

Class: UP/II-034-02/06-01/18

Number: 354-01/06-7

Zagreb, 02 February 2006

Under Article 71(1) of the Public Procurement Act (Official Gazette, No 117/01 and 92/05) and Article 8 of the Act on the State Commission for Supervision of Public Procurement Procedure (Official Gazette, No 117/03), the State Commission for Supervision of Public Procurement Procedure, having regard to a complaint lodged on behalf of the complainant by H.S., lawyer, Slavonski Brod, against decision No O-1283/05 taken by the client to select the most advantageous tender in public tendering procedure No. 05-21-15661/3047, published in the Official Gazette on 28 November 2005, for procurement of a compressor, gives the following

DECISION

1. Decision No O-1283/05, of 19 December 2005, taken by the client to select the most advantageous tender for procurement of a compressor shall be annulled
2. Public tendering No 05-21-15661/3047, published in the Official Gazette on 28 November 2005, for procurement of a compressor shall be cancelled.
3. The client shall reimburse the complainant for the complaint procedure costs of HRK 12 695, 00 within 8 days; the second part of the reimbursement claim is denied as ungrounded.

Grounds

The client published tendering procedure No 05-21-15661/3047 for procurement of a compressor in the Official Gazette on 28 November 2005.

Five tenders were submitted for the purpose of that procedure.

On 19 December 2005, the client took decision No O-1283/05 on the selection of the most advantageous tender, selecting the tender submitted by K.k. d.o.o. (ltd.) as the most advantageous one.

On 23 December 2005, D. d.o.o. (ltd.) filed an objection against decision No O-1283/05.

On 29 December 2005, the client denied that objection as completely ungrounded.

On 10 January 2006, D. d.o.o. (ltd.) lodged a complaint against decision on the selection of most advantageous tender No O-1283/05 in tendering procedure No 05-21-15661/3047 essentially arguing that the client had double standards in evaluating the object of the procurement in question by regarding its tender inadmissible for not having technical characteristics required in the tender documentation, while regarding the selected tender admissible although it did not have technical characteristics required in the tender documentation; that the client described the object of the procurement in favour of a certain manufacturer.

The complainant seeks this body to annul the decision and the tendering procedure in question.

The complainant seeks the client to reimburse it for all complaint procedure costs of HRK 18 795, 00.

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

The complaint is grounded.

While examining the complainant's first argument, this body determined the alleged irregularity. The complainant essentially argues that the client had double standards in evaluating the object of the procurement in question by regarding its tender inadmissible for not having technical characteristics required in the tender documentation, while regarding the selected tender admissible although it does not comply with technical characteristics required in the tender documentation.

Upon examination of the tender documentation, this body determined that the client, in Paragraph 6 under section "Technical characteristics and specifications", stipulated that each tenderer must submit a tender for a compressor with the following characteristics:

7 bar working pressure, capacity 5.3 m³/min – 89 l/s, three-cylinder diesel engine as Deutz F3M 2011, oil-cooled, power 36 kW, power of sound – 2000/14 EC: 100 dB, pressure of sound at 7m – ISO 2151: 72 dB, oil capacity of the screw-element: 8 l, rpm 2750, gas tank capacity: 80 L, connections for compressed air: 3*G ¾, without the generator.

Upon examination of documentation submitted in the tender, it is determined that the complainant submitted a mobile compressor, type C 50, which differs from the object

required in the tender documentation in following characteristics: required capacity was 5,3 m³/min, while the offered capacity was 5,0 m³/min, oil-cooled engine was required, and oil and air-cooled engine was offered, required power was 36 kW, while the offered power was 35,5 kW, required gas tank capacity was 80 L, while the offered gas tank capacity was 60 L.

Upon examination of documentation submitted in the tender, it is determined that the selected tender included a Kaeser mobile screw-compressor, which differs from the object required in the tender documentation in following characteristics: required capacity was 5,3 m³/min, while the offered capacity was 5,6 m³/min, oil-cooled engine was required, and water-cooled engine was offered, required power was 36 kW, while the offered power was 33,6 kW, required rpm was 2750, and the rpm offered was 2400, required gas tank capacity was 80 L, and the capacity offered was 105 L, required connections for compressed air were 3*G ¾, while the offered connections were 2*G ¾.

On the basis of examination of both the selected tender and the tender submitted by the complainant, this body determined that technical specification of submitted objects is not in accordance with technical specification required in the tender documentation. Therefore, in compliance with Article 60 (1), Paragraph 2 of the Public Procurement Act, it is concluded that both tenders are not in accordance with the conditions set out in the tender documentation.

Upon examination of the register of examination, evaluation and comparison of tenders, this body determines that the client's expert committee considered the complainant's tender inadmissible explaining that the submitted object does not satisfy required technical characteristics, while finding the selected tender admissible although the submitted object does not comply with the required technical characteristics.

