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Clarifying and supplementing tenders - selected national law and practice

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Serbia

Draft PPL

Додатна објашњења, контрола и допуштене исправке

Члан 142.

- *Наручилац може да захтева додатна објашњења која ће му помоћи при прегледу, вредновању и упоређивању понуда или пријава, а може да врши и контролу (увид) код понуђача, односно његовог подизвођача.*
- *Ако су подаци или документација, коју је понуђач, односно кандидат доставио непотпуни или нејасни, наручилац може, поштујући начела једнакости и транспарентности, у примереном року који **није краћи од пет дана**, да захтева од понуђача, односно кандидата да достави неопходне информације или додатну документацију.*
- *Поступање, у складу са ст. 1. и 2. овог члана, не сме да доведе до промене елемената понуде који су од значаја за примену критеријума за доделу уговора или до измене понуђеног предмета набавке.*



Serbia (2)

Ако понуда садржи рачунску грешку, наручилац је у обавези да од понуђача затражи да прихвати исправку рачунске грешке, а понуђач је дужан да достави одговор у року од пет дана од дана пријема захтева.

Ако се понуђач не сагласи са исправком рачунске грешке, наручилац ће његову понуду одбити.

У случају разлике између јединичне и укупне цене, меродавна је јединична цена.



Poland

(Article 25 (1))

Contracting authorities may only request statements or documents necessary to conduct the procurement procedure i.e. statements or documents confirming:

- Fulfillment by the economic operator conditions for participation,
- Fulfillment by proposed goods, services or works requirements of the contracting authority,
- Lack of grounds for exclusion.

(Article 25a (1))

Together with tenders or requests for participation economic operators submit **statements**, valid at the moment of submission of tender or application.

Information contained **in the statements** constitutes an initial confirmation that the economic operator: 1) is not subject to exclusion and complies with the conditions for participation in the procedure; 2) complies with the shortlisting criteria (if applied)

Statement: above EU threshold – ESPD, below the thresholds, in a form specified by the contracting authority



Poland (2)

Article 26 (3)

Obligation to require economic operators to submit missing information!

If an economic operator **failed to submit** the declaration (statement) referred to in Article 25a (1), the declarations or documents confirming the circumstances referred to in Article 25 (1), or other documents necessary to carry out a procedure, the declarations or documents are incomplete, contain errors, or raise doubts specified by the contracting authority, the contracting authority **shall request** that they be submitted, supplemented, or corrected, or to explanations were provided within the time limit specified by the contracting authority, unless despite their submission, supplementation, or correction, or despite provided explanations, **the tender of the economic operator would be rejected or if it would be necessary to cancel the procedure.**



Poland (3)

Clarifications of tenders

Article 87.

1. During examination and evaluation of tenders the contracting authority may require **explanations** of the tenders' contents submitted by the economic operators. Negotiations between the contracting authority and the economic operator concerning the submitted tender and, subject to para. 1a and 2, any changes in the contents thereof shall not be admissible.

1a. In course of the examination and evaluation of tenders in a competitive dialogue procedure, the contracting authority may require from the economic operators to specify, improve tenders and provide additional information, however either the essential changes in tenders or the changes of the requirements specified in the specification of essential terms of contract shall not be admissible.



Poland (4)

Correction of errors

Article 87 (2)

2. The contracting authority shall correct in the text of the tender:

- obvious misprints,
 - obvious computational errors considering the calculation consequences of the conducted modifications,
 - other errors which result in inconsistency with specification of essential terms of contract but do not cause essential modifications of the tender
- and shall forthwith inform the economic operator whose tender has been corrected.

Poland (5)

Rejection of tenders

Article 89.

1. The contracting authority shall reject a tender, if:

1) it is not in conformity with this Act;

2) its content is inconsistent with **the content of** specification of essential terms of contract, without prejudice to Article 87 para. 2 item3;

(...)

6) contains computational errors in the calculation of prices;

7) within 3 days from the submission of notification, the economic operator did not agree to the correction of a error (...)

(...)

Germany

§ 56 of Ordinance on the Award of Public Contracts

- **Reviewing the confirmations of interest, requests to participate and tenders; follow-up requests for documentation**

The confirmations of interest, requests to participate and tenders shall be reviewed for completeness and technical accuracy; tenders shall also be reviewed for mathematical accuracy.

