



Date: Sep 2, 2009  
No: 090-78/2009

The Information Commissioner, by official duty and through the authorised public officer, Nataša Pirc Musar, pursuant to Article 2 of the Information Commissioner Act (Official Gazette of the RS, Nos. 113/05 and 51/07-ZUstS-A, hereinafter: ZInfP), Paragraphs 3 and 4 of Article 27 of the Act on the Access to Information of Public Character (Official Gazette of the RS, No. 51/06 – Official Consolidated Text and 117/06 – ZdavP2, hereinafter: ZDIJZ), and Paragraphs 1 and 2 of Article 251 of the General Administrative Procedure Act (Official Gazette of the RS, No. 24/06 - Official Consolidated Text, 105/06 – ZUS-1, 126/07 – ZUP-E, 65/08-ZUP-F, hereinafter: ZUP), in the appeal of the company **ELSA Gornja Radgona d.o.o., Šlebingerjev breg 15, Gornja Radgona, duly represented by its attorney-at-law Janez Tekavc, MA, Hacquetova 8, 1000 Ljubljana** (hereinafter: the Applicant), **against the Decision of Elektro – Slovenija d.o.o., Hajdrihova 2, 1000 Ljubljana No. 759/820/vv, of May 20, 2009** (henceforth: the Body), in the case of accessing information of public character, by official duty issues the following

### DECISION

1. Appeal against the Decision No. 759/820/vv, of May 20, 2009 is sustained and the contested Decision is annulled. The Body is obliged to provide the Applicant with copies of the following documents within 15 days from the receipt of this Decision:
  - Document supporting the references of the actual contractor (2 documents);
  - Document supporting the references of the manager responsible for works of September 22, 2009 (1 page);
  - A nominative list of individuals (2 pages) of September 22, 2009 whereat the Body is obliged to conceal all data in the third column of the table (born) on the second page of the document;
  - A Form "Specification of the Contractual Price – Annex 1 - (page 19/26 of the offer – 1 page);
  - Auditor's opinion of September 25, 2009 (2 pages);
  - A list of machinery whereat the Body is obliged to conceal all data from the second to fifth column of the list (data on the type of a machine, equipment, means of transport, data on the make, number and type of ownership);
  - The text of Article 15 of the contract enclosed to the bid;
  - The text of Article 15 of the concluded contract whereat the Body is obliged to conceal the name and surname of the individual stated in paragraph 3 of Article 15 of the concluded contract (line 9 of Article 15 of the concluded contract).
2. The reminder of the request is rejected.
3. No extra costs in this procedure are noted.

### REASONING:

On April 1, 2009 the Applicant filed a request at the Body to access information of public character, namely the Applicant requested copies of the tender documentation, bidding documentation of the company Elektroservisi d.d., Dobrave 6, 1236 Trzin and the contract concluded between the Body and the company Elektroservisi d.d. with which the Body awarded the company Elektroservisi d.d. the implementation of works on the 2 X 110 kV Velenje Šoštanj overhead power line OPPC conductor. Subordinately, in the event the contract did not exist, the Applicant requested a copy of a purchase order or purchase orders or other documents pursuant to which the company Elektroservisi d.d. is performing the aforementioned works. In the event the documentation proved extremely extensive, the Applicant requested access to requested documents and a possibility of subsequent definition of copies. On April 23, 2009 the Body with a letter No. 614/240/BT informed the company Elektroservisi d.d. on the access to the requested documents granted to the Applicant, namely on May 20, 2009 at 10:00 and invited the company Elektroservisi d.d. to be present in order to protect its business secrets. At the same time the Body appealed to the company Elektroservisi d.d. to inform them in writing as to which parts of the bid they do not allow access to.

With the letter No. 622/240/BT of April 24, 2009 the Body informed the Applicant about the day when the Applicant may access the requested documents.

Upon accessing the offer on May 20, 2009 minutes No. 240/BT/09 were taken indicating that the Body, in the presence of the representative of the company Elektroservisi d.d., enabled the Applicant to access tender documentation 240/BT/202/08, offer No. 176/08 MP of September 15, 2008 appertaining to the bidder Elektroservisi d.d. and contract No. 840/2008 of October 3, 2008. According to the proscription imposed by the representative of the company Elektroservisi d.d. access to the following parts of the bid was not allowed:

- documents supporting bidder's references,
- documents supporting the references of the manager responsible for works,
- a nominative list of individuals,
- time schedule,
- tender proforma invoice – price specification,
- auditor's opinion,
- a list of machinery,
- Article 15 of the contract (both concluded and the one enclosed to the bid to tender).

The content of the minutes indicate that the Applicant's authorised person requested access to the entire documentation; however, the Body did not allow such access based on the letter sent by the company Elektroservisi d.d.. The Applicant's authorised person requested a written decision issued pursuant to the provisions of the ZDIJZ, which would indicate part in which the request was denied and which would contain all elements prescribed by the ZDIJZ. In order for the decision to be prepared pursuant to the ZDIJZ, the access was discontinued and resumed after the decision had been served to the Applicant's authorised person.

Upon accessing the documentation the company Elektroservisi d.d. presented "Authorisation for representing the company at the access to bidding documentation No. 2-191/09 of May 19, 2009", indicating that the company does not allow access to the aforementioned documents enclosed to tender documentation submitted at the open call for tender by the company Elektroservisi d.d.

In relation to the aforementioned request presented by the Applicant's authorised person the Body produced a document No. 759/820/vv of May 20, 2009, entitled »Decision« which was also served to the Applicant's authorised person at the access to the documentation. In the said Decision the Body points out that the Applicant is not allowed access to the aforementioned documents pursuant to the letter No. 2-191/09 of May 19, 2009 sent by the bidder, i.e. the company Elektroservisi d.d., the document does not contain any substantive explanation.

The Applicant appealed against the Body's Decision within the legally prescribed time. In their appeal the Applicant indicates that the Body invited them to access the requested documents whereupon the Applicant was confound with the Decision that the Body would not allow access to the entire documentation but limit such access. Upon the Applicant's special request the Body than issued a Decision which is not substantiated given that the said Decision does not contain reasons why the Applicant was denied access to the documentation.

Furthermore, in their appeal the Applicant indicates that the contested Decision was signed by Milan Jevšenak, MSc, who is entered into the Court Register as a representative. The Applicant indicates that the applicable Companies Act (Official Gazette of the RS, No. 42/2006 with amendments and supplements; henceforth: the **ZGD-1**) does not recognise the notion representative; therefore, it remains unclear which authorisations such person holds in the legal transactions. Undoubtedly, such person cannot be considered a principal of the Body which in the case of the companies performing public service – in the Applicant's view – could be equal to managing director, general manager, management... The Applicant thus believes that the Decision was issued by the person who is not authorised to perform such acts and the Applicant thus proposes that also due to the said reason the court of second instance annuls the Decision *ab initio*.

The Applicant believes that the Body does not hold any rights to invite the contractor of public procurement before the examination of the documents to point out which parts of documentation such contractor allows access to. Moreover, the Body has no right to invite the contractor of public procurement to be present at the examination of the documentation. However, the Body did just that and engaged the entire commission which conducted the public procurement and claimed that the said commission is also responsible for conveying information of public character. In Applicant's view the procedure of public procurement with the award of contract on the implementation of public procurement ended. Consequently, the powers of the commission

which was in charge of the said public procurement also ended. The Applicant requested access to the documentation pursuant to the ZDIJZ and not pursuant to the Public Procurement Act (Official Gazette of the RS, No. 128/2006, 16/2008; henceforth the ZJN-2); consequently, in the case of the said access to the documentation the Body should have acted in line with the provisions of the ZDIJZ.

The Applicant believes that the provisions of the ZDIJZ in the case of the implementation of public procurement procedure do not apply only in the period of reaching a decision on the award of the public procurement. In the concrete case the Decision had been reached well in advance of the access to the documentation; furthermore, the contract with the selected contractor had also been concluded before the access.

Moreover, the Applicant believes that pursuant to the provisions of the ZGD-1 the documents may not be classified as business secret with a company's subsequent decision since such an act would annul the supervision function over the work of the public service holder since such holder of public service would alone or in co-operation with the providers of public procurements which the holder awards define the level of public supervision over their operations by selecting data which such holder would allow access to. Subsequent classification of a particular part of documentation as business secret is in the view of the Applicant inadmissible also pursuant to the rules and regulations of the public procurement given that Article 82 of the Public Procurement Act in the fields of water, energy, transport, and postal services (Official Gazette of the RS No. 128/2006, 16/2008; henceforth the ZJNVETPS) does not allow the documentation to be supplemented or completed save for the elimination of formal errors, which the classification of parts of documentation as business secret does not belong to.

