

Class: UP/II 034-02/06-01/203

Number: 354-01/06-7

Zagreb, 08 May 2006

Under Article 71 of the Public Procurement Act (Official Gazette, No. 117/01, 92/05), and Article 7 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 the complaint to public tendering procedure No. 06-23-2577/409 and the Decision, taken by the client, to select the most advantageous tender for procurement of works, services and equipment for renovation of the central kitchen, gives the following

DECISION

1. Decision No. 953 of 04 April 2006, taken by the client, for procurement of works, services and equipment for renovation of the central kitchen, shall be annulled.
2. Public tendering No. 06-23-2577/409 for procurement of works, services and equipment for renovation of the central kitchen shall be cancelled.

Grounds

The client published public tendering No. 06-23-2577/409 for procurement of works, services and equipment for renovation of the central kitchen in the Official Gazette, Advertising section for public procurement No. 9 of 27 February 2006.

Economically most advantageous tender calculated on the basis of price, time-limit, and a guarantee term for the works performed was specified as the selection criterion

Seven tenders were submitted for the purpose of the tendering procedure. The client decided that the most advantageous tender is the one submitted by G. d.o.o. (Ltd.)

P. d.o.o (Ltd.), one of the tenderers participating in the tendering procedure, lodged an objection with the client and a complaint with the State Commission for Supervision of Public Procurement Procedure, thus challenging the decision on the selection of the most advantageous tender. The complainant argues that its tender is the most advantageous one due to its experience and references, and time-limit of 40 days set out for performance of

the requested works. In accordance with the additional criteria, the complainant was graded with 95%, not 91% as the client stated.

The selected tender is not admissible because the documentation submitted by the tenderer was not in accordance with Article 49(3) of the Public Procurement Act nor with General conditions of the tendering procedure. It is essential that each tender represents an unbreakable unit bound together and paginated, with a guarantee included. This condition can not be regarded as an irrelevant or formal reason.

At the public opening of tenders the information on time-limit or guarantee term, as additional criteria that carry significant number of points, was not read.

Furthermore, the complainant states that it was not provided with an explanation of reasons for its tender having been graded with only 91 points, although it should have been graded with more points.

The client gave its opinion on the alleged arguments. In its opinion on the complaint, the client argues that the fact, that the tender submitted by the complainant has the lowest price, is irrelevant as the selection criterion of the procedure in question is economically most advantageous tender calculated on the basis of price and additional criteria stated in the tender documentation. In instructions for tenderers, the client determined additional criteria for selection of the most advantageous tender, proportional value of each criterion, manner of application and calculation, and subsequently selected economically most acceptable tender. The selected tender was awarded with the highest grade of 95,72% whereas the complainant's tender with 91,00%. The complainant failed to include time-limit of 40 days for performance of works, but stated 03 April 2006 as the opening day and 31 May 2006 as the closing day of the works in question, which is more than 40 days.

Article 49(3) of the Public Procurement Act provides that the tender must be bound together, but it does not stipulate that it must be bound together with a guarantee as the complainant states. Therefore, the client argues that the complainant's arguments are formal and irrelevant, since the fact, that the selected tender was not bound together with a guarantee, could not make a significant influence in the tendering procedure in question.

The client states that the tendering procedure was conducted in accordance with provisions set out in the Public Procurement Act, that economically most acceptable tender was selected, and subsequently 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 partially grounded.

Upon examination of the tender documentation, this body determines that the tenderer's argument, that its tender is the one with the lowest price, is valid. On the other hand, on page 83/1 of its tender the complainant specified 03 April 2006 as the opening day and 31 May as the closing day of the works in question, and 40 days as the tender validity period. Therefore, the tenderer's argument, that its tender included 40 days time-limit for performing the requested works, is not valid. The client stated, both in Paragraph 5 of its invitation for tenders and the tender documentation, that the works in question should start on 03 April 2006 and be completed on 30 May 2006. Time-limit for performance of the works in question offered by the complainant was in accordance with the time-limit requested by the client. The selected tenderer offered 40 days time-limit for performance of the works in question, which is shorter than the complainant's time-limit. The complainant's statement, that the selected tender was graded with 95,72% and its tender with 91,00%, is valid. The selected tender is not in accordance with Article 49 of the Public Procurement Act because it does not satisfy the stipulated form, i.e. it is not bound together and paginated. Form of the tender is stipulated by law for the purpose of preventing any subsequent modification being made in the tender. Thus, the complainant's argument is grounded.

The complainant is true when arguing that the additional criteria were not read at the public opening of tenders. It is also true when arguing that the selection criteria are not clear enough, i.e. that they are not stated in the decision on selection.

Acting upon the complaint and supervising the regularity of the conducted procedure and compliance of cogent norms laid down in the Public Procurement Act, in accordance with provision provided for in Articles 7 and 135(1) of the General Administrative Procedure Act, this body has undoubtedly determined irregularities in the procurement in question.