The contracting authority **may**, in compliance with the principles of transparency and equal treatment, **ask** the candidate or tenderer to **complete, send on or correct** any incomplete, missing or incorrect business-related documents, particularly self declarations, statements, certificates or other means of proof, or to complete or send on any incomplete or missing documents related to the performance.

The contracting authority is entitled to state in the contract notice or procurement documents that it will not follow up with requests for documents.

Germany (2)

§ 56 of Ordinance on the Award of Public Contracts

*Follow-up requests for performance-related documents concerning the economic evaluation of the tenders using the award criteria are excluded. **This shall not apply to pricing, provided only non-essential individual entries are involved, the individual prices of which do not change the overall price or adversely affect the evaluation sequence and the competition.** Following the contracting authority's request, the documents shall be submitted by the candidate or tenderer within a reasonable time limit to be set by the contracting authority according to a calendar date.*

The decision to follow up with requests for documents and the result thereof shall be documented.

Germany (3)

§ 57 Exclusion of expressions of interest, confirmations of interest, requests to participate and tenders

The evaluation [team] shall exclude tenders from undertakings that do not meet the selection criteria and tenders that do not fulfil the requirements of Section 53, in particular:

- tenders that were received late or not in the proper form, unless this occurred for reasons not attributable to the tenderer,
- **tenders that do not include the documents requested initially or by follow-up request,**
- tenders in which tenderers' changes to their own data entries are questionable,
- tenders in which changes or additions have been made to the procurement documents,
- **tenders that do not contain the required pricing information, unless only nonessential individual entries are involved, the individual prices of which do not change the overall price or adversely affect the evaluation sequence and the competition, or**
- variant

Correcting bids under German law after the expiration of the deadline

- **Examples from German case law:**
- In formal award procedures procurement law prohibits negotiations, because otherwise the transparency of the procurement procedure would be compromised. It is contrary to this basic concept if a bidder is granted the right to subsequently **increase his prices**.
- **Changing negative into positive prices** is unlawful
- An **amicable increase in price** is not a permissible "clarification" of the bid, but an impermissible renegotiation
- Providing one bidder with the opportunity to confirm over the phone a dubious discount is unlawful

Portugal

PPL

Article 72 Clarification and supply of tenders or applications

1. The evaluation committee may request the participants of the [procurement] procedure to clarify any aspect of submitted tenders which it considers necessary for the purpose of analysis and assessment of tenders.
2. Submitted clarifications make an integral part of tenders or applications, provided that they do not contradict essential elements or do not alter or complete their attributes or do not alter or correct omissions which should lead to exclusion of tenderers or candidates (...)

Portugal (2)

3. **The contracting authority should** request tenderers or candidates, to correct, within a maximum period of five days, irregularities in their proposals and applications, resulting from non-essential formalities, including the submission of documents which merely prove facts or qualities prior to the date of submission of the tender or application and provided that such supply does not affect competition and equal treatment.

4. The contracting authority **shall correct** clerical or calculation errors in tenders or applications provided the existence of an error or the way how it should be corrected is obvious to anybody .

5. Requests formulated by the contracting authority in accordance with paragraphs 1 – 3, as well as relevant answers should be made available by the contracting authority at the electronic platform used by it so all candidates or tenderers are informed about this fact.

Slovenia

Contracting authorities may request economic operators

➤ where information or documentation to be submitted is or appears to be incomplete or erroneous, or where specific documents are missing,

to submit the missing documents or to supplement, correct or clarify the relevant information or documentation within an appropriate time limit, provided that such requests are made **in full compliance with the principles of equal treatment and transparency.**

➤ only where contracting authorities cannot establish certain facts by themselves.

- Submitting a missing document or supplementing, correcting or clarifying the relevant information or documentation **may** relate exclusively to **elements of the tender the existence of which may be objectively verified before the expiry of the time limit fixed for the submission of requests to participate or tenders.**
- The contracting authority shall exclude an economic operator that fails to submit the missing documents or fails to supplement, correct or clarify the relevant information or documentation.