The Applicant believes that the Body should not have asked the contractor about the eventual existence of data in the bid, i.e. data which could represent business secret pursuant to the second paragraph of Article 39 of the ZGD-1 (i.e. objective criteria), but would need to decide at its own discretion. The Applicant believes that the requested data does not fulfil the terms and conditions to be classified as business secret, since it involves data on meeting the terms and conditions of public procurement which was carried out in an open call, i.e. publicly and this data was not classified as business secret in the said procedure.

The authorised person invited the Body with a letter no. 090-78/2009/3 of August 15, 2009 to submit contestable documentation which the authorised person received on June 22, 2009.

The authorised person invited the company Elektroservisi d.d. with his letter no. 090-78/2009/2 of June 15, 2009 to join the appeal procedure as an accessory intervenor and define whether the requested documents may represent for the company an exception from the free access to public information and if such is the case to provide explanation. At the same time the authorised person invited the company to express its view whether it allows the Applicant to access these documents. On June 24, 2009 the authorised person received from the authorised person of the company Elektroservisi d.d. a letter in which *inter alia* the company states that it does not know which procedure of accessing information of public character is in question and it is thus asking for additional explanation. The authorised person sent the company's authorised person an additional explanation on June 26, 2009. On July 7, 2009 the authorised person received a letter sent by the authorised person of the company Elektroservisi d.d., with which the company entered the procedure as an accessory intervenor. In its letter the accessory intervenor indicates that the Applicant had an opportunity to co-operate in the procedure provided by the special law regulating the field of public procurement and in which access to bidding documentation of the accessory intervenor had been made possible. The accessory intervenor believes that the Applicant – in the event the Applicant believes their rights have been breached – has a possibility to appeal, i.e. file a claim for a review before the National Review Commission; however, the Applicant failed to use such instance.

The accessory intervenor believes also that in the case of this particular request issued by the Applicant, a principle of *»ne bis in idem«* has been breached since the Applicant applied the same legal redress in the procedure of filing public procurement and that the Applicant now tries to access the same information via other legal grounds which in the view of the accessory intervenor proves inadmissible given that pursuant to the legal principle *»ne bis in idem«* it is not allowed to decide on the same matter twice.

The accessory intervenor insists that the requested documents undoubtedly represent a business secret and are also subject to personal data protection and that the disclosure of such documents would provide a competitive advantage to an unauthorised person who would dispose with such information. The accessory intervenor insists that the data requested by the Applicant represents data the disclosure of which would cause a considerable damage to the company if made available to an unauthorised person. The extensive praxis of

the National Review Commission bears witness to the issue in question. Undoubtedly, price specification represents business secret to which the access is not allowed during the public procurement procedure. Potential bidders in these procedures may only learn the price per unit and the total price which the Applicant was acquainted with. Furthermore, a list of machinery is unquestionably business secret since it is matter of fixed assets that the accessory intervenor disposes with and which would be used to perform a particular public procurement.

In the opinion of the accessory intervenor the data on references indisputably indicates the business clients the accessory intervenor co-operates with, i.e. their suppliers, which buildings the accessory intervenor performed works on, rendered services and/or supplied goods. The same hold truth about the references of the manager responsible for works. A nominative list of individuals means that regardless of the fact whether the workers are permanently employed or co-operate on the basis of a signed contract, disclosure of such list would represent a breach of the personal data protection and a consent of each individual would need to be obtained as to whether such individual allows their personal data to be disclosed or not. Time schedule indicates a plan of works implementation of which also represents competitive advantage given that the accessory intervenor is a producer and executor of works and they have invested in their development a number of years and preparations as well as assets in order to prepare bids pursuant to the procedure and in the manner as requested by the principals and at the same time by fulfilling the criteria achieve the lowest possible price and meet also other terms and conditions set forth by the principal in the public procurement procedures. The accessory intervenor points out to the extensive praxis of the National Review Commission which the Information Commissioner should perform a review before reaching a decision on the matter in question.

The accessory intervenor indicates that the requested data is classified as business secret also in their business records with appertaining decisions. Moreover, in the public procurement procedure certain data may be classified as business secret on the grounds of competitive advantage on the market.

The Applicant believes that the Information Commissioner should ask the Body to provide the entire documentation related to the Applicant's request and present the accessory intervenor the Applicant's appeal. Consequently, the Information Commissioner inspected and established that the appeal had not actually been presented to the accessory intervenor. The Information Commissioner thus immediately sent the appeal to the accessory intervenor's authorised person with the letter no. 090-78/2009/8 of July 7, 2009, and extended the deadline to the accessory intervenor for their eventual additional reasoning for additional 5 working days.

On July 16, 2009 the je Information Commissioner received another letter sent by the accessory intervenor in which the accessory intervenor additionally states that they had been rejected a possibility to participate in the procedure in the first instance and they consequently did not prove legal grounds for classifying requested documents as business secret. The fact is that the accessory intervenor holds a decision with which the accessory intervenor adopted rules on protecting personal data and other official and business secrets and non-compete obligation. All data showing technological processes, employees' structure, financial structure and assets, price specification, contractual or business partners and concluded contracts with them, as envisaged in the aforementioned rules, represents the accessory intervenor's business secret. All requested data to which the Applicant's access had been rejected represents data classified as business secret pursuant to the aforementioned decision. According to the opinion of the accessory intervenor this data represents business secret regardless as to whether the public procurement procedure is completed or not.

The accessory intervenor does not agree with the Applicant's claim that business secret needs to be classified as such in the bid and that subsequent classification of particular documents as business secret is inadmissible. If the Applicant believes that rules and regulations of public procurement procedure were breached, it is the accessory intervenor's opinion that the Applicant should have applied legal protection in the said procedure and instigated review before the National Review Commission. The accessory intervenor believes that the Information Commissioner is not competent to decide in cases related to legislation covering the field of public procurement and to decide on legal questions and grounds related to the ZJN-2 or the ZJNVETPS.

On July 16, 2009 the accessory intervenor sent to the Information Commissioner by fax a copy of the decision on setting forth the Rules on the protection of personal data and other official and business secrets and non-compete obligation of the company Elektroservisi d.d. adopted by the management board to which the accessory intervenor refers to in their letters and thus set forth the method of classifying and protecting business secrets in the company.

**The appeal is duly substantiated.**

The Information Commissioner hereby explains that pursuant to the provisions of Article 247 of the General Administrative Procedure Act (hereinafter: the ZUP) that the Information Commissioner as the second instance authority shall review the Decision in the part which is contested by the appellant. Furthermore, the Information Commissioner shall review the Decision within the scope of the appellant's allegations and, *ex officio*, examine whether the first instance proceeding was subject to substantial violations and whether material law was infringed.

## **1. General on the procedure of first instance**

### **1.1. Component part of the Decision in the administrative procedure**

With the contested Decision the Body decided on the Applicant's appeal with which the Applicant's request for obtaining access to documents was partly rejected and in its operative part exhaustively stated documents access to which was rejected to the Applicant. In doing so, the Body – as the main and only reason for the rejection – indicated that the Body decided in such a manner pursuant to the written request sent by the Applicant, while the Body failed to indicate substantial reasons for rejecting the request.

Primarily, the Information Commissioner establishes that the Body, without concretely declaring its position towards the documents subject matter of its review, referring to the Applicant's written request, rejected the Applicant's request. The Information Commissioner thus establishes that the reasons for the Decision arising from the operative part of the contested Decision are not stated. At the same time, the Body with its Decision decided also on the appointment of the Body's authorised person which was not the subject of Applicant's request. Therefore, the Body in first instance decided over the Applicant's request.

The Information Commissioner explains that the Decision cannot be reviewed if such decision does not have reasoning or essential parts of the reasoning which pursuant to the law it should have since it is not possible to determine that the appeal is substantiated – the same is prescribed by court practice, see the ruling of the Supreme Court of the Republic of Slovenia No. I Up 494/2003, VS15303 (more: General Administrative Procedure Act with Commentary, the editors Prof. Dr. Tone Jerovšek and Prof. Dr. Gorazd Trpin, Inštitut za javno pravo, 2005, Commentary to Article 237 of the ZUP).

