

Procurement of Medical Devices for Clinical Centre Dr Dragisa Misovic

IOP/6-2017/RD

Clarification No. 4

Issued on 13 September 2017

Question:

After examining the contents of the documents for the tender procedure – Procurement of Medical Devices for Clinical Centre Dr Dragisa Misovic, number IOP/6-2017/RD, we hereby submit a request for clarification of the tender documents.

In the tender documents, you subdivided the tender in question into 8 lots, as follows:

- Lot 1 – Operating room
- Lot 2 – Sterilization
- Lot 3 – Hospital furniture
- Lot 4 – Auxiliary surgical devices
- Lot 5 – Anaesthesia
- Lot 6 – Laboratory
- Lot 7 – Imaging equipment
- Lot 8 – ICT Infrastructure

After examining the specifications, we determined that Lot 1: Operating room and Lot 5: Anaesthesia consist of a large number of pieces of medical equipment and apparatus, (and even medical furniture) which are not, according to the Public Procurement Law, goods of the same kind in order to be subdivided into the same lot, as it was set in the tender documents. By subdividing the procurement in question this way you have limited competition, because for the mentioned lots there is no equipment manufacturer/bidder who can submit an appropriate bid, i.e. to offer on their own all the goods listed in the specifications of the mentioned lots.

In the tender documents, in the invitation to bid and on your website you have stated that the tender procedure is done according to Article 7, paragraph 1, item 2a of the Public Procurement Law, since the procurement is funded by the European Investment Bank and the Council of Europe Development Bank, and as such it is exempt from the Public Procurement Law. The paragraph 2 of the same Article of the Law prescribes that in case of procurements exempt from the Public Procurement Law, the Contracting Authority is obliged to act in line with the principles set forth in the Public Procurement Law.

According to the above, the basic obligation of the Contracting Authority when conducting the procurement procedure for procurements exempt from the Public Procurement Law is to follow, first of all, the principle of ensuring competition, defined in Article 10 of the Law and the principle of equality of bidders, defined in Article 12. Article 10 of the Law prescribes that the Contracting Authority is obliged to facilitate as much competition as possible in a public

procurement procedure, and that it may not limit competition, and in particular, it may not prevent any bidder from participating in a public procurement by unjustified use of the negotiated procedure or by using discriminatory requirements, technical specifications, or criteria. Article 12 of the Law prescribes that the Contracting Authority shall ensure equality of all bidders in all phases of a public procurement procedure, and that it may not impose conditions that would constitute national, territorial, subject-matter or personal discrimination among bidders, or discrimination arising from the classification of the business activity performed by the bidder.

After examining your website we saw that another potential bidder asked the same question as we, only for the Lot 7: Imaging equipment. We'd like to draw your attention to the fact that your response from 4 September 2017, to the question of the potential bidder, where the bidder asked for the Lot 7 to be subdivided into several lots, by having each piece of equipment as a separate lot, is at the very least vague and general. In your response you did not give a concrete explanation to why all the equipment, composed of the goods which are not of the same kind, and which is also the case for the equipment from Lot 1: Operating room and Lot 5: Anaesthesia, is subdivided into one lot.

Article 64 paragraph 4 of the Public Procurement Law prescribes that public procurement of goods, services or works of the same kind is a public procurement with the same or similar purpose, whereby the same bidders taking into account the nature of the activities they perform can fulfil it. Public procurement by lots, in line with Article 3 paragraph 1 item 35 of the Public Procurement Law, is a procurement whose subject is subdivided into several separate units of the same kind, and which is designated as such in the call for bids and tender documents. Based on the provisions of the law above, in order for the procurement to be subdivided into lots, the goods that would make up one lot must be of the same kind, i.e. must have the same or similar purpose, whereby the same bidders taking into account the nature of the activities they perform can fulfil it. It follows from the above that the goods that are, in the procedure in question, subdivided into the same lot (lots 1 and 5) are not of the same kind according to the provisions of the Public Procurement Law, and therefore as such cannot make up one lot.

Also, in the response from 4 September 2017 you stated that while making subdivisions in this procurement you were guided by the fact that the equipment is of the same kind, and also by the main principle in the public procurement procedure – the principle of efficiency and cost-effectiveness. We believe that you have misinterpreted the mentioned provision of the law defined in Article 9 that prescribes that the Contracting Authority shall ensure that goods, services or works procured in public procurement are of appropriate quality relevant to the purpose, intended use and value of public procurement. Paragraph 2 of the same Article stipulates that the Contracting Authority shall ensure that public procurement procedure is conducted and awarding of contracts are made within time limits and as prescribed by this Law, with minimum costs spent in conducting public procurement. With the mentioned Article of the Law you cannot explain the reason why you subdivided the goods that are not of the same kind into the same lot, thereby not following the fundamental principles from the Law, and those are the principle of ensuring competition and the principle of equality of bidders. Article 10 of the Law, i.e. the principle of efficiency and cost-effectiveness in an important principle for the public procurement procedure, but it is definitely not above the principle of ensuring competition

and the principle of equality of bidders, i.e. it cannot be the reason for discriminating against bidders and subdividing the procurement in the manner that no bidder can submit a bid independently.