The client, i.e. its expert committee failed to make a report on the reasons for application of additional criteria, and to explain those reasons. Upon examination of documentation submitted by the client, this body determines that the report on the reasons for application of additional criteria is not contained in the documentation. The client's expert committee was obliged to make that report, as stipulated by provisions laid down in Article 46 of the Public Procurement Act. The client stated the method of computation only for tender price, not for other selection criteria.

Article 46 of the Public Procurement Act provides that the client must, in the invitation to tender and tender documentation, specify the criteria to be applied in selecting the best tender.

The most favourable tender is either an admissible tender with the lowest price or an admissible tender that is the most economical on the basis of price and the additional criteria for best tender selection listed in the tender documentation. Paragraph 3 of that Article lists the additional criteria that can be applied by the client.

Pursuant to Article 46(5) of the Public Procurement Act the client was obliged to list the additional criteria in the tender documentation in order of their importance and ascribe to them their relative weight from 1 to 100 per cent as well as determine the method of computation.

Paragraph 8 of that Article provides that before drafting tender documentation, the client's expert committee must prepare a statement explaining, as well as justifying the application of, any additional criteria.

In specifying the selection criteria, the client also specifies the evaluation method of each criterion in a manner that will allow their objective examination. In order for tenderers not to have doubts, it is important for each criterion to be clearly specified both regarding its content and the method of computation. Thus, the elaboration of criteria allows the client's evaluation of tenders to be objectively examined.

Relation between price and additional criteria should be viewed through expected profit dependency, i.e. price of the object of procurement. Application of criteria that are not economically profitable to the client is pointless.

Throughout the procurement procedure, the client is obliged to apply and interpret the criteria in the same manner, thus they could be objectively examined.

Application of any other criteria different from those specified by the expert committee and announced publicly is not permitted.

The object of procurement is designated by name, purpose and characteristics, classification, and record. Selection criteria must be related to the object of procurement, not the tenderer. By specifying experience at similar jobs as an additional criterion, the client acted illegally because this criterion is related to the tenderer, not the object of procurement.

Regarding the model of evaluating the characteristics or advantages, the client regularly specifies minimal characteristics as a condition, but evaluates everything that exceeds that minimal requirement. It is essential that the degree of the expected economic profit is explained for each criterion.

Since the client failed to act in accordance with Article 46 of the Public Procurement Act, it follows that the tendering procedure in question was conducted in opposition to the Public Procurement Act.

The minutes kept at the public opening of tenders were not signed by the authorized representatives of the tenderers, but the client stated that six tenderers participated at the public opening of tenders. Article 54(6) of the Public Procurement Act provides that the minutes shall forthwith be open to review, verification of content and signing by the attending authorized representatives of the tenderers. The client failed to act in accordance with this legal provision, thus the procedure in question was conducted in opposition to provisions laid down in the Public Procurement Act.

Paragraph 13 of the invitation for tenders specified the tender validity period – 40 days – as oppose to the provision set out in Article 44(1) of the Public Procurement Act stipulating that a tender validity period may not be shorter than 60 days from the date of tender opening.

In the tender documentation, the client specified different time-limits for performance of the object of procurement in question. Therefore, it is not clear whether the period from 03 April 2006 to 31 May 2006 or the period of 40 days, specified on page 10 of the instructions for tenderers where the client explains the steps of selecting procedure, is the longest time-limit. This ambiguity does not allow any conclusion on the possibility to offer a shorter time-limit for performance of the object of procurement and its relation

with the time-limit specified in the invitation for tenders and tender documentation. Since the client failed to state the model of computation for this criterion, the number of points that would be awarded to a tenderer offering 35 or 50 days as the time-limit for performance of the works is not clear.

Furthermore, the client specified that the tender must include, inter alia, the conditions under which it is offered (fixed price, possibility of taking a loan, et al.). The reason for the client to seek a possibility of taking a loan is not clear since the decision on establishment of the expert committee states that the procurement funds are provided in the financial plan. The client may commence the procurement procedure if the procurement funds have been forecasted in the budget, financial plan or are obtained or secured in another manner (Article 14 of the Public Procurement Act). The scope of procurement may not simultaneously cover the purchase of goods, services or works and the raising of funds for such procurement. The raising of funds for procurement must fall within the scope of a separate tendering procedure (Article 33(5) of the Public Procurement Act).

The client failed to make the tender documentation in accordance with provisions set out in Articles 26 and 27 of the Public Procurement Act.

The complainant's tender was not bound together when submitted to this body, although the first page includes the guarantee which does not bind the tender. Thus, it is not possible for this body to determine the form of the tender submitted to the client, i.e. whether the guarantee bound the tender together or it was submitted in two parts as to this body.

The selected tender is not bound together, which is not in accordance with Article 49(3) of the Public Procurement Act.

On those grounds, it is clear that the client failed to prepare the tender documentation and conduct the procurement procedure in question in accordance with provisions set out in the Public Procurement Act. Therefore, the State Commission decides as stated 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.

Deliver to:

1. 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