The Information Commissioner emphasises that the reasoning of the authoritative decision is one of the principal rules of administrative (process) law in terms of restricting senior power and its misuse. Consequently, the reasoning has been an essential integral part of (formal) legality pursuant to the international standards since 1977 in line with the resolution of the Council of Europe on the Protection of the Individual in Relation to the Acts of Administrative Authorities (Resolution No. 77 (31) on the Protection of the Individual in Relation to the Acts of Administrative Authorities), and today pursuant to the general principles of the Administrative Law as regularly enforced by the Court of Justice of the EC. Furthermore, the right to reasoning could also be deemed as a part of the right to fair trial or procedure pursuant to Article 6 of the European Convention on Human Rights (Council of Europe). The reasoning is not necessary only due to the frequently indicated reason, i.e. that the party may use all legal means and that the appeal or competent body may examine the legitimacy and correctness of contested solution.

Further reasons are as follows:

1. the fact that every legal act is first and foremost intended for a party who has a right to learn about the decision and its underlying reasons (the so-called dialogue with the party),
2. the reasoning gives grounds indicating impartiality of decision-making and objectivity of a decision,
3. obligation to provide reasoning bounds the Body to (more than it would) deeply engage in establishing and proving the actual state and terms and conditions of the material law.

Only the reasoning answers why the Body decided as indicated in the decision (more: General Administrative Procedure Act with Commentary, the editors Prof. Dr. Tone Jerovšek and Prof. Dr. Gorazd Trpin, Inštitut za javno pravo, 2004, Commentary to Article 214).

Pursuant to Article 214 of the ZUP the content of the decision's reasoning needs to contain:

1. explanation of the claims made by the parties and their statements re the facts;
2. established state and evidence which the said state rests upon;
3. underlying reasons decisive for reviewing particular evidence;
4. statement on provisions of the rules and regulations which the said decision rests upon;
5. underlying reasons which on the basis of established actual state dictate such decision, and
6. underlying reasons due to which the claims of the parties were not sustained.

The Information Commissioner establishes that the reasoning of the Decision in question is overly restricted and without any actual content, the Body failed to establish the actual state since it did not make its declaration about each and every document and explain reasons why these documents represent exception to freely available information of public character; consequently, the reasoning of contested Decision is thus incomplete. The Information Commissioner, therefore, establishes that such decisions cannot be reviewed at all since the reasoning of the contested Decision remained at the declaratory level which does not permit reviewing (Item 7 of Paragraph 2 of Article 237 of the ZUP), which represents material breach of the provisions of the Administrative Procedure and thus needs to be annulled *ab initio*.

Since the Information Commissioner as the Body of second instance, similar to the body of first instance, is obliged to respect fundamental principles of the Administrative Procedure, the Information Commissioner is obliged to respect also the principle of economy of the procedure as set forth in Article 14 of the ZUP. Therefore, the procedure needs to be run quickly, which means the slightest delay possible for the parties and other intervenors involved yet in the way that everything necessary is supplied in order to establish the actual state, preserve the rights and legal benefits of a party and issue lawful and proper decision. Since the contested Decision cannot be reviewed due to unfounded reasoning, the Information Commissioner established that the deficiencies of the procedure of first instance would be eliminated faster and in a more economical way by the Information Commissioner so the Information Commissioner annulled the Body's Decision *ab initio* and solved the matter by herself as explained as follows.

#### **1.2. The right to access other bids pursuant to the ZJN-2 and the right to access information of public character pursuant to the ZDIJZ**

Second and third sentence of Paragraph 6 of Article 22 of the ZJN-2 prescribe that the principal needs to allow the bidder, at their request, to access other offers and other documentation after the decision on the award of contract has been reached. The provisions of the law regulating access to information of public character regarding the access to documentation on public procurement in time of opening the offers until the issue of the decision on the award of contract, do not apply. Considering the aforementioned diction it was necessary to determine when the provisions of the ZDIJZ commence to apply regarding the access to documentation on public procurement. Time limit is thus the issue of the decision on the award of contract.

Paragraph 1 of Article 79 of the ZJN-1 prescribes that after the bids have been reviewed and assessed the principal needs to reach the decision on the award of contract within a reasonable time, which should not be longer than 60 days. The principal needs to inform the bidders about their decision by mail, fax or email. After the offers have been assessed, the principal selects the most favourable or cheaper provider. The principal expresses their decision on selected bidder in their decision on the award of contract (more Public Procurement Act with Commentary, Margit Čampa MA et al., Official Gazette of the RS, Ljubljana, 2007, p. 295).

Taking into consideration second and third sentence of Paragraph 6 of Article 22 of the ZJN-2, the provision of the ZDIJZ commence to apply simultaneously with the bidder's right to access other bids and other documentation pursuant to the ZJN-2. The Information Commissioner establishes that the diction of the provision is clear and that the provisions of the ZDIJZ commence to apply as of the day the decision on the award of contract has been reached. At the same time, i.e. as of the day the decision on the award of contract has been reached, bidders have a right to request access to other offers and other documentation pursuant to the provisions of the ZJN-2.

Based on the publication on the Portal of public procurements No.: JN8752/2008 of October 14, 2008, it may be concluded that the Body reached the Decision on the award of contract on September 30, 2008 while the Applicant filed an appeal on April 1, 2009. Considering the fact that the Applicant is also a bidder, it may be concluded that the Applicant could have requested access to the offers also pursuant to Article 22 of the ZJN-2 as well as pursuant to the ZDIJZ. However, it unambiguously derives from the Applicant's appeal that the Applicant expressly referred to the ZDIJZ; therefore, their appeal needs to be tried pursuant to the ZDIJZ.

The ZDIJZ defines access to the information of public character in Article 25 by stating that the body shall forthwith enable the applicant to get acquainted with the contents of the requested information by way of ensuring them a transcript, a copy or electronic record of such information. If the applicant requests the information to be submitted to them for consultation, the body is obliged to ensure the applicant (the) consultation in such a manner that the applicant has enough time to get acquainted with the contents of the information. Therefore, the body cannot select the manner in which the applicant shall be enabled access to information yet the body needs to enable access in such a manner as requested by the applicant. Failing this, the applicant has – pursuant to Paragraph 2 of Article 27 of the ZDIJZ – the right to appeal when the information received is not in the form requested.

In the case in question the Applicant requested copies of requested documentation and only in the event the said documentation was overly extensive, the Applicant requested access to the said documentation with a possibility to make photocopies, while the Body – acting contrary to the Applicant's request – enabled the Applicant only to access the documentation by way of which the Body breached rules of the procedure.

Reviewing the entire procedure in first instance and by establishing that the Decision cannot be tried (as already explained hereinabove), the Information Commissioner could not actually establish which substantive law the Body applied when reaching a Decision in first instance. The Information Commissioner assumes that the Body enabled access to the Applicant pursuant to Article 22 of the ZJN-2 yet in spite of this issued the Decision by referring to the ZDIJZ.

### **1.3. Person competent to decide pursuant to the ZDIJZ**

In their appeal the Applicant states that the Decision had not been issued by a competent person to decide pursuant to the ZDIJZ. In line with Article 9 of the ZDIJZ the body is obliged to appoint one or more officials competent for the transmission of public information. By accessing the web site of the Agency of the Republic of Slovenia for Public Legal Records and Related Services the Information Commissioner established that a person issuing the contested Decision is also entered as a representative of the Body in the Slovenian Business Register, namely according to the content of entry into the Slovenian Business Register, the said person represents the Body independently<sup>1</sup>. Considering the aforementioned, regardless of the type of representative (legal, statutory, authorised,...), it means that such person has all authorisations to decide independently on issues of the Body. Consequently, according to the Information Commissioner's opinion this means that the said representative may independently decide on issues of accessing public information.

### **1.4. Accessory intervenor in the procedure**

In the appeal procedure the Information Commissioner established that the company Elektroservisi d.d. had been invited to the procedure of first instance, namely by enabling the party to participate at the access where the said party could protect their rights and legal benefits which the company also did. Pursuant to the aforementioned it means that the company Elektroservisi d.d., in slightly unusual manner yet still, was enabled to participate in the procedure of first instance as an accessory intervenor.

