

Contracting authority
ACER
Agency for the Cooperation
of Energy Regulators
Trg republike 3
1000 Ljubljana, Slovenia

Tenderer:
TELEKOM SLOVENIJE, d.d.
Cigaletova ulica 15
1000 Ljubljana, Slovenia

SUBJECT: Submission of Facts and Evidence Regarding the Eligibility of Rejection of the Tenderer TELEKOM SLOVENIJE, d.d.

REFERENCE: Procurement procedure No. ACER/OP/MMD/04/2016 for the provision of IT hosting services for the Agency for the Cooperation of Energy Regulators

Dear Sir/Madame,

With this letter we would like to present facts and evidence regarding the eligibility of rejection of the tenderer Telekom Slovenije, d.d. with respect to the notification that our tender has not been successful in the procurement procedure No. ACER/OP/MMD/04/2016 for the provision of IT hosting services for the Agency for the Cooperation of Energy Regulators.

The Agency for the Cooperation of Energy Regulators provided explanation of the reasons why our tender did not meet your expectations with notification dated 13.09.2016 and supplemented by notification dated 22.9.2016. Although Telekom Slovenije, d.d. already replied to the notification dated 13.9.2016 with letter dated 22 September 2016, with this letter we supplement our letter dated 22 September 2016 and provide for additional clarification as to reply to your letter No. ACER/2016/AP/sv/mv/421 dated 22 September 2016. Namely, in our view there has been a misunderstanding on several issues in this procedure. We hope that our additional explanation on the matter will convince the Agency for the Cooperation of Energy Regulators as the contracting authority in the above-mentioned procedure to review its decision and to find the tender submitted by Telekom Slovenije, d.d. as the most economically advantageous tender.

Ad1)

According to publicly available information, the Agency is in **conflict of interest** with Information d.d., as we elaborate below.

Point 18 of the Preamble to the Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators states:

The Agency should have the necessary powers to perform its regulatory functions in an efficient, transparent, reasoned and, above all, independent manner. The independence of the Agency from electricity and gas producers and transmission and distribution system operators is not only a key principle of good governance but also a fundamental condition to ensure market confidence. Without prejudice to its members' acting on behalf of their respective national authorities, the Board of Regulators should therefore act independently from any market interest, should avoid conflicts of interests and should not seek or follow instructions or accept recommendations from a government of a Member State, from the Commission or another public or private entity. The decisions of the Board of Regulators should, at the same time, comply with Community law concerning energy, such as the internal energy market, the environment and competition. The Board of Regulators should report its opinions, recommendations and decisions to the Community institutions.

The tasks of the Agency in Article 11 of the Regulation (EC) No 713/2009 include Monitoring and reporting on the electricity and natural gas sectors, which reads as follows:

The Agency, in close cooperation with the Commission, the Member States and the relevant national authorities including the national regulatory authorities and without prejudice to the competences of competition authorities, shall monitor the internal markets in electricity and natural gas, in particular the retail prices of electricity and natural gas, access to the network including access of electricity produced from renewable energy sources, and compliance with the consumer rights laid down in Directive 2009/72/EC and Directive 2009/73/EC.

In public tender documentation, the contracting authority submits that:

According to REMIT, the Agency is responsible for monitoring wholesale energy markets to detect market abuse. Wholesale energy markets monitoring by the Agency shall be based on timely collection of data on transactions executed and orders placed on wholesale energy markets in the European Union (trading data), as well on as fundamental data, that is data related to the operational conditions of the energy systems in both the electricity and gas sectors.

The concept of "Conflict of interests" is defined also in Regulation (EU, EURATOM) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002, wherein Article 57 stipulates:

1. Financial actors and other persons involved in budget implementation and management, including acts preparatory thereto, audit or control shall not take any action which may bring their own interests into conflict with those of the Union. Where such a risk exists, the person in question shall refrain

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from such action and shall refer the matter to the authorising officer by delegation who shall confirm in writing whether a conflict of interests exists. The person in question shall also inform his or her hierarchical superior. Where a conflict of interests is found to exist, the person in question shall cease all activities in the matter. The authorising officer by delegation shall personally take any further appropriate action.

2.

For the purposes of paragraph 1, a conflict of interests exists where the impartial and objective exercise of the functions of a financial actor or other person, as referred to in paragraph 1, is compromised for reasons involving family, emotional life, political or national affinity, economic interest or any other shared interest with a recipient.

and

Article 107

Exclusion criteria applicable to awards

1. A contract shall not be awarded to candidates or tenderers who, during the procurement procedure for that contract:

(a) are subject to a conflict of interests;

....

