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Directorate-General for Internal Market, Industry, Entrepreneurship and
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Access to Procurement Markets

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Mr Sašo Matas,
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Subject: reply to inquiry of Slovenian authorities: competitive procedure with negotiations

Dear Mr Matas,

I refer to your letter of 10 June 2019 whereby you request the standpoint of the Commission services concerning competitive procedure with negotiations.

I would like to remind you that the views expressed below are the views of the European Commission services and the only binding interpretation can be given by the Court of Justice of the European Union.

You inquire whether the tenderer, who is deemed to be in a situation of any of the exclusion criteria and who is deemed to meet the applicable selection criteria in the previous unsuccessful open or restricted procedure, has to resubmit an European Single Procurement Document (ESPD) in the competitive procedure with negotiation.

In response to your inquiry, there must be a distinction made between negotiated procedure with publication (Article 26(4)b 1st subparagraph, 1st sentence of directive 2014/24/EU) and the negotiated procedure without publication (Article 26(4)b, 1st subparagraph, 2nd sentence, of directive 2014/24/EU).

In case the contracting authority decides to go for a negotiated procedure with publication thereby allowing all/other economic operators to submit a tender, the ESPD will have to be requested from all tenderers.

In the framework of the negotiated procedure without publication, there is, in principle, no obligation for the contracting authority to request again an ESPD from tenderers because:

- 1) the negotiated procedure without publication under Article 26(4)b, 1st subparagraph, 2nd sentence, follows a first open or restricted procedure, where the economic operators have already submitted an ESPD;
 - 2) such open or restricted procedure was not successful because only irregular or unacceptable tenders were received;
 - 3) out of these irregular or unacceptable tenders, all of and only the ones that:
 - a. comply with the criteria of Articles 57 to 64 of Directive 2014/24/EU (e.g. meeting the selection criteria and in particular having the required qualifications), AND
 - b. met the formal requirements of the first procurement procedure (e.g. the tender was submitted electronically and it was submitted in time),
- shall be included in the negotiated procedure without publication under Article 26(4)b, 1st subparagraph, 2nd sentence;
- 4) it ensues from point 3 that the tenders admitted to the negotiated procedure are the ones that were irregular because of their “technical” offer (e.g. a technical annex that was required was missing or the price corresponding to specific technical provisions was not indicated separately, contrary to the call for tenders requirements), or unacceptable because e.g. their price exceeded the contracting authority’s budget.

The fact that the contracting authority is not obliged to require (again) the ESPD for the negotiated procedure without publication under Article 26(4)b, 1st subparagraph, 2nd sentence, does not mean that it is prohibited to do so; in case of long delay between the first unsuccessful procedure and the launching of the negotiated procedure under Article 26(4)b, 1st subparagraph, 2nd sentence, the contracting authority might consider it appropriate to require the ESPD again from tenderers.

At the end of the negotiated procedure, the tenderer to whom it is intended to award the contract will have to provide up-to-date certificates and supporting documents.

We remain at your disposal for any further clarifications.

Yours sincerely,



Bonifacio GARCIA PORRAS
Head of Unit

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