In the procedure of accessing information of public character pursuant to a written request, the provisions of the ZUP apply subsidiarily (Paragraph 2 of Article 15 of the ZDIJZ). Due to the said reason the Body needs to ensure that the procedure is attended by all those the rights and legal benefits of who the Body's decision could

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<sup>1</sup> [http://www.ajpes.si/prs7podjetjeSRG.asp?s=1&e=152588&id\\_sklopa=3](http://www.ajpes.si/prs7podjetjeSRG.asp?s=1&e=152588&id_sklopa=3)

influence on, i.e. all parties the rights and legal benefits of who would be affected by sustaining the request to access public information and enable them to participate in the procedure.

Due to eventual impact of the Decision on the rights and legal benefits of the company Elektroservisi d.d., the Information Commissioner also invited the company to apply as an accessory intervenor in the procedure or invited the company to define whether the requested data represents for the company any of the exceptions set forth in the first paragraph of Article 6 of the ZDIJZ. The authorised person of the company Elektroservisi d.d. send the Information Commissioner the Management's Decision in which on January 1, 2008 the company's General Manger adopted Rules on protecting personal data and other official and business secrets and non-compete obligation No.: 1-2/IH/BV and the reasoning declaring that the company is entering the procedure of second instance as an accessory participant and insists on the classifying the requested documents as business secret.

## **2. Information of public character**

The ZDIJZ represents concretisation of constitutional right to access information of public character defined in Paragraph 2 of Article 39 of the Constitution of the Republic of Slovenia (Official Gazette No.: 33/91-I with amendments; henceforth the Constitution) and governs the procedure which enables each and everyone free access and repeated use of public information used by state authorities, local community bodies, public agencies, public funds and other persons of public law, holders of public authorisations and public service providers. The ZDIJZ regulates a wide spectre of public sector's operation, not only in part when a wide circle of public sector bodies are encompassed, i.e. bodies which need to follow the provisions of the law in first instance but also in the segment of the definition of the public information itself. The purpose of the ZDIJZ, deriving from Article 2, is to ensure that the work of the bodies is public and open, and to enable natural and legal entities to exercise their rights to acquire information whereat with a view to achieve the aim of this Act, the bodies shall endeavour to inform the public on their work to the greatest extent possible. Pursuant to Paragraphs 1 and 2 of Article 5, the ZDIJZ enables legal entities or natural persons to have free access to public information regardless of the legal interest. The principle of free access means also that all information appertaining to all parties involved are available to everyone. The burden of proof thus lies on the body, i.e. to prove that particular information are excluded from free access, namely because the information is not deemed as public information, or when the criteria for public information are fulfilled yet access to such information may be denied due to one of the legally defined exceptions pursuant to Paragraph 1 of Article 6 of the ZDIJZ.

Pursuant to the provision of the Paragraph 1 of Article 4 of the ZDIJZ the public information shall be deemed to be information originating from the field of work of the bodies and occurring in the form of a document, a case, a dossier, a register, a record or other documentary material (hereinafter referred to as "the document") drawn up by the body, by the body in cooperation with other body, or acquired from other persons.

It also derives from the aforementioned Paragraph 1 of Article 4 of the ZDIJZ that the public information is defined with three basic criteria:

- information originating from the field of work of the body (information related to the work of the body and which the body obtained within the frame of its regulator competences),
- the body disposes with such information,
- information is stored in material form.

The body needs to draw up the public information during its work and in procedures which the body is authorised for pursuant to general rules and regulations. The information thus needs to be related to the field of work of the body. However, it is not necessary that the body has drawn up the information by itself. The information may also be acquired from other persons, i.e. even private-law bodies who are not deemed the bodies within the meaning of Article 1 of the ZDIJZ. It is only important that the body acquired the information within the scope of its competences.<sup>2</sup>

The public information is represented only by a document which already exists, has been drawn up, or a document which the body has already drawn up or acquired within the frame of its work. The bodies, governed by the ZDIJZ, are obliged to enable access only to already existing information and are not obliged to draw up a new document, collect information, perform researches or process data in order to meet the applicant's request.

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<sup>2</sup> see PhD Thesis written by Ms Urška Prepeluh, The Right to Access Public Information, Ljubljana 2004, p. 148



Exception to the aforementioned is information stored in computer databases created in relation with the body's activity. The obligation to provide information, to wit, relates to the so-called "raw" information<sup>3</sup>.

Initially, the Information Commissioner was thus determining whether the information in question originates from the field of work of the Body. In the case in question the Applicant requested access to tender documentation, bidding documentation of the company Elektroservisi d.d. and contract concluded between the Body and the company Elektroservisi d.d., on the basis of which the Body awarded the company Elektroservisi d.d. the contract on the implementation of work on the facility 2 X 110 kV Velenje Šoštanj overhead power line OPPC conductor. The Information Commissioner established that all documents requested by the Applicant appertain to the field of work of the Body since they relate to public procurement which the Body, regulated by the ZJN-2, performed pursuant to the applicable legislation in the field of public procurement.

The Information Commissioner establishes that the Body performs compulsory public utility service and is thus a public utility company and as such legal entity of public law and it is thus – pursuant to Article 1 of the ZDIJZ obliged to provide information of public character. The aforementioned fact was not contestable for neither of the parties during the procedure since none of the parties in this procedure appealed.

In no instance the Body denied that it disposes of the requested documents and that such documents really exist. After all, the Body provided the Information Commissioner, at its explicit request, all the requested documents at once.

### **3. Exceptions to the free access**

If the requested documents contain public information, each and every person has access to such information pursuant to the provisions of the ZDIJZ. The only reason for denying access to such information might be the existence of the exceptions set forth in the ZDIJZ. The Body may in whole or partly reject the Applicant's request if it establishes that the requested datum or document represents any of the exceptions set forth in Paragraph 1 of Article 6 of the ZDIJZ. The said Paragraph defines eleven exceptions when the body may deny access to requested information.

#### **3.1. Business secret**

Pursuant to the principle of transparency the ZJN-2 expressly prescribes the public character of particular documents; therefore, the exception on the basis of business secret does not apply for such documents pursuant to Paragraph 3 of Article 39 of the Companies Act (henceforth ZGD-1), which is also important for determining business secrets. *Hence the price indicated in the offer may never be classified as business secret which in the event of criterion of economically most advantageous offer means the data indicating the evaluation or categorisation of such offer within the frame of other criteria since already the ZJN-2 directly prescribes the public character of this data pursuant to the principle of transparency.*

Furthermore, in the Information Commissioner's view data appertaining to selected bid indicating fulfilment of terms and conditions may not be classified as business secret. In the event the offer fails to meet the terms and conditions, such offer would need to be eliminated; hence, all data representing the criteria as well as the terms and conditions needs to be freely available in the procedure of accessing public information. The public needs to be able to check – via access to public information – whether the selected offer has met all the terms and conditions and criteria set by the principal. In such a way supervisory function of the right to access public information is fulfilled thus preventing poor management and errors made during the exercise of power, among others also the errors in the procedures of awarding public procurements.

The Information Commissioner additionally stresses that business secret as an exception pursuant to Article 6 of the ZDIJZ needs to be interpreted restrictedly, i.e. by taking into consideration the principles of transparency, equality, competition as well as, of course, compulsory publicity of some documents (as prescribed by law). Especially due to Paragraph 3 of Article 39, it needs to be made clear that in some cases also a company is not entitled to classify particular data as business secret with a written decision, i.e. subjectively.

In addition the National Review Commission (henceforth the DRK) with its decision No.: 018-22/2006-33-554 decided in the case in question that the principal is not necessarily bound by the bidder's express classification

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<sup>3</sup>see Comment on the Access to Public Information Act, doc. dr. Senko Pličanič with co-authors, Inštitut za javno upravo pri Pravni fakulteti v Ljubljani, 2005, p. 83

which bidding documents are considered business secret and which of public character. On one hand the principal is obliged to protect as classified all those bidding documents which might not be labelled as classified yet represent objective business secret; however, on the other hand it is obliged to enable competitive bidders access to all those bidding documents which the bidder labelled as classified yet they contain data which pursuant to the law are deemed as public or represent breach of law or good business practice. The DRK decided (in more cases) that not only data disclosed at the public opening of bids but also data pursuant to which the principal establishes the fulfilment of the requirements deriving from tender documentation and assesses the offers and in line with the criteria from tender documentation selects the most advantageous bid represent the public part of the bid.