In accordance with the provisions above, the contracting authority has declared in its tender documentation that the contract shall not be awarded to an economic operator that is subject to a conflict of interests involving the Agency as the contracting authority.

Correspondingly, the contracting authority stressed this in **Annex I - Tender specifications, point 16.2 Exclusion from award of contracts (Article 107, Financial Regulation)**:

The FWC shall not be awarded to tenderers who, during the procurement procedure for this FWC:

(a) are subject to a conflict of interests.

....

Annex III Framework service contract in Point II.1. Definitions states:

‘Conflict of interest’: *a situation where the impartial and objective implementation of the FWC by the contractor is compromised for reasons involving family, emotional life, political or national affinity, economic interest, or any other shared interest with the contracting authority or any third party related to the subject matter of the FWC;*

‘Professional conflicting interest’: *a situation in which the contractor’s previous or ongoing professional activities affect its capacity to implement the FWC or to perform a specific contract to an appropriate quality standard.*

Point II.7. Conflict of interest and professional conflicting interests reads as follows:

II.7.1 *The contractor must take all the necessary measures to prevent any situation of conflict of interest or professional conflicting interest.*

II.7.2 *The contractor must notify the contracting authority in writing as soon as possible of any situation that could constitute a conflict of interest or a*

h

professional conflicting interest during the implementation of the FWC. The contractor must immediately take action to rectify the situation.

The contracting authority may do any of the following:

- (a) verify that the contractor's action is appropriate;*
- (b) require the contractor to take further action within a specified deadline;*
- (c) decide not to award a specific contract to the contractor.*

II.7.3 The contractor must pass on all the relevant obligations in writing to:

- (a) its personnel;*
- (b) any natural person with the power to represent it or take decisions on its behalf;*
- (c) third parties involved in the implementation of the FWC, including subcontractors.*

The contractor must also ensure that the persons referred to above are not placed in a situation which could give rise to conflicts of interest.

Point II.18.1. Grounds for termination by the contracting authority states:

The contracting authority may terminate the FWC or a specific contract in the following circumstances:

...

- (h) if the contractor is in a situation that could constitute a conflict of interest or a professional conflicting interest as referred to in Article II.7;*

Considering the above, we are of the opinion that the contracting authority should indisputably exclude from the tendering procedure any tenderer that exhibits a clear conflict of interests.

As deriving from your notification ACER/2016/AP/sv/mv/421 dated 22 September 2016, the tenderer was awarded to INFORMATIKA informacijske storitve in inženiring d.d., Vetrinjska ulica 2, 2000 Maribor (hereinafter: Informatika d.d.). In our view, this tenderer should not be awarded the contract as they represent a clear conflict of interests considering the Agency's tasks, as demonstrated below.

Publicly accessible and revised 2015 annual report of Informatika d.d. writes as follows:

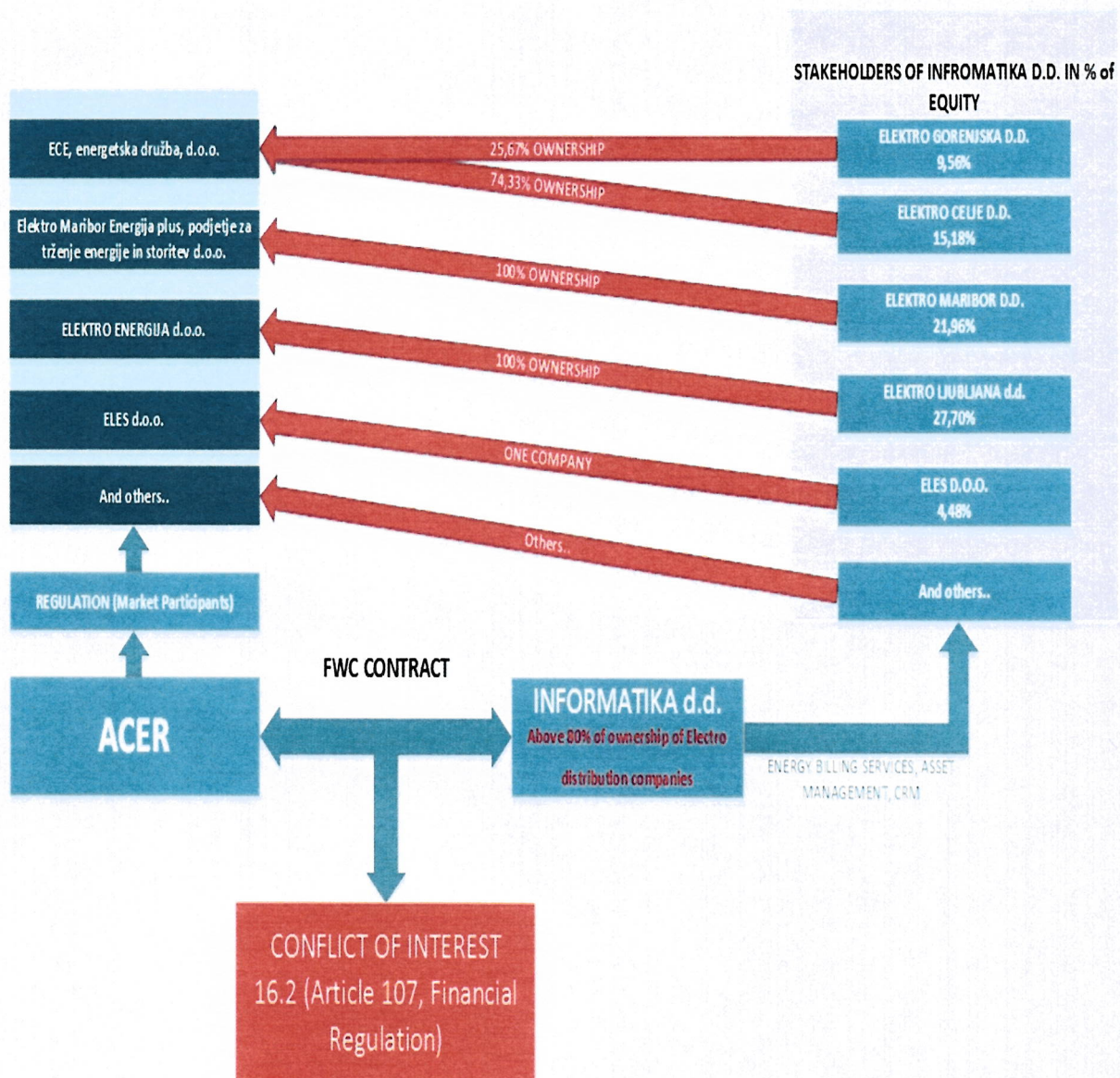
Informatika d.d. is a company that provides crucial and indispensable services for all five electricity distribution companies in Slovenia. Most of the company's revenue is created by providing services for the following companies: Elektro Celje, Elektro Ljubljana, Elektro Maribor, and Elektro Primorska. Informatika d.d. provides them with all services related to connecting users to the network, accounting of network use, changing suppliers, disconnections, data exchange with all electricity suppliers. Informatika d.d. provides Elektro Gorenjska with services of a single point of contact, through which the data of all electricity providers is exchanged and the data on network use is forwarded to the market regulator SODO d.o.o. Informatika d.d. provides data exchange via a reporting system to other actors on the electricity market (The Energy Agency of the Republic of Slovenia, Borzen, MG). Other revenues are created through our services performed for Elektro energija, E3 from Primorska region, Energija Plus from Maribor, and other smaller clients. Some of our revenue is also generated by printing various documents.¹

¹ Revised 2015 annual report stran 6, vir: AJPES, 19.9.2016.

Furthermore, Informatika d.d. website also writes:

The fact that distinguishes Informatika d.d. from others is that over 90% of our services are provided to electricity distributors, who are at the same time our majority stakeholders. Therefore, the relationship client-provider is intertwined with the relationship owner-capital, which is taken into account in planning, securing business transactions, and drawing up contracts.²

Conflict of interests scheme:



As evident from the above and considering the Agency's responsibilities as the electricity market regulator, the provision of the activities that are the subject of the public contract by an economic entity under direct supervision of electricity distribution companies clearly

² See web-page of Informatika d.d., available at <<http://www.informatika.si/index.php?predstavitev&r=2>>, last accessed 19 September 2016.

exhibits a conflict of interests. The companies supervised by the Agency could therefore, through their subsidiary, come into contact with sensitive information that concern the performance of the Agency's tasks. Regarding the independent nature of the Agency, this is unacceptable and contrary to the provisions of the tender documentation which prohibits any form of conflict of interests between the contracting authority and the selected contractor, as deriving from the Framework service contract draft.

Given the evidence submitted above, we expect that the Agency shall act in accordance with the above provisions of the tender documentation and exclude the tenderer Informatika d.d. from the tendering process due to a clear conflict of interests.

