



LEGAL ANALYSIS

of points 1,2,4 & 5 of the motivation for cancellation

of tender procedure for “Design and construction of Zheleznitsa Tunnel”

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MOTIVE 1

Description of motivation: The first ground for termination of the public procurement is related to defects of the Tender documentation. With this regard, the Resolution refers to a report ПК-ТТИ-8 has been provided by the Public Procurement Agency in the course of the preliminary control of the procedure. The report contains an estimation of the compliance of the conditions of the tender documentation with the mandatory law requirements. One of the conclusions in this report represents the fact that the Methodology for evaluating the offers does foresee that if a participant failed to provide a document, activity or procedures in its offer than and in such case the participant will not be automatically disqualified and the participant’s offer shall be evaluated with minimum points. Respective recommendations to adjust the Tender documentation should have been made to the Contracting Authority, but the latter should have disregarded them. This would represent grave breach of the provisions of the Law on Public Procurements that cannot be remedied at this stage of the proceeding.

Independent observer’s comments: Certain concerns arise with respect to the above conclusion. On one hand, the Resolution does not explicitly say which documents, activities and procedures the exclusion is declared admissible. On the other, in the published version of the evaluation methodology, it is explicitly stated that if any of the documents needed for the technical evaluation are not provided, the tender will be rejected. Even if the Tender documentation did foresee for the pretended exclusion, that would be not fully compliant with the law, the Contracting Authority acting in good faith and based upon the law would still be in a position to disqualify a participant that failed to provide certain documents. Neither the Methodology nor the Tender Documentation restrict the Contracting Authority’s possibility to disqualify a participant that fails to provide documents. Therefore, we do not find justified grounds for termination the complete procedure if there is a still possibility to disqualify only the participants with defective offers.

MOTIVE 2

Description of motivation: The second termination ground is based upon the considerations that there is a certain discrepancy between the Tender Documentation the Contracting Authority's clarifications and the applicable law. The public procurement is with an estimated amount of BGN 250.000.000,--. The Tender Documentation does not specify explicitly that the estimated amount can be exceeded. However, the Contracting Authority by the way of giving clarifications has admitted that an offer could exceed the estimated amount.

Independent observer's comments: Indeed, the Announcement for commencement of the public procurement procedure provides that the estimated amount of the public procurement is determined at BGN 250.000.000,--. However, the Tender Documentation does not provide explicitly that the estimated amount is at the same time the maximal admissible amount that can be offered by the tender participants. According to the Bulgarian law if there is no such explicit limitation the participants are free to offer sums exceeding the estimated amount of the public procurement according to the Tender Documentation. From this prospective any clarifications of the Contracting Authority admitting an offer to exceed the estimated amount are in our opinion issued in full compliance with the applicable law. Furthermore, the quoted in the Resolution clarification reads that the indicative amount shall be treated as maximum amount and in case a of higher offer presented the law will be applied. Therefore, we cannot accept the second termination ground given by the Contracting Authority in the Resolution for terminating the public procurement as justified and lawful.

MOTIVE 4

Description of motivation: The fourth ground for the termination of the Public Procurement Procedure (PPP) is the argument that according to the clarifications provided by the former contracting authority (NCSIP) in its Clarification Letter No. ОП-29-ОТ-007/27. 01. 2016, the latter has provided the possibility to the participants to present a bank certificate and a bank guarantee in Euro and not only in Bulgarian Leva. That has to be considered in the opinion of the present contracting authority API as a violation of Art. 27 from the Application Ordinance to the PPA (old) stating that if a tendering authority has used a certain currency by fixing the estimated value of the tender at its opening, the authority has to use the same currency in all other cases in which the value of the tender is mentioned.

Independent observer's comments: Such argument in our opinion could not be considered as a legally founded and sufficient for the termination of the PPP.

In the case at hand the former contracting authority did not refer at all to a different currency with respect to the estimated value of the tender. It has merely provided a clarification that participants could provide a certificate for the existence of the required financial funds (20 million BGN) as well as the required guarantee (2,5 million BGN) by presenting a certificate, resp. a bank guarantee, in EUR. If that would be the case, the amounts in EUR stated in the certificate, resp. bank guarantee, should cover the minimum

amount in BGN calculated on the basis of the fixed currency rate EUR-BGN of the Bulgarian National Bank, i.e. 1 EUR = 1,95583 BGN.

In our understanding this could not represent any violation of the provision of Art. 27 of the Application Ordinance to the PPA (old). The first reason is that the aim behind the rule is to ensure that the currency mentioned in the estimated value by opening the public tender would remain the same in all documents and publications of the tender and not to restrict the possibilities of the participants to present bank certificates or bank guarantees in another currency.

Furthermore, as the currency exchange rate of the Bulgarian currency to Euro does not fluctuate at all due to the fixed rate as long as Bulgaria is bound by the Currency Board introduced in the country, there is no exchange rate risk to be borne by the tendering authority.

MOTIVE 5

Description of motivation: The last ground for the termination of the PPP according to the decision of API is that the former tendering authority (NCSIP) has extended the term for the submission of the offers due to lack of the statutory requirements of Art. 27a, par. 8, p. 1 PPA (old). The present contracting authority further argues that the extension of the term has been made following a request of a participant which does not state an exact ground for that but merely that the prolonged term would help the participants to present a better made and evaluated bid.

Independent observer's comments: According to the said provision the contracting authority has to extend the term for the submission of the offers if the initial term is not sufficient for the participants, including the case where the participants has to observe on site additional documents related to the tender or the place of its performance.

In our view, the extension of the term for submission of the offers could be made by the contracting authority even if there is no request submitted by any of the participants. In it is the contracting authority's own discretion to consider whether there is such necessity or not, especially in cases like the present one where subject of the tender is a complex engineering and construction project and the extension of the term seems to be rather of interest of all participants and the tendering authority itself. Moreover, the clarification letter to which the termination decision refers does not include any indication that the term has been extended due to the request submitted by one of the participants.

Thus, in our opinion the extension of the term could not represent any valid ground for termination of the procedure. On the contrary, it is a reason to admit that the extension of the term corresponds with the principle of equal treatment and participants have submitted better elaborated and evaluated offers within the concrete tendering procedure.

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