Since the accessory intervenor in the procedure referred to the existence of business secret as a reason for rejecting the Applicant's request to access some of the requested documents, the Information Commissioner reviewed these documents firstly pursuant to Article 39 of the ZGD-1.

The Information Commissioner thus reviewed whether all requirements set forth by the ZGD-1 for business secret as per subjective criteria pursuant to Paragraph 1 of Article 39 of the ZGD-1 are fulfilled. The said Paragraph prescribes that data defined as business secret by a company with a written decision is deemed as business secret. Shareholders, employees, members of boards and other persons obliged to protect business secret need to be informed of such decision.

In the case in question the Information Commissioner reviewed minutes on access to the bid No.: 240/BT/09 of May 20, 2009, where the Body indicated that the representative of the company Elektroservisi d.d. does not allow access to exhaustively indicated parts of requested documentation. Pursuant to a written prohibition of the company Elektroservisi d.d. the Applicant was rejected access to the indicated documents. The document which the Body refers to in its rejection and which the company Elektroservisi d.d. submitted during the access to the offer performed by the Applicant, contains only a statement that access to the relevant documents is denied. The date on the document is May 19, 2009, which is the day before the access. On July 16, 2009 the authorised person of the company Elektroservisi d.d. provided the Information Commissioner with the decision issued by the management board with which the company Elektroservisi set forth the Rules on protecting personal data and other official and business secrets and non-compete obligation (henceforth also referred to as the Rules). In Article 7 the Rules expressly prescribe that data is defined as business secret of the company as a rule at the commencement of a particular assignment or at the beginning of its collecting or processing. Furthermore, Article 8 sets forth which company's data is deemed as business secret. Among others, data relating to market position or company's activity is deemed as business secret, namely presence of the company on domestic and foreign market, customers and suppliers, planning and sales calculations, financial position and activities (financial transactions, debts and receivables, liquidity), investments, investment elaborates, analyses and project solutions, drawings, operating documentation, employees' and shareholders' personal status, bids, pro-forma invoices (price structure) for tenders or public auctions, until the results are published, drafts of particular information, analyses, elaborates, locations where documents containing confidential data and suchlike are stored. Articles 9 and 10 set forth that data defined by managing director or executives is also deemed as business secret. Particular documents deemed as business secret are labelled visibly with label classified. The Information Commissioner establishes that in the subjective manner of deciding upon business secret, i.e. which data shall be deemed classified, the decision rests upon the company. In order for the data to be classified as business secret, the importance of such data for the society is not important yet only the subjective decision of the company to protect particular data as business secret. The beneficiary alone with their actions and at their own discretion label particular data as classified and prohibits its unjust communication. For such criteria to be fulfilled, an expressed decision on which data is deemed as business secret needs to be adopted. Such decision may be set forth in a general act or may be individual.

In the case in question the method of defining data as business secret of the company is primarily set forth in the general act adopted by the company. The said act, as mentioned before, prescribes that the general manager or an executive of the company define the data as classified as a rule at the beginning of an assignment or at the beginning of their collecting and that the documents containing classified data need to be labelled with a label classified. The accessory intervenor submitted a particular act, namely authorisation for representing the company at the access to tender documentation (henceforth also the Authorisation) in which the company sets forth the document which the company does not allow access to (without any explanation). The aforementioned document carrying the date May 19, 2009, which means that the document had been drawn up way before the accessory intervenor submitted their bid to public procurement. As reasoned hereinunder the Information Commissioner could not have taken such document into consideration in her review

on the existence of the decision on defining the business secrets pursuant to the Paragraph 1 of Article 39 of the ZGD-1.

Due to decisiveness and prevention of vagueness the decree pursuant to the Paragraph 1 of Article 39 of the ZGD-1 needs to be adopted in writing. The aforementioned acts, i.e. in our concrete case the Rules and the Authorisation need to contain also data on the manner pursuant to which the company would protect the business secret as prescribed in Paragraph 1 of Article 40 of the ZGD-1. As regards the method of protection it is considered that the act not only sets forth concrete data deemed as business secret but also sets forth who and how such data is stored and who decides on when and how such data is communicated to other persons. All the aforementioned requirements are in whole fulfilled with the said acts. However, the third requirement needs to be added to all the aforementioned requirements, i.e. the requirement regulating all regulatory acts. The decree cannot take a retroactive effect. Breaches of business secret are thus represented not only by the acts which have been as such set forth with a decree (more: the Commentary on the Companies Act, second, amended issue, 1. book, editor Prof. Dr. Marijan Kocbek, GV Založba, d.o.o., Ljubljana, 2002, p. 195-196). In the case in question the accessory intervenor had only adopted the Rules at the time of submitting the tender, i.e. the Rules which failed to define the documentation, enclosed to the bid, as business secret since the said documentation cannot be subsumed under any of the documents set forth in Article 8 of the Rules. The provision of Article 8 of the Rules is too wide to allow such action given that the concrete act was adopted by the general manager a day before intended access to the requested documentation was to be performed. The rule that data needs to be defined and accurately labelled as business secret before it is submitted to third party (in the case in question before the bid had been submitted to public tender), was thus breached. The obligation is each particular business entity is to protect their business secrets by themselves. In the event the business entity fails to do that in due time, such business entity needs to face the consequences of their actions by themselves.

The Information Commissioner believes that definiteness undoubtedly prescribed by Paragraph 1 of Article 39 of the ZGD-1 is not ensured with only a flat-rate and substantially extremely wide listing of documents or data which is deemed as business secret under the Rules. Such division (see the Commentary on the ZGD-1, p. 196) only demonstrates variety or diversity of data which may be labelled as classified; however, it does not hold any legal effect.

*Mutatis mutandis* it applies equally for the provision of Paragraph 1 of Article 22 .of the ZJN-2, which prescribes that the principal needs to ensure that all data processed during the public procurement procedure which is labelled as classified by the bidder pursuant to the law regulating the corporate entities is treated as business secret. In the case in question the procedure of awarding the public procurement has already been concluded given that the contract has already been signed with the selected bidder. Therefore, it is contrary to the provisions of the ZJN-2 if it is allowed that the bidder labels documents from their bid as business secret at the time when the bidder has already become the principal's business partner. Such opinion was confirmed by the Constitutional Court of the Republic of Slovenia in its decision under Ref. No.: U 284/2008-35 of May 27, 2009, indicating among others in its reasoning: »The plaintiff submitted the decision adopted on December 22, 2004, setting forth that all data contained in the contract concluded on November 4, 2004 is deemed as business secret. The plaintiff does not object to the conclusion made by the defendant that the decision of December 22, 2004 does not contain the manner for protecting a business secret and that the decision only generally defines business secrets which is contrary to the provisions of the ZGD-1. However, a fact emphasised by the defendant that the plaintiff submitted the decision to the Body as late as on September 10, 2007 in relation with the contract concluded on November 4, 2004 should not be neglected and pursuant to the aforementioned the defendant rightly concludes that the requested document was not protected with the decision in question.«

On the basis of reviewing the documents the Rules and Authorisation, the Information Commissioner established the terms and conditions set forth by the ZGD-1 (Paragraph 1 of Article 39) are not fulfilled.

When verifying the conditions for existence of business secret, it is necessary to take into consideration also Paragraph 3 of Article 39 of the ZGD-1, prescribing that data deemed public pursuant to the law or data on the breach of the law or good business practice may not be classified as business secret.

Paragraph 2 of Article 22 of the ZJN-2, to wit, prescribes that the price indicated in the bid is always considered public data and can – in no event – be labelled as classified. In the event of the criterion of economically the most favourable bid, the data indicating the price or placement of the bid pursuant to other criteria is always deemed public.

Paragraph 6 of Article 22 of the ZJN-2 defines that the entire documentation on awarded public procurement is public as long as it does not contain business secrets or confidential data set forth in this Article. The provisions of the law regulating access to public information as regards access to documentation on public procurement do not apply in time from opening the bids to decision on the award of public procurement.

Regardless of the aforementioned, all data not defined as such with a company's decision is deemed as business secret yet it proves evident that substantial damage would be incurred if disclosed to an authorised person (Paragraph 2 of Article 39 of the ZGD-1). The accessory intervenor refers to such circumstances in their letters. The Information Commissioner reviewed each document separately in order to establish whether the terms and conditions set forth in Paragraph 2 of Article 39 of the ZGD-1 are fulfilled and whether such data would need to be protected as business secret pursuant to objective criteria.