As deriving from your notification ACER/2016/AP/sv/mv/421 dated 22 September 2016, the Agency was aware of the *ownership structure* of both tenderers and has looked into it during the evaluation; however, the Agency did not identify any situation that could lead to a conflict of interest. As seen from the given explanation, the Agency considered *only* ownership structure and not the consequences of the existing ownership structure. However, as explained above, not only the *ownership structure* of the Informatika d.d. is problematic by itself, the main conflict of interest is in fact, that the few companies that are regulated and supervised by the Agency will have direct access to all information of the Agency, which is regulating them.

In our view, data integrity and analytics ought to be the highest priority of the Agency, as it is the core business of the Agency to collect market energy prices in whole European Union. We believe, that the Agency should consider how other competitors on the energy market would react, when they will get information that their secure data is being kept by one of their competitors. Based on our understanding and knowledge, all the collected data have to have 100% integrity and credibility in order to be able to stand in court in case of fraud or market cartel agreements. From legal perspective, this issue will question the credibility of the Agency. Therefore, we believe that the Agency should carefully consider how outcome of this tender, if not altered, would influence the conditions among competitors on energy market.

In our view, based on the above, there is a clear conflict of interest in the matter and we ask for the substantive feedback from the Agency on the matter, i.e. how the Agency legitimates the decision and why the Agency considers that there is no the conflict of interest in the matter. If we will receive no such answer, we shall start with the annulment procedure before the General Court of the European Union.

Ad2)

Additionally, we wish to highlight our opinion regarding the marks awarded to our tender, namely the **Technical quality criteria** section:

Criterion 1.1: marks awarded: 7.00 points / maximum marks available: 10.00 points /threshold: 6.00 points. Each of the proposed components guarantees availability and resilience/redundancy. The proposed infrastructure is based on a solid and mature solution. Scalability of components should have been better addressed but in general they meet the Agency's expectations.

Clarification: We would like to get more details on "how scalability should be better addressed". We have proposed a solution that is capable – based on our calculations and experience from existing infrastructure/contract, (storage, networking, and CPU capacity)

– to handle the Agency's infrastructure for 4 years. We have included High-end equipment in our calculations, as this is most suitable for the Agency. Based on this, we would like to ask you to revalidate your evaluation or give us the opportunity to explain our solution.

Criterion 1.2: marks awarded: 8.00 points / maximum marks available: 10.00 points /threshold: 6.00 points. The solution offered is flexible enough, even if based on four (4) years old products. The variety offered is satisfactory and it allows a proper balance between costs and performances. The technologies offered are standard and supported by almost all other vendors.

Clarification: We would like to get more details on the statement "four years old products", since we are offering new products, and our economical calculation is based on new products that fit the Agency's current demands. Please keep in mind that the Agency will need a large amount of disk capacity for the next 2 to 4 years. This is one of the reasons we have also included products like IBM 3310 tape, which is capable of handling max 6.13 PentaByte of data.

Criterion 1.3: marks awarded: 7.00 points / maximum marks available: 10.00 points /threshold: 6.00 points. Reliability of the performance is in line with the current standards. The efficiency of the solution is appropriate. Performances offered are adequate to the needs expressed in the Tender Specifications. Description of the offered performance is well detailed.

Clarification: We would like to better understand where we have lost 3 points, since we are offering the latest (and based on benchmarks) top equipment in the market to achieve the Agency's standards. We ask you to revalidate our solution and give us the opportunity to explain our proposal.

Criterion 1.5: marks awarded: 8.00 points / maximum marks available: 10.00 points /threshold: 6.00 points. Variety, flexibility, compatibility and maturity of the software offered meets the expectations. The variety of the software proposed helps in selecting a cost effective solution. Some tools may appear to be redundant in some functional aspects which could allow the Agency to better tailor the final solution according to its needs.

Reply:

We would like to better understand where we have lost 2 points. We have proposed the best software solution based on the data of public research institutions (Gartner, etc.), with full support and subscription to satisfy the Agency's continuity and security needs. The proposed solution is not based on open source and it has back-to-back coverage with vendors so the Agency's operations cannot be compromised.

Criterion 1.8: marks awarded: 6.00 points / maximum marks available: 8.00 points /threshold: 4.80 points. Business continuity and disaster recovery services are comprehensive, consistent and the plan meets the requirements and the needed achievements. It includes only partially some details on the possible final implementation.

Clarification

We would like to better understand where we have lost 2 points. Telekom Slovenia is the only DC provider in Slovenia that is able to provide 100% Business Continuity and is the only provider in Slovenia that has certification for Business Continuity - ISO22031. We wish to provide you with more details regarding the final implementation, if this is not sufficiently clear from our offer. Additionally, there are 2 DWDM independent links implemented between primary and DR site (fully encrypted). All equipment offered includes HW maintenance support for hardware replacement in case of faults; all systems are working

in High Availability to achieve maximum business continuity. All offered solutions are implemented in compliance with hardening guides - level 1 (SANS, CIS) - hardening.

