1-2006 of 27 February 2006 with reference to the provision of Article 12(6), Paragraph 1(2) of the Public Procurement Act.

The client announced its intention to conclude a contract with C. d.d. (Inc.), branch office Z. The selected tender price is HRK 1 324 213, 44.

Z. d.d.(Inc.), an economic subject having interest in the procedure in question, lodged an objection with the client and the State Commission for Supervision of Public Procurement Procedure essentially arguing that the client significantly infringed and misused provisions of the Public Procurement Act since there is no technical or art reason for the protection of a special or exclusive right when the procurement can be performed solely by certain economic entities, but that the service in question represents a regular activity of insurance companies.

The client concluded an insurance contract with C d.d (Inc.), branch office Z., for a definite period of 10 years prior to the commencement of the Public Procurement Act. Therefore, the complainant maintains that the client was not obliged to conduct another procurement procedure for insurance services within the meaning of Article 78(2) of the Public Procurement Act. It also argues that by initiating the procurement procedure, the client broke the contract, which does not represent any protected or exclusive right or condition set out in Article 12(6), Paragraph 1(2) of the Public Procurement Act. The complainant, thus, seeks this body to annul the decision on selection of a tender in direct agreement procedure in negotiating procedure without prior invitation for tender No. 06-44-3514/553, and the reimbursement for all complaint procedure costs.

In its opinion on the complaint, the client used the same argument as in its reply to the objection, that on 02 January 2000 it concluded an insurance contract for a definite period of 10 years under more favourable conditions. As the contract in question was concluded for a definite period, the client was not obliged to conduct another procurement procedure within the meaning of provisions set out in Article 78(2) of the Public Procurement Act.

On the basis of the above mentioned insurance contract concluded with C. d.d. (Inc.), this insurance company has a protected right to provide the insurance services within the meaning of Article 12(6), Paragraph 1(2) of the Public Procurement Act. Therefore, the client seeks this body to deny the complaint as ungrounded.

The complaint is admissible, lodged within the stipulated time-period, and represented by an authorized person.

The complaint is grounded.

Upon examination of the tender documentation, this body determines that the complainant's argument, that there is no technical or art reason for the protection of a

special or exclusive right when the procurement can be performed solely by certain economic entities, is valid. The client failed to prove that the conditions set out in Article 12(6), Paragraph 1(2), of the Public Procurement Act occurred in the procurement procedure in question. The client's argument, that C. d.d. (Inc.) has a special or exclusive right, is ungrounded.

Article 12(6), Paragraph 1(2), of the Public Procurement Act provides that the client may exercise the direct agreement method of procurement with one tenderer without prior announcement of an invitation to tender by direct agreement in negotiating procedures, if, due to technical or art reasons, i.e. reasons concerning the protection of a special or exclusive right, procurement can be completed by only one economic entity. The insurance contract, concluded by the client on 01 January 2000, does not represent the legal ground referred to by the client as a special or exclusive right.

Article 2(1), Paragraph 18, of the Public Procurement Act provides that special or exclusive rights are rights conferred by a competent body, under a law or another regulation, to one or more legal or natural persons.

C d.d. (Inc.) was not conferred a special or exclusive right by a competent body under a law or another regulation. Therefore, the complainant is right to argue that the client significantly infringed provisions of the Public Procurement Act. None of the above mentioned legal conditions can be found in the tender documentation submitted by the client.

Pursuant to the provisions set out in Article 8 of the Act on the State Commission for Supervision of Public Procurement Procedure, the complainant covers the initiation fee for a complaint procedure. Covering of the fee is related to the initiation of a procedure before this body. Under Article 8(3) of the Act on the State Commission for Supervision of Public Procurement Procedure, the reimbursement claim must be clear, specified and submitted prior to passing the decision. The reimbursement claim was submitted to this body prior to passing the decision, but it was not clear and specified. Therefore, the reimbursement claim is denied.

On those grounds, it is clear that the client failed to conduct the procurement procedure in accordance with provisions of the Public Procurement Act. Therefore, the State Commission decides as in Paragraphs 1 and 2 of this decision.

## **INSTRUCTION OF LEGAL REMEDY**

The complainant cannot lodge an appeal against this decision, but has right to initiate an administrative procedure by bringing an action before the Administrative Court of the Republic of Croatia within 30 days from the receipt of the decision.

## **HEAD OF THE STATE COMMISSION**

**Goran Matešić**

### **Deliver to:**

1. Z. d.d.
2. Client
3. Government of the Republic of Croatia – Public Procurement Office, Markov trg 2, Zagreb
4. State Audit Office, Zagreb, Tkalciceva 19
5. Records Office, here