**a) Documents supporting references on the bidder**

Before defining documents as business secret or not a business secret, the Information Commissioner additionally explains that only data which in any way represents a competitive advantage for a company are subject to business secret. However, data which does not influence on the competitive position of the bidder on the market is not deemed as business secret (more: Companies Act with Commentary, GV Založba, Ljubljana, 2002, henceforth: ZGD with Commentary). This needs to be taken into consideration at an important fact that pursuant to the ZJN-2 a greater number of data in the tender documentation taking account of Paragraph 3 of Article 39 of the ZGD, consequently may never be deemed as business secret.

In the case in question the Body set forth the terms and conditions to be fulfilled by the bidders in order to participate in the public procurement tender, namely with the provisions of public tender published on the Public Procurement Portal No.: JN 7469/2008 of September 2, 2008 in Item III. 2. 1.

In the said Item a requisite of one excellent reference of actual contractor is set forth, namely a reference on the reconstruction (by fitting the composite isolation chains) and laying the conduits in three phases on one system while the other system is under voltage on the 110kV overhead power line and higher voltage level in the length of 30 km, in the past three years. Such works needed to be performed in the EU. The bidder should indicate the number of the contract, year of implementation, and the title of the project. The reference needs to be confirmed by the principal. The references in ELES do not need to be confirmed; however, a contract number or order number needs to be indicated.

As regards the references it is only the existence of references and the parts in references which indicate the fulfilment of terms and conditions as well as criteria that are deemed public. The part of references which does not have any influence on the concrete public procurement may be regarded as business secret if the content of data in references meets the conditions for classifying the data as business secret. In order to be able to draw a line between public and classified part of the references each case needs to be reviewed separately, i.e. case by case, due to different and frequently exhaustive requirements set forth by the principal of public procurement when filling out the reference forms, it is impossible to establish clearly in each case.

The Information Commissioner reviewed all documents which refer to documents supporting the bidder's references and established that among all the reference business partners, which the bidder co-operated with, the corporation performing public service (and thus regulated by the ZJN-1) is the only indicated partner. Most of the public utilities are founded pursuant to the Public Utilities Act (ZGJS, Official Gazette of the RS, No.: 32/93 and 30/98, henceforth the ZGJS) in one of the forms of the companies with share capital (see Ivanjko, Organiziranost gospodarskih javnih služb, p. 6, published: Lex localis – revija za lokalno samoupravo, year I, No.: 4/2003, Maribor). Companies regulated with Article 1 of the ZDIJZ are beside other persons of public law also public service providers. Public services in Slovenia are performed in private-law and public-law organisational and legal forms.

Person performing public service and who co-operated with the bidder is – pursuant to Article 1 of the ZDIJZ – obliged to ensure access to public information. Which bidders the public service provider co-operates with in public procurement is definitely information deriving from the field of work of these bodies and thus represents information of public character (e.g. Article 4 of the ZDIJZ). Such data thus represents public information according to the ZDIJZ, and falls also under Paragraph 3 of the Article 39 of the ZGD-1, prescribing that data deemed public pursuant to the law may not be classified as business secret.

Documents requested by the Applicant in this part are – pursuant to the Information Commissioner’s – only documents supporting the fulfilment of terms and conditions on co-operation in the procedure of the award of public procurement. Reviewing the requested documents the Information Commissioner established that the said documents contain only data supporting the fulfilment of the terms and conditions for co-operating in public tender; therefore, the statements of the accessory intervenor that the documents on their references are in whole classified as business secret are not founded. The Information Commissioner agrees that the said documents indicate the business partners the accessory intervenor co-operates with, which companies are their suppliers, which buildings/facilities the accessory intervenor performs works on, services or supplies goods to yet it is important to take into consideration that the accessory intervenor was competing at a public tender where public funds are used and that the principal signing the references (or Elektro Slovenija, where the signature has not been required) had known that it was signing the references for the bidder competing at a public tender. Therefore, the expectation that the data on them being the contracting party of the bidder should be protected is no longer founded. In the case in question the principal himself confirmed the references of the bidder which means that all contracts indicated in the references had been concluded pursuant to the public procurements and their existence cannot be subject to business secret. The publicity of the aforementioned documents is founded also by reasons indicated hereinabove, namely the entity providing the references is a public utility performing public service and such information is deemed as information of public character.

The Information Commissioner thus concludes that the references are in part which confirms the existence of the references public. Moreover, the references are public also in part listing the bidder’s business partners which are public utilities. Data on the names of reference business partners when indicating public utilities is public pursuant to the ZDIJZ as well as the ZJN-2. Due to all the aforementioned reasons the Information Commissioner decided that the Applicant holds a right to access the requested documents as a whole.

#### **b) Documents supporting the references of the manager responsible for works**

The Body set forth the terms and conditions which the bidders need to fulfil in order to be able to co-operate in the public tender on the award of public procurement by publishing the provisions of public tender on the Portal of public procurements No.: JN 7469/2008 of September 2, 2008 under Item III. 2. 1.

The said Item as a condition sets forth also the provision of data on the actual manager responsible for works and the actual head of working group who shall be appointed to implement the relevant works. The manager responsible for works needs to meet the terms and condition set forth in the ZGO-1 and hold experiences in managing works on at least three 110 kV overhead power lines and higher voltage level (with laying of composite isolation chains) of which the length of overhead power lines amount to at least 10 km. The said manager should have performed such work in the area of the EU. The supporting document needs to be confirmed by the principal.

The document requested by the Applicant in this part – pursuant to the Information Commissioner’s view – is only a document supporting the fulfilment of one of the terms and conditions for the co-operation in the procedure of the award of public procurement. Reviewing the requested document the Information Commissioner established that it only contains data supporting the fulfilment of the terms and conditions for the co-operation in the public tender; therefore, the statements of the accessory intervenor that the document on the references of the manager responsible for works is in whole classified as business secret are not founded. The document contains the name and surname of the manager responsible for works, his/her education and projects which he/she co-operated in, which are also the requirements the bidder needed to fulfil in order to meet the terms and conditions. The Information Commissioner agrees that the said document indicates the business partners the accessory intervenor co-operates with, which company is their contracting partner, which buildings/facilities the accessory intervenor performs works on, services or supplies goods to yet it is important to take into consideration that document only indicates the data which the bidder needed to submit in order to fulfil the required terms and conditions. Moreover, also in this case the company providing the reference is a public utility and thus regulated by the ZJN-2 and ZDIJZ so the entire business concluded (including the data on contracting partners) is deemed public. Due to the aforementioned personal data on the manager responsible for works cannot be protected since the indication of such data is one of the terms and conditions of the public tender. Due to these reasons the Information Commissioner decided that the Applicant holds the right to access the requested document as a whole.

#### **c) A nominative list of individuals**

Item III. 2. 1. of the published public tender sets forth the provisions of submitting a nominative list of individuals who shall be working on the facility, their qualifications and duties. A document supporting their experiences on reconstruction of at least a 110 kV overhead power line and higher voltage level needs to be provided.

Also a document requested by the Applicant in this part is – pursuant to the Information Commissioner’s – only a document supporting the fulfilment of terms and conditions on co-operation in the procedure of the award of public procurement. Reviewing the requested document the Information Commissioner established that it only contains data supporting the fulfilment of the terms and conditions for the co-operation in the public tender; therefore, the claims of the accessory intervenor that the nominative list of individuals is in whole classified as business secret are not founded. The terms and conditions of the tender expressly indicate that a nominative list of individuals performing the work on the facility needs to be provided. Due to the aforementioned not only the name and surname but also the personal data on the individuals cannot be protected since the indication of the said data is one of the terms and conditions of the public tender. The data indicated in the third column on the second page of the document needs to be concealed, namely date and place of birth of the workers, since it represents protected personal data as shall be explained hereunder. Due to the aforementioned reasons the Information Commissioner decided as deriving from the operative part of this Decision.

#### **d) Time schedule**

The Body set forth the terms and conditions which the bidders need to fulfil in order to be able to co-operate in the public tender on the award of public procurement by publishing the provisions of public tender on the Portal of public procurements No.: JN 7469/2008 of September 2, 2008 under Item III. 2. 1.