Based on your notification ACER/2016/AP/sv/mv/421 dated 22 September 2016, we calculated our total technical SUM was 78 points. With our additional explanations as provided above, we are confident that we can achieve even more and come closer to ACER expectations (90%), which will bring Agency's integrity to the highest level comparing with other EU Agencies and in front of all NRA/Market participants in the Europe.

Based on your latest notice, Informatika d.d. scored only 66 points on their technical solution, which brings their overall solution under big question, since the Case Study from tender is not showing the real picture of Agency's infrastructure and the demands of the Agency. From this perspective and based on our past experience, we advise the Agency to reconsider, if offered solution of Informatika d.d. is the right fit for the environment of the Agency.

Additionally, based on our good insight on the market, we legitimately estimate that the tender of the Informatika d.d. does not fulfil not only technical requirements, but also personnel requirements, **security policies requirements** (ISF implementation plan) and references as set in the tender documentation. Therefore, we would kindly like to ask to access to tender documentation of the Informatika d.d. in order to clarify this issues. We believe such a clarification would be in the interest of all parties involved.

Ad3)

Regarding our **financial proposal**, we wish to explain that our expectations were (based on our experience from previous engagement for FWC ACER/OP/MMD/12/2013) that we will be invited to the second stage of the procedure, where we will receive the final technical requirements and will be given the chance to form the final price in our final tender submission.

Nevertheless, we wish to further explain that the scenario upon the economics were evaluated requested 600 man days to be included and divided amongst particular professional profile levels. The scenario upon the economics were evaluated requested 600 man days to be included and divided amongst particular professional profile levels. In this matter we have to emphasise that the proposed technical solution includes significant level of automation and work optimisation which was gained through the current active engagement in managing the same environment as it is the subject of this public tender. Based on that, we argue that we would need significantly less man days for establishment and delivery of the services in the scenario than any other competitor, so we deem unfair and discriminatory to request and set as mandatory for all tenderers to include the same predefined amount of man days in the calculation. In our case, allowing us to include in the calculations the amount of man days we deem appropriate would result in significantly lower total price, especially for the long term calculation.

Based on our assumption and experience we already have with the Agency ACER, we estimate the following:

2 years:

Qty	Tender Spec
20	A-level profile expert working off-site
50	A-level profile expert working on-site
20	B-level profile expert working off-site
50	B-level profile expert working on-site
20	C-level profile expert working off-site
50	C-level profile expert working on-site

1 year:

Qty	Tender Spec
20	A-level profile expert working off-site
30	A-level profile expert working on-site
20	B-level profile expert working off-site
30	B-level profile expert working on-site
30	C-level profile expert working off-site
20	C-level profile expert working on-site

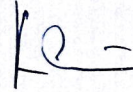
When forming our initial price, we have taken into account that ACER is currently holding 30+ NRA contractors that are generating approx. 600GB of traffic/day. Based on these facts, we have also proposed equipment that is able to cover all business demands for the next 4 years.

From your notification ACER/2016/AP/sv/mv/421 dated 22 September 2016 it is evident that the tender of Informatika d.d. was selected due to the offered price which amounted to EUR 1,334,792.40. This appears to be abnormally low tender price, taking into account the requirements set by the Agency in the tender documentation. As deriving from the Directive 2014/24/EU of the European Parliament and of the Council on public procurement, tenders that appear abnormally low in relation to the works, supplies or services might be based on technically, economically or legally unsound assumptions or practices (Recital 103). In our view the tender of Informatika d.d. (should be questioned as abnormally low by the Agency, especially if considered what was said above in Ad 1). Namely, the Informatika d.d. might have the hidden motives for offering unusually low tender price for the contract, as it would gain access to the data of its competitors which by far exceed the financial benefits of the awarded contract. It is not to be neglected, that the Agency estimated the budget for this tender at EUR 6.000.000,00. The selected tender is more than 4,5 (!) times lower than the budget estimated by the Agency. In our view, in such an important tender procedure, when the subject of the contract is essential for the work quality of the Agency, the price should not be the prevailing criteria for the award of the contract, especially if the price appears to be abnormally low.

Conclusion

Considering all of the above, we believe that the Agency should review the decision, to exclude the tenderer Informatika d.d. from the tender procedure, and continue the tendering procedure by inviting Telekom Slovenija, d.d. to a negotiation dialogue.

Kind regards,



Business Account Sales Director

Gorazd Klemenčič

Ljubljana, 23 September 2016

