

**Class: UP/II-034-02/06-01/38**

**Number: 354-01/06-9**

**Zagreb, 10 February 2006**

Under Article 71(7) of the Public Procurement Act (Official Gazette, No 117/01 and 92/05) and Articles 7 and 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 the complaint against the decision of 27 December 2005 taken by the client to select the most advantageous tender in public tendering procedure No. 942 of 28 November 2005 for the procurement of accumulator batteries as Fiamm type monolite (12 SLA40)- 30 pieces and accumulator batteries as Oldham type 12 HI 40 – 30 pieces, gives the following

### **DECISION**

1. Decision of 27 December 2005 taken by the client to select the most advantageous tender in public tendering procedure No. 942 of 28 November 2005 for the procurement of accumulator batteries as Fiamm type monolite (12 SLA40)- 30 pieces and accumulator batteries as Oldham type 12 HI 40 – 30 pieces shall be annulled.
2. Public tendering procedure No. 942 of 28 November 2005 for the procurement of accumulator batteries as Fiamm type monolite (12 SLA40) - 30 pieces and accumulator batteries as Oldham type 12 HI 40 – 30 pieces shall be canceled.
3. The reimbursement claim for all complaint procedure costs is denied.

### **Grounds**

On 28 November 2005 the client, in the Official Gazette – Advertising section for public procurement, published public tendering procedure No. 942 for the procurement of accumulator batteries as Fiamm type monolite (12 SLA40) - 30 pieces and accumulator batteries as Oldham type 12 HI 40 – 30 pieces determining that the selection of tenders will be cost-based.

C.E. d.o.o. (ltd.), P.L. craft business owned by V. i M.B., E. d.o.o. (ltd.) and E.P. d.o.o. (ltd.) submitted their tenders for the purpose of the public tendering procedure.

Upon examination of evaluation and comparison of tenders, the client's expert committee found two tenders admissible and proposed the tender submitted by C.E. to be selected as the most advantageous one. Subsequently, the client, as the responsible person, decided on the selection.

P.L., craft business owned by V. and M.B. filed an objection to that decision within the period stipulated by law arguing that the client was wrong in determining its tender inadmissible, with the explanation that the offered battery did not satisfy the required height, although it had the lowest price. It maintained that the batteries in question could be stored on 300 mm shelf-space without any modification, and proposed the client to take another decision on selection.

The client in its answer denies the objection as ungrounded arguing that the tender documentation, under Paragraph A, describes the required batteries as Fiam type monolite (12SLA50) dimension 287 mm, width 173 mm, height 202 mm, while the tender in question included batteries of 221 mm height. The tender was considered inadmissible because the existing arrangement of shelves, with a narrow space for manipulation, is not suitable for higher batteries.

P.L. then lodged a complaint with this body essentially stating that it denies the decision on selection because the client was wrong in defining the object of the procurement in question "as Fiam" and "as Oldham" since the object of procurement can be described by its general characteristics, such as type of technology, voltage, capacity and durability, and not by its secondary characteristics, such as dimension of batteries. It maintained that by using the word "as", the client specified a certain product in a millimeter regardless of its real needs, thus requiring the product of a certain manufacturer, which is against the provisions of the Public Procurement Act. Therefore, P.L. seeks the tendering procedure in question to be cancelled and HRK 4 500, 00 compensation for a loss sustained.

In its opinion on the complaint, the client states that the tender documentation, under section Technical specification, required batteries of specific dimensions as there is a limited space for their storage, and that the complainant's tender was regarded inadmissible because the battery in question was 221 mm high while the required height was 202 mm. It maintains that the space between shelves does not allow the storage of batteries higher than 202 mm, i.e. that the batteries higher than 202 mm do not allow

manipulation and regular service. Therefore, the client suggests the complaint to be denied as ungrounded.

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

The complaint is partially grounded.

It is beyond dispute that the client had right to require the object of procurement described “as Fiam”, although the object in question can be described by its voltage, capacity, durability, et al., only if that description assumed suitable quality. Therefore, the complainant’s argument, that the client was wrong in describing the object of the procurement in question “as Fiam”, since Article 35(3) of the Public Procurement Act provides possibility of designating objects of procurement by a brand, type, trademark, drawing, origin, etc., but always followed with the wording “or any such other appropriate...” only if such designation is justified by the type of procurement or if comprehensible description cannot be provided otherwise, is ungrounded in this part. Pursuant to Article 33(1) of the Public Procurement Act the object of the procurement is determined by the client and described clearly, comprehensibly and unambiguously, so that all tenderers may offer goods comparable in terms of their type, quality, price and any other properties and conditions as may be required.