The said Item as a condition sets forth also the provision of dynamic time schedule of the implementation of works in electronic (on CD or discs) and in written form. The time schedule needs to be drawn up within envisaged excavations of overhead power lines indicated hereunder, namely as per particular supply field. Preparation works, replacement of equipment and intersections in particular supply fields need to be made evident.

The document on the time schedule is – in view of the Information Commissioner – a document indicating the strategy of work and business processes of the bidder that had been drawn up on the basis of their business praxis. By disclosing the said document indicating the time schedule the competitive companies would gain access to improvements which the bidder invested into technological processes. The document indicates work planning which means a competitive advantage. The bidder had invested a number of years and practical experiences, preparations and funds to rationally prepare a time schedule of work showing that the bidder can offer the most optimal plan for the realization of the tender service at the most favourable price, i.e. with their staff, logistics, project design, proforma invoice calculation and by using adequate machinery which they dispose of. Disclosure of such delicate business data would – pursuant the Information Commissioner’s view – incur a concrete and substantial damage to the bidder and influence on the competitive position of the company on the market. Pursuant to the Information Commissioner’s opinion such data is to be classified as business secret pursuant to the Paragraph 2 of Article 39 of the ZGD-1, since it is evident that a considerable damage would be incurred by the bidder if such data was disclosed to an unauthorised person.

#### **e) Tender proforma invoice – price specification**

In the procedure of public procurement which is the subject matter of the case under review, a criterion was set forth that the public procurement was to be awarded to the bidder which would besides fulfilling the tender terms and conditions also offer the lowest tender price. The Body thus determined which of the bidders fulfilled predefined terms and conditions and then pursuant to one criterion, i.e. price, selected the most favourable bidder. This means that the price specification as per particular items was definitely not a criterion; however, a price of a particular item cannot be classified as business secret. Furthermore, the principle of a transparent use of public funds prescribes that each use of public funds should be identified accurately. In view of the Information Commissioner individual final prices of services which as such do not disclose anything, cannot inflict substantial damage to the company if such information is disclosed to unauthorised persons. Data on the price that each of the companies charges for performing a particular service cannot represent business secret yet may only lead to the conclusion if a particular price is high or low. Such conclusion in relation with the institute of business secret that protects data which influences on the competitive position of a company has no relation. Data stated in the form on the tender price specification does not indicate bidder’s experiences, equipment, staff qualifications and skills, work organisation or implementation procedures. Furthermore, the said data does not disclose the results of development and progress of the bidder. Moreover, the said data does not

reflect innovation, investments into development studies and employees. In the case in question separate prices of different services are indicated and not the entire structure of the price. Considering the aforementioned the Information Commissioner decided that the price of a particular service as well as, of course, the final tender price cannot be classified as business secret. The final price was also the only criterion (taking into consideration the terms and conditions) for selecting the most favourable bidder.

The structure of price presented in the manner indicated hereinabove which meets the terms and conditions for classifying the data as business secret pursuant to the Paragraph 2 of Article 39 of the ZGD-1 is data stated in the Form 3: Bills of quantities for electrical installation and on-site assembly. The price structure indicated in this Form would – in view of the Information Commissioner – provide a competitive company data on bidder's experiences, equipment, staff qualifications and skills, work organisation or implementation procedures. Such disclosure would influence on the competitive position of the bidder on the market and inflict the bidder substantial damage. The Information Commissioner emphasises that the price structure itself does not indicate the use of public funds since the said principle was met by disclosing the tender price per particular service. Form 3: Bills of quantities for electrical installation and on-site assembly thus represents business secret and consequently, does not represent freely available information pursuant to Item 2 of Article 6 of the ZDIJZ. The Form Tender Price Specification represents public information which does not contain data that could be classified as business secret.

#### **f) Auditor's opinion**

Decree on financial operations of spending authorities (Official Gazette of the RS No.: 71/99 with amendments) in its Article 6 prescribes that in the event the value of funds of a public procurement exceeds 50 m Slovene Tolars, the principals need to – within 30 days after this decree is enforced – enter additional provisions into the tender terms and conditions pursuant to which providers who fail to provide timely fulfilment of their obligations towards the suppliers of goods, subcontractors and co-operators, namely by presenting an authorised auditor's report confirming that the bidder for the tendered public procurement has in their accountancy data (which shall not be older than 15 days before the expiry date for the submission of tenders pursuant to the public procurement tender) cleared all their liabilities due towards the suppliers of goods, subcontractors and co-operators. Submission of auditor's report is thus in some procedures of public procurement necessary due to the fulfilment of terms and conditions of open invitation to tender.

Upon reviewing the document in question the Information Commissioner established that its content may not represent business secret since as such does not contain any data disclosure of which would influence on the company's market position. The report contains only declarations that the bidder has cleared all liabilities due towards the suppliers, subcontractors and co-operators. The content of the report does not indicate any business data which could be classified as business secret and thus influence on the competitive position of the bidder on the market. In view of the Information Commissioner the said document does not represent business secret pertinent to the accessory intervenor according to the Paragraph 2 of Article 39 of the ZGD-1, given that the criterion of imposition of substantial damage, which would be sustained if disclosed to an unauthorised person, is not fulfilled.

#### **g) A list of machinery**

Publishing the provisions on the Portal of public procurements No.: JN 7469/2008 of September 2, 2008 the Body set forth the terms and conditions which the bidders need to meet in order to qualify for co-operating at the tender for an award of public procurement.

In Item III. 2. 1. of the published open call for tender a submission of a list of machinery demonstrating the adequacy of machinery for the implementation of the works in question, is set forth as a requisite. A list needs to evidence the type, equipment and tools used to implement the works.

The document, the copy of which is requested by the Applicant in this part, is in view of the Information Commissioner in fact a confirmation of the fulfilment of one of the terms and conditions set forth for the co-operation in the procedure of the public procurement; however, its content implicates a list of machinery (construction, installation machinery and means of transport) of the bidder. In order to meet these tender terms and condition, it had been envisaged that the document is actually enclosed and that it contains the type, equipment and tools, which would be used in the implementation of works. In view of the Information

Commissioner such data might – if disclosed to an unauthorised third persons – impose substantial damage to the accessory intervenor and influence on the competitive position of the bidder given that the competition would learn about their machinery and under which obligation and property law form the bidder disposes of such machinery. Moreover, a non disclosure of such data represents a competitive advantage of the company, namely, what machinery the bidder disposes of and what machinery the bidder owns, what machinery the bidder leases or owns pursuant to some other legal address. This data, to wit, indicates debt-credit relations, financial position of the company and the structure of machinery which the company disposes with and competes on the market. In view of the Information Commissioner this data is undoubtedly of the nature which indicates the fulfilment of the terms and conditions prescribed by the business secret requirement under Paragraph 2 of Article 39 of the ZGD-1; therefore, such data needs to be concealed in the requested document.

**h) Article 15 of the Contract (concluded and enclosed to the bid).**

The Information Commissioner thoroughly reviewed the content of Article 15 of the Contract enclosed to the bid and contract which was later concluded and established that the content of the aforementioned is not the same; therefore, each of the aforementioned documents need to be decided upon separately.

Article 15 of the Contract enclosed to the bid regulates the obligation of submitting bank guarantees for remedy of defects within the warranty period. In the said Article the bidder upon submitting the bid had not added or amended anything so the Article proves to be the same to the Article in the Contract which was an integral part of the tender documentation. The said Article does not contain any data which could be classified as business secret of the accessory intervenor since it only represents a draft of a contract which all potential bidders received with the tender documentation. In view of the Information Commissioner the said document does not meet the terms and conditions to be classified as business secret pursuant to the Paragraph 2 of Article 39 of the ZGD-1.

In Article 15 of the concluded Contract the representatives of the contracting parties are defined. In view of the Information Commissioner this Article also does not contain any data which could represent the bidder's business secret. Only the employee of the bidder is indicated, i.e. the representative for the implementation of works whose name and surname in relation with the bidder represents a personal data which needs to be protected and thus concealed as explained hereunder. Indication of name and surname of the manager responsible for works as defined in Article 15 of the concluded Contract is – in view of the Information Commissioner – not disputable since the bidder had to indicate such data as a requisite in their bid submitted. It is thus founded that the public has the right to check if the statements in the bidder's offer (also the condition for the co-operation in the public procurement) were then transferred into the concrete legal transaction which was concluded pursuant to the implemented procedure of public procurement.