The Public Procurement Law gives bidders the possibility of submitting bids independently, with a subcontractor or as a group of bidders (joint bid). The tender documents must be prepared in such a way that based on them the bidders can prepare an appropriate bid, which is defined in Article 61 of the Public Procurement Law. Technical specifications which closely describe the subject of the public procurement are an integral part of the tender documents. The point of the Public Procurement Law is that the bidders can bid individually, i.e. that the subdivision of the procurement into lots, additional conditions and the technical specifications do not limit competition among bidders and in that way force bidders to join together into joint bids or to bid with subcontractors in order to prepare an appropriate bid. In the case of this concrete procurement, by subdividing it into lots the way you also did with the tender documents, for lots 1 and 5, you prevented all potential bidders, i.e. the world-renowned manufacturers of medical equipment and their authorised representatives to participate in this procedure independently.

We hereby note that in our request we have referred to your response to the request for clarification of the tender documents from 4 September 2017, because we expect that the answer to our question will be similar, so we'd immediately like to draw your attention to the fact that such a response will not be accepted as a good enough explanation to why you subdivided the procurement this way and therefore prevented bidders to bid independently and didn't ensure competition in the procurement procedure in question.

Furthermore, by examining the contents of the tender documents we noticed that the technical characteristics for certain equipment from lots 1 and 5 exactly match one type of equipment, from a specific manufacturer. In the mentioned case those manufacturers/bidders are placed in a more favourable position compared to the others, because in order to prepare an appropriate bid, if the procurement stays subdivided like this, the other bidders must join those manufacturers, which brings them into an unequal position at the very beginning of the procedure.

Based on everything mentioned, we kindly ask you to further divide Lot 1: Operating room and Lot 5: Anaesthesia into lots, by having each item from the specifications, i.e. each piece of equipment, as a separate lot. Although according to Article 7 paragraph 1 item 2a of the Public Procurement Law this procurement is exempt from the Law because it is completely funded by an international financial organization, the law requires you to follow the principles stipulated in the Public Procurement Law and ensure as much competition as possible, of course with following the principle of efficiency and cost-effectiveness.

According to Article 20 of the Public Procurement Law, we kindly ask you to confirm the receipt of this email.

Answer:

The objective of the procurement of medical equipment for the needs of the Clinical Centre Dr Dragisa Misovic is equipping the new surgical unit within the centre. As such, it implies the

procurement of a large number of devices whose use is defined by the nature of this unit's work. Thus, the procurement is complex and challenging in terms of volume (174 items) and the type of devices to be procured.

While preparing the tender documents, the Contracting Authority was making sure to reconcile the fact concerning the volume and technical requirements and the principles of public procurements.

The Contracting Authority subdivided the procurement into several separate parts of the same kind, to be more precise into 8 lots. Neither the law nor special regulations define more detailed criteria for subdividing goods into lots, and they also do not define in more detail the term of use, but leave it to the Contracting Authority to decide how it will subdivide the procurement, taking into account the general provisions of having the goods of the same kind or for the same purpose into one lot.

In this regard, the Contracting Authority did not put all the necessary equipment used for hospital treatment into one lot, but interpreted the term 'being of the same kind' through functionality of the certain group of devices and their role in the functional units – Operating room, Anaesthesia, Sterilization...

When analysing lots by items it is clear that the Contracting Authority was guided by the principle of equipment being of the same kind in terms of functionality. For instance, in Lot 1 Operating room, the furniture to be procured is the furniture placed in the operating room and as such it is to be used during surgeries.

Simultaneous and timely execution of the entire subject of public procurement is necessary for optimal functioning. In later work, the comprehensive support for the entire system of devices in the functional units is ensured this way.

Having all of the above in mind, the Contracting Authority believes that further subdivision would increase the risk in terms of functionality of the surgical units, and that forming 174 separate lots following the lot-device principle would put at risk the fulfilment of the objective of the procurement, which is equipping the new surgery department of the hospital.

Furthermore, we believe that competition is in no way compromised by subdividing devices into lots. The Contracting Authority did not prevent any bidder from participating in the public procurement procedure by using discriminatory conditions, technical specifications and criteria. If you believe that discriminatory conditions, technical specifications and criteria are used, you need to point out the specific cases of that.

Having in mind all of the above, we believe that no principle of public procurements was violated, and that the Contracting Authority reconciled the principles and the needs of the Beneficiary in an optimum way and that they subdivided the procurement into lots in the way that doesn't put the objective of the procurement at risk.