The client was obliged to define the voltage of batteries, their capacity, and durability in order to allow the possibility of defining the object of the procurement in accordance with the above mentioned article. The client acted accordingly. Using the wording “as Fiam”, the client required exact quality of the product in question, thus acting in accordance with Article 35(3) of the Public Procurement Act. On the other hand, the complainant is right when arguing that the client was wrong in defining the object of the procurement in question with the wording “as Fiam” with the purpose of designating dimensions that the required product needs to satisfy.

It is clear that the client procures 60 batteries for two 1 400 mm high cabinets with four shelves, 300 mm shelf-space, and shelf-dimension 680x720 mm. Since the figures on the dimension of space for storing 30 batteries and those on maximum height of the batteries needed for the purpose of their manipulation are crucial in this case, the client was obliged to state them in the tender documentation. Each tenderer would then be able to

know whether 30 batteries could be stored in the required space, i.e. whether the offered battery satisfies the required height.

Acting upon the complaint and supervising the legality of the tendering procedure in question, this body determines that the client, in its decision on the establishment of an expert committee, failed to estimate the planned procurement value. In order to commence the procurement procedure, the client must draft a procurement plan for the fiscal or business year and forecast the procurement funds in the budget, financial plan or the funds obtained or secured in another manner. The planned procurement value is the value estimated by the client in its procurement plan which is secured in a specified section of the budget or financial plan. The planned procurement value data reveal the sum that the client planned to spend for a certain object of procurement. On the basis of the planned procurement value the client either applies provisions of the Public Procurement Act, if the procurement costs exceed HRK 200 000,00, or the Regulation of the Government of the Republic of Croatia on procurement procedure for goods, works and services of a lesser value, if the estimated procurement value does not exceed HRK 200 000,00. In Paragraph III of the Decision on the establishment of an expert committee the client, under section “expendable spare parts and servicing material”, estimated total value of HRK 3 000 000,00 for procurement to be conducted in the year 2005, but failed to estimate the funds planned for the procurement in question. The client failed to estimate the procurement value as provided for in Article 15 of the Public Procurement Act. Importance of the planned procurement value and the client’s obligation to control it during a procurement procedure can be noticed in Article 64(1), Paragraph 3, providing that the client must cancel the tendering or portions thereof if the price of the most advantageous tender is greater than budgeted or secured procurement funds.

In its invitation for public tendering, Paragraph 4(a), the client states that tenders must be submitted not later than 3 p.m. on the 10<sup>th</sup> day from the public announcement of the invitation, thus acting against Article 52(2) of the Public Procurement Act stipulating that the client must specify the same date, place and time for the submission and opening of tenders. In its tender documentation, Paragraph 13(a), the client stated that each tender must be submitted to the client’s registry office not later than 3 p.m. on the 10<sup>th</sup> day from announcement of the invitation in the Official Gazette, thus acting against Article 27(1),

Paragraph 15, of the Public Procurement Act providing that the tender documentation must specify date, time and place of tender submission and opening. Pursuant to the above mentioned legal provisions, each client is obliged to specify the period for tender submission by date, while each tender, under Article 50(6) of the Public Procurement Act, must be submitted not later than the date and time specified in the tender documentation.

Upon examination of the tender documentation it is determined that the client, in Paragraph 5, sought the responsible person to submit a certificate from criminal records as the evidence of qualifications in order to determine that the responsible person has not been passed a final sentence in a criminal procedure related to its business activity in last 5 years. The client sought this evidence of qualifications in opposition to Article 37 (4), Paragraph 3, of the Public Procurement Act providing that the evidence of qualifications is a certificate from criminal records or any such equivalent certificate as issued by judicial or administrative bodies of the country of domicile for the tenderer's responsible person.

Therefore, it is determined that the client, in the tendering procedure in question, acted against cogent legal norms by designating the object of the procurement with the wording "as Fiam", thus assuming the dimension, not characteristics of the batteries as provided for in Articles 33(1) and 35(3) of the Public Procurement Act, and failing to estimate the planned procurement value as provided for in Article 15 of the Public Procurement Act, and failing to specify the period for tender submission by date as provided for in Article 27(1), Paragraph 15, and Article 52(2) of the Public Procurement Act, and failed to determine the evidence of qualifications as provided for in Article 37(4) of the Public Procurement Act. Due to the infringement of cogent legal norms the tender documentation contains significant omissions and faults which is sufficient, under Article 64(1), Paragraph 5, for cancellation of the public tendering procedure in question. Furthermore, the decision on selection is annulled as illegal since it is a consequence of an illegal procedure.

The reimbursement claim for all complaint procedure costs and HRK 4 500, 00 for a loss sustained is denied since it is not specified in a manner provided for in Article 8(3) of the

Act on the State Commission for Supervision of Public Procurement Procedure (Official Gazette, No. 117/03).

On those grounds, the State Commission decides as stated in Paragraphs 1, 2, and 3 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.

#### **DEPUTY HEAD OF THE STATE COMMISSION**

**Marija Cvrlje**

#### **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
6. Records Office, here