Reviewing Articles 15 of both contracts the Information Commissioner establishes that they do not contain any data communication of which would cause damage to the competitive position of the accessory intervenor. The Information Commissioner thus concludes that by disclosing the data from Articles 15 of both contracts would cause substantial damage neither to the Body nor to the other contracting party if disclosed to the public. Consequently, the data in the aforementioned contracts cannot be protected as business secret under Paragraph 2 of Article 39 of the ZGD-1, the Information Commissioner thus decided as deriving from the operative part of this Decision.

**3.2. Personal data – a nominative list of individuals, auditor's report and Article 15 of the concluded contract**

Upon reviewing the requested documents the Information Commissioner established that some of the documents contain personal data of individuals (name and surname as well as dates of birth).

The Information Commissioner thus reviewed which of the documents indicate the exception pursuant to Item 3 of Paragraph 1 of Article 6 of the ZDIJZ, which as an exception of freely available personal data pursuant to the law regulating the protection of personal data indicates the breach of personal data protection and thus instructs the application of the Personal Data Protection Act (Official Gazette of the RS, No.: 94/07 – Official Consolidated Text; henceforth the ZVOP-1).

The purpose of the ZVOP-1 is prevention of unconstitutional, unlawful and unjustified interventions into the privacy and dignity of individuals (Article 1 of the ZVOP-1). Pursuant to the provision of Item 1 of Paragraph 1 of



Article 6 of the ZVOP-1 personal data is any data relating to an individual, irrespective of the form in which it is expressed. An individual needs to be a defined or definable natural person to whom the personal data refers to whereat an individual is an identified or identifiable natural person to whom personal data relates; an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity, where the method of identification does not incur large costs or disproportionate effort or require a large amount of time.

Taking into consideration the aforementioned definition of personal data it may be concluded that the data on personal name and surname as well as date of birth of an individual indicated in the documents requested by the Applicant, represents data which may be protected, namely such data which refers to an individual within the meaning of Item 1 of Paragraph 2 of Article 6 of the ZVOP-1. Item 2 of Paragraph 1 of Article 6 of the ZVOP-1 prescribes that a natural person is identifiable if such individual can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity, where the method of identification does not incur large costs or disproportionate effort or require a large amount of time. Pursuant to the aforementioned data and pursuant to the content of particular documents, such individuals may become identifiable so it needs to be established for each particular document whether such data represents an exception under Item 3 of Paragraph 1 of Article 6 of the ZDIJZ, due to which the access to public information may be rejected.

### **3.2.1. Nominative list of individuals**

The relevant document contains not only the name and surname but also the date of birth as well as the workplace of the individual. The requisite set forth by the principal for co-operating in the open call for tender was the indication of name and surname as well as the workplace of a worker; dates of birth had not been indicated as a requisite or criteria. Since the indication of name and surname together with the indication of the date of birth undoubtedly represent personal data which the bidder was not obliged to indicate in order to meet the terms and conditions, the personal data on the date of birth needs to be concealed in order to pay due observance to the principle of proportionality.

### **3.2.2. The Auditor's opinion**

In the aforementioned document authorised auditor drawing up the opinion is signed at the end of the text. Given that the said document confirms the fulfilment of terms and conditions and which needed to be drawn up by an authorised auditor, it is essential that the personal data appertaining to the auditor in the document remain as is and is not concealed regardless of the fact that the person may be identified in a simple way and data represents her personal data. Therefore, the Information Commissioner decided that in this case such data may not be classified as protected personal data since the person to whom the personal data refers to knew that she was delivering her opinion for the purposes of meeting tender terms and conditions of the open call for tender in question.

### **3.2.3. Article 15 of the concluded contract**

The said Article of the concluded contract contains the name and surname of the person responsible for the implementation of works appointed by the bidder. The indication of name and surname of this person was neither a requisite nor a criterion for co-operating in the open call for tender. Name and surname of the individual in relation with the company in which the said person works undoubtedly mean that the person may be identified in a simple way without any disproportionate effort; therefore, such data needs to be concealed in order to protect individual's personal data.

Considering the aforementioned the Information Commissioner decided that the Body is obliged to disclose the requested documents whereat the Body needs to eliminate all those parts which contain data representing acceptable exception pursuant to Paragraph 2 of Article 6 of the ZDIJZ. In the event the requested document contains acceptable exceptions, a partial access needs to be allowed to the Applicant.

## **4. Partial access**

The institute of partial access is regulated with Article 7 of the ZDIJZ, which sets forth if a document or a part of a document contains only a part of the information referred to in Article 6 of the ZDIJZ (e.g. personal data), which may be excluded from the document without jeopardizing its confidentiality, an authorized person of the

body shall exclude such information from the document and refer the contents or enable the re-use of the rest of the document to the applicant. The later in relation with the principle that the work of bodies is public and open as set forth in Article 2 of the ZDIJZ indicates that the body's obligation to always apply the institute of partial access unless it proves impracticable according to the criteria of Article 21 of the Decree on communication and re-use of information of public character (Official Gazette of the RS, No.: 76/2005, 119/2007; henceforth the Decree) or when (and if) partial disclosure threatens the confidentiality of protected information. Article 16 of the Decree prescribes that if the document or its part only partially contains information indicated in Article 6 of the ZDIJZ, it is deemed that such data may be excluded from the document without jeopardizing its confidentiality if such data may be physically eliminated, concealed, permanently erased or otherwise made inaccessible in the case of a physical document; delete, code, block, limit or otherwise made inaccessible in the case of a document in an electronic form (Paragraph 1). Irrespective of the aforementioned it is deemed that the information cannot be excluded from a document if excluded information could be gathered from the remaining information in the document (Paragraph 2).

The Information Commissioner establishes that in the case in question access to the requested document may be enabled with the institute of partial access without intervening in protected personal data. By excluding personal data in the manner set forth in the operative part of this Decision such data becomes anonymous which means that the identification of an individual is rendered impossible. By making the data anonymous the identification and recognition of individual is lost (for more see Personal Data Protection with Commentary, editor and Nataša Pirc Musar, Ljubljana 2006, Commentary to Article 13 of the ZVOP-1).

## **5. Conclusion**

The Information Commissioner sustained the Applicant's appeal since at first instance the facts were incompletely established and substantial violations of the rules of the procedure were committed. Pursuant to Paragraphs 1 and 2 of Article 251 of the ZUP the Information Commissioner amended the procedure and eliminated deficiencies and settled the case differently and issued her own decision.

This decision has been issued by official duty and, pursuant to Item 30 of Article 28 of the Administrative Fees Act (Official Gazette of RS, No.: 42/2007 – Official Consolidated Text with amendments, henceforth ZUT-UPB3), is tax free.

No extra costs in this procedure are noted.

### ***Instruction on legal remedy:***

This decision in the administrative procedure is final. The decision cannot be appealed; however, a lawsuit can be filed by the Applicant and accessory intervenor at the Administrative Court of the Republic of Slovenia, Fajfarjeva 33, Ljubljana, Slovenia, within 30 days of receipt of this decision. Such a lawsuit may be sent with registered mail, filed directly in writing at the above mentioned court, or presented orally in minutes directly with the said Court. If the lawsuit is sent via registered mail, the day the mail is served to the Court is deemed as the date the lawsuit has been posted. The lawsuit shall be filed in at least three copies and should also contain this decision in its original, or a copy thereof, as an attachment.

The procedure conducted by  
Ms Nataša Brenk, MA  
The Information Commissioner Counsellor

The Information Commissioner  
Nataša Pirc Musar, LLB

To be served to:

- Mr Janez Tekavec, MSc, Attorney at Law, Hacquetova 8, 1000 Ljubljana, Slovenia (the authorised person of the Applicant ELSA Gornja Radgona d.o.o., Šlebingerjev breg 15, Gornja Radgona) – with service form pursuant to the ZUP

- Elektro – Slovenija d.o.o., Hajdrihova 2, 1000 Ljubljana, Slovenia - with service form pursuant to the ZUP
- Ms Breda Razdevšek, Attorney at Law, Dalmatinova 11, 1000 Ljubljana, Slovenia (the authorised person of the accessory intervenor Elektroservisi d.d., Dobrave 6, 1236 Trzin) - with service form pursuant to the ZUP
- A collection of documents at the Information Commissioner.