The complainant rightly argues that the client had double standards in evaluating the object of the procurement in question because this body determined that the client had had double standards in evaluating the object of the procurement in question when finding the complainant's tender inadmissible for not having technical characteristics required in the tender documentation, while regarding the selected tender admissible although it failed to comply with technical characteristics required in the tender documentation as well.

Therefore, the State Commission decides as stated in Paragraph 1.

While examining the complainant's second argument, this body determined the alleged irregularity. The complainant essentially argues that the client described the object of the procurement in favour of a certain manufacturer.

Upon examination of the tender documentation, this body determined that the client, in Paragraph 6 under title "Technical characteristics and specifications", described the object of the procurement in question with following characteristics:

Compressor, 7 bar working pressure, capacity 5,3 m³/min – 89 l/s, three-cylinder diesel engine as Deutz F3M 2011, oil-cooled, power 36 kW, power of sound – 2000/14 EC: 100 dB, pressure of sound at 7m – ISO 2151: 72 dB, oil capacity of the screw-element: 8 l, rpm 2750, gas tank capacity: 80 L, connections for compressed air: 3*G 3/4, without the generator.

The client procures the object for the purpose of certain business activities, i.e. in order to satisfy specific needs that the object is designed for. Therefore, while describing the required technical specification, the client must state the function, operation, efficiency and/or technical characteristics necessary for the object in question in a manner that is not in favour of any manufacturer but clear enough for each applicant to understand what kind of an object should be included in a tender.

The object of the tendering procedure in question is described in a manner that excludes the possibility of submitting a valid tender unless it includes an object that is in accordance with each technical detail of the required object. In that case, it would follow that the client, when describing the object, copied technical specification of a certain manufacturer whose product is already put on the market.

Public Procurement Act explicitly forbids any description of the object of procurement in a manner of determining strict technical facts because such technical specification points to a specific product of a favoured manufacturer, with the exception of cases stated in Article 35(3) of the Act providing that the object, due to its unusual features, may be designated by a brand, type, trademark, drawing, origin, etc., but always followed with the wording "or any such other appropriate..." and only if such designation is justified by the type of procurement or if comprehensible description cannot be provided otherwise.

Upon examination of Paragraph 6, Technical characteristics and specification, this body determines that the client described the object in an illegal and irregular manner by using technical specification that required goods of a special make or origin, and thus acting in advantage of a certain tenderer without using the wording “or any such other appropriate”, which is not in accordance with Article 35(3) of the Public Procurement Act.

The complainant rightly argues that the client described the object of the procurement in favour of a certain manufacturer because this body determined that the client, opposite to Article 35(1) of the Public Procurement Act, had not used usual descriptions and requirements concerning quality, safety, denotation, testing, testing methods and packaging.

It follows that the tender documentation in question contains significant omissions and deficiencies and it should be modified or supplemented. Unfortunately, under Article 32(1) of the Public Procurement Act, after the deadline for the submission of tenders, the client may not modify or supplement tender documents and, if it deems that the published tender documentation contains substantial omissions or deficiencies, the client is obliged to cancel and repeat the tendering procedure.

Therefore, in accordance with Article 64(1), Paragraph 5 of the Public Procurement Act, the State Commission decides as stated in Paragraph 2 of this conclusion.

Deciding on the complainant’s reimbursement claim for all complaint procedure costs this body determines that the claim is partially grounded.

In its reimbursement claim for all complaint procedure costs, the complainant lists the following costs: reimbursement of costs incurred by the State Commission, HRK 5 000,00; fee, HRK 70,00; costs of making the complaint, HRK 6 250,00; costs of making the objection, HRK 5 000,00; VAT to the complaint and objection costs, HRK 2 475,00; total sum, HRK 18 795,00.

The reimbursement claim is defined, specified and submitted prior to passing the decision, which is in accordance with Article 8(3) of the Act on the State Commission for Supervision of Public Procurement Procedure stipulating that the reimbursement claim must be defined, specified and submitted prior to passing the decision.

Since the complaint is successful, the complainant's reimbursement claim for all complaint procedure costs is partially accepted.

The reimbursement claim is grounded for the following costs: reimbursement of costs incurred by the State Commission, HRK 5 000,00; fee, HRK 70,00; costs of making the complaint, HRK 6 250,00 with VAT of HRK 1 375,00, which makes the total sum of HRK 12 695,00.

The reimbursement claim is not grounded for the following costs: costs of making the objection, HRK 5 000,00 with VAT of HRK 1 100,00.

The client is obliged to reimburse the complainant for complaint procedure costs of HRK 12 695, 00 within 8 days, which is in accordance with Article 8(5) of the Act on the State Commission for Supervision of Public Procurement Procedure.

Therefore, the State Commission decides as stated in Paragraph 3 of this opinion.

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. H.S., lawyer, Slavonski Brod (on behalf of the complainant)
2. Client
3. Selected tenderer
4. Government of the Republic of Croatia – Public Procurement Office, Markov trg 2, Zagreb
5. State Audit Office, Zagreb, Tkalciceva 19
6. Records Office, here