Slovenia (2)

Except where correcting or supplementing a **manifest error**, provided that such correction or supplementation does not result in the submission of a new tender,

the tenderer **may not supplement or correct** the following:

- the price per unit, net of VAT,
- the value per item, net of VAT,
- the aggregate value of the tender, net of VAT, except where the aggregate value is changed in accordance with paragraph 7 of this Act, or the tender in terms of criteria;
- the part of the tender relating to technical specifications of the subject-matter of the contract;
- those elements of the tender that affect or might affect the classification of the tender in relation to other tenders received by the contracting authority during the procurement procedure.

Only the contracting authority, and subject to the tenderer's written consent, may correct calculation errors identified during the examination and evaluation of tenders. However, the quantity and price per unit, net of VAT, shall remain unchanged.

Slovenia (3)

- where the contracting authority, during the examination and evaluation of tenders, finds that a calculation error has occurred due to an incorrect mathematical operation that was set in advance by the contracting authority, the contracting authority, subject to the tenderer's written consent, may correct the calculation error by calculating the value of the tender using the correct mathematical operation and taking into account the prices per unit, net of VAT, and quantities proposed by the tenderer.
- the contracting authority, subject to the tenderer's written consent, may correct an erroneous VAT rate.

Croatia

Article 293 PPL

(1) if information or documentation which should be provided by the economic operator is or appears to be incomplete or erroneous or specific documents are missing, **the contracting authority may**, respecting the principle of equal treatment and transparency, request the economic operator concerned to add, clarify, complete or submit required information in the set time period, not shorter than 5 days.

(2) Acting in accordance with paragraph 1 may not lead to negotiations related to criteria for selection of offers or proposed object of procurement.

(3) If the contracting authority does not use the possibility envisaged in paragraph 1 it is obliged to explain its reasons in the record of evaluation and assessment of tenders.



France

- Article 59 of the PP decree

Contracting authority verifies whether tenders submitted are regular, acceptable and suitable.

A tender is **irregular** if it does not respect requirements formulated by the contracting authority in the procurement documents or does not comply with the relevant legislation, in particular concerning social or environmental issues

Unacceptable tender is the tender which exceeds the budget which had been set by the contracting authority

Unsuitable tender is the one which is irrelevant to the contract, being manifestly incapable, without substantial changes of meeting needs of the contracting authority as specified in the procurement documents.

France (2)

In **open** or **restricted** procedure all irregular, unacceptable or unsuitable tenders are rejected,

however,

contracting authority **may allow** all bidders concerned to ‘regularise’ irregular tenders in the appropriate time period, provided they are not abnormally low.

France (3)

- **In all other procedures** unsuitable tenders are rejected
- Tenders which are irregular or unacceptable can be made regular or acceptable during negotiations or dialogue, provided they are not abnormally low.
- **At the end of negotiations or dialogue** all tenders which remain irregular or unacceptable are rejected, the contracting authority may, however, allow all economic operators concerned to 'regularise' irregular tenders in the appropriate time period, provided they are not abnormally low.
- Regularisation of irregular tenders may not result in the modification of substantial characteristics of the tenders.

France (4)

- **Article 55 of the Decree on Public Procurement**

Contracting authority which establishes that certain information which should be included in the offer is missing or incomplete **may ask** all bidders concerned to complete tenders in the appropriate time period, equal for all concerned.

France (5)

- Contracting authority **may require** bidder to complete or explain evidence or documents submitted.
- If the bidder or candidate is in the situation when
 - he is subject of exclusion,
 - does not satisfy the conditions for participation set by the contracting authority,
 - submit false information or documents or
 - cannot submit required documents to complete, supplement his offer

is declared inadmissible and he is eliminated from the procedure.

Conclusions – comparison

RIGHT OF THE CONTRACTING AUTHORITY

- Serbia
- France
- Germany
- Slovenia
- Croatia
- Portugal (clarifications)

OBLIGATION OF THE CONTRACTING AUTHORITY

- Poland
- Portugal (missing information, irregularities in tenders)



Conclusions – comparison (2)

GENERAL APPROACH

- General rules and principles how to proceed:
- Serbia
- Croatia
- Portugal

DETAILED APPROACH

- General rules + detailed provisions what can or cannot be changed in tenders:
- Poland
- Slovenia
- France
- Germany



- Thank you very much for your attention

- Questions?

