



Mr. Nikita Stampa
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Your letter No./of
Ref.Ares(2017)3469040

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Contact person
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Bratislava
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Additional question to the explanatory statement of the European Commission on the public procurement in the field of information and communication technologies

Dear Mr. Stampa,

Let us thank you for the explanatory statement presented in letter of the European Commission, Ref. Ares(2017)3469040 of 10 July 2017, concerning the design contest as well as service contracts on SW works and related issues concerning possible use of the negotiated procedure without prior publication. Individual parts of the explanatory statement were discussed at the working group for public procurement in the field of ICT and, in the part concerning design contest, it was agreed that the working group would submit an additional question to the European Commission in order to ensure uniformity of the application practice of contracting authorities and the decision-making practice of controlling authorities.

At the beginning, let us provide you with a short summary of the possibility to use the design contest for software works, in which respect, the European Commission, referring to Art. 78(1) (a) of Directive of the European Parliament and the Council 2014/24/EU on public procurement, held that it is possible, by means of negotiated procedure without prior publication, to enter into a contract on development of complete software works (ranging from the design up to the implementation), with a bidder whose bid (proposal) is evaluated by the jury as the winning bid (proposal) in the design contest. In its letter Ref.Ares(2017)3469040, the European Commission responded to question 5.1 as follows:

„In case of a public supply contract, the contracting authority has the freedom to ensure the operation, support, updates or upgrade (hereinafter referred to as the "Operational Services"):

...

2. by the supplier of the tailor-made software, by means of:

- a. the specific provisions of the original supply contract providing for these Operational Services, or*
- b. a separate service contract, if the supplier wins a separate public procurement procedure or a separate lot in the original public procurement procedure for the Operational Services.“*



Our understanding of the above explanatory statement is that the development of software works as well as its operation (operational services) will be (can be) the subject-matter of the contract granted to the successful bidder in the design contest.

In order to eliminate any doubts, let us request you for a confirmation that the above explanation can be used for every public procurement procedure, including the design contest with the subsequent use of the negotiated procedure without prior publication with the winning bidder in the desing contest.

In connection with the above, let us submit an additional question to the European Commission:

Question: Is it correct understanding of the explanation that the public procurement for development of complete software works for the purposes of conclusions contained in the explanatory statement of the Commission also applies to public procurement of the so called Service Contract (SLA Agreement), which is part of the contract granted to the winning participant (bidder) of the design contest followed by the negotiated procedure without prior publication or (as an alternative to the above), can a contract on supply of software works contain special provisions on operational services (with the content identical with the service contract)?

In this connection, let us emphasize that, in the application practice, the procurement of software works is always connected to the procurement of its operation for a certain period of time, because only the supplier of the works is the entity disposing of the knowledge (including authors – program developers) of the entire works and, therefore, it is natural and necessary that the operation of the works be provided by the supplier of the works, at least during certain initial period of time. Equally, this requirement is in line with the requirement of maintaining the warranty for the works. If the operation of the works and related intervention to the works were performed by means of the contracting authority itself or by a third party, it could lead to a non-transparent situation from the viewpoint of liability for the required functionality of the works in the event of occurrence of defects, malfunction of a part or the whole of the works. Thus, the supplier could easily refer to the fact that the defect or malfunction was caused by it and claim that it supplied the works without any defects. In such case, demonstrating if the supplier supplied the works already containing defects and thus the connection to possibly occurred negative impact would be at least complicated for the contracting authority. At the same time, it would pose a direct threat to the warranty.

Thank you for your cooperation and early reply.

Regards

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