

TO  
SIEMENS LTDA.  
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Reference: Internacional Tender IC 0873-17

Subject: Impugnation - Response - unfounded

Dear Mister

Initially, we should clarify that ITAIPU is a legal person under international public law, established by a treaty between the Federative Republic of Brazil and the Republic of Paraguay, in the full exercise of its sovereignties, which establishes the rules governing the III of the Statute of ITAIPU, Annex III of the Treaty), combining and especially making compatible the internal laws of both Contracting States.

ITAIPU has its own procedures for bidding events that it promotes regulated in the ITAIPU General Bidding Order, adopting only and subsidiarily the Brazilian and/or Paraguayan legislation, as the case may be, in the delineation of legal issues that arise, as set forth in sub-item 1.2.2 of the Dossier of Bases and Conditions of the International Tender in question.

The bid made by ITAIPU, in front of his peculiar legal nature, are governed by a General Bidding Order as set out in subsection 1.2.2 of the aforementioned summoning act is not applicable, therefore, Law No. 8.666/93 or Law 13.303/2016, as reported by the impugnant.

In any case, ITAIPU's General Bidding Order, in accordance with the principles established in the Brazilian and Paraguayan legal systems, establishes compliance with the basic guidelines, which will guide the entire bidding process, in the following terms:

*“Art. 2º - The basic principles governing the processes and procedures regulated in this Order are those of equality or equality, legality, morality, integrity, impersonality, reasonableness and proportionality, economy, competitiveness, speed, publicity, wide defense and contradictory, administrative efficiency, and those principles that are related to them and to the bids prevail, in addition, the principles of adherence to the bid instrument and objective judgment.*

**Single Paragraph-** *All works, services, purchases, leases and divestitures contracted by ITAIPU, except in the exceptional cases provided for in this Order, shall be preceded by a Bid, designed to select the most advantageous proposal for the Entity and the promotion of sustainable development, respecting the basic principles set forth in the main section of this article.”*

In ballast to the above grounds, and after careful analysis of the impugnation presented, we found that the allegations do not deserve, respectfully, provenance. The conditions and requirements established in the convening instrument do not offend the principles inscribed in art. 2 of the ITAIPU General Bidding Order and aim to establish a fair and sufficient measure to meet the needs of ITAIPU and also not to lose sight of the opening of the necessary competitiveness imposed on all bidding events.

That said, we pass the analysis of each of the allegations brought by the impugnant:

- a) As regards the allegation that the requirements of technical qualification violate the principles of isonomy, reasonableness and competitiveness (SH. 2).

A: Contrary to the assertion of the impugnant, the setting of the technical qualification requirements does not prejudice those principles, since there is no prohibition on participation by national companies, if they prove that they "manufactured" and "supplied" their equipment for lots 1 to 3. The qualification requirements that require proof of "manufacture" and "supply" are intended to encourage the direct participation of foreign manufacturers and domestic manufacturers (Brazilian and Paraguayan), if so decide, so that said international bidding is not restricted to market participation (commercial representatives), as exclusive participation through representatives (which may occur if the equipment manufactured is not required) may make it impossible to obtain more favorable prices for ITAIPU (cost of representation), in addition to increase the risk of non-compliance with (technical support, guarantees and/or after-sales services), since the ITAIPU versus manufacturer relationship will be intermediated by the local representative.

The definition of internationally competitive bidding allows manufacturers established abroad and in Brazil and Paraguay to participate directly (without representatives), which in theory leads to the offer of more attractive prices. In addition, nothing prevents the manufacturer holding required technical capacity representative constitutes a mandate to represent him in the bid, provided that use of own technical assets and no company belonging to the established group in another country. Once again, the definition of technical qualification criteria does not prohibit the participation of Brazilian and Paraguayan companies on equal terms with foreign companies, provided they prove the manufacture and supply of the equipment.

- b) As regards the allegation of "misunderstanding of the additions", as the impugnant is a "subsidiary of Siemens Germany, having a shareholding of Siemens Germany, as well as license to use and manufacture its equipment" (SH 2 to 4).

A: Contrary to what the impugnant alleges, ITAIPU does not acknowledge misunderstandings in the answers to the questions posed in the aforementioned additions, since for the Brazilian legal system the fact that the matrix and subsidiary (subsidiary) are established in different countries constitutes separate legal entities, even though belonging to the same economic group even if Siemens AG (German) holds a stake in Siemens Ltda. (Brazilian).

On the other hand, considering that these are separate legal entities, nothing prevents Siemens AG from participating directly in the bidding process by providing performance certificates that "manufactured" and "supplied" the said equipment to Siemens Ltda. (Brazilian), or that Siemens Ltda. (Brazilian) participates in presenting certificates from third parties that manufactured and supplied these equipment.

- c) As regards the allegation and that the thesis that the "scope would require manufacture in Brazilian territory for the purpose of satisfactory and adequate execution of the contract [...] without any relevance to Siemens Ltda. Whether or not it is the manufacturer of the equipment [...]", as it is a purchase and sale with delivery at the Itaipu Hydroelectric Power Plant by provision of sub-item 2.4.3 of the DBC (SH. 5 and 6).

A: There is no requirement that the equipment be manufactured in Brazil, requiring only that the proponent (national or foreign), regardless of the place of establishment, proves that he "manufactured" and "supplied" the equipment. The proof of manufacture and supply is commercially relevant (possibility of offering more favorable prices for the direct participation of domestic and foreign manufacturers) and the technical aspect (guarantee services, support etc.) that can be offered directly by the manufacturer without the representative.

- d) As regards the allegation that the TCU considers that "[...] the formulation of unreasonable requirements in terms of the local administrative structure should be avoided in order to impose a disproportionate burden on undertakings, thereby inhibiting competitiveness [...]" and that, therefore, maintaining the "dossier forecast" would be "to discriminate to Siemens" (SH. 6 and 7).

A: The decisions of the *Tribunal de Contas da União (TCU)* are not binding on ITAIPU because of the legal nature of the entity described in sub-item 1.2.1 and the characteristics of the bidding described in sub-item 1.2.2, both of the Dossier of Bases and Conditions (DBC) , however, the recommendations of the Court of Auditors, when not contrary to the internal rules of ITAIPU and the General Bidding Order (NGL), are as far as practicable, since they represent good practices.

That said, it is understood that there is no unlawful or unreasonable requirement that requires the constitution of a "local administrative structure" or "local factory" or any provision in the Terms and Conditions that represents discrimination against Siemens or any other company, since the conditions are intended to prove that the tenderer "manufactured" and "supplied" the equipment in question, regardless of where it is located, and that there is therefore no discrimination as to the location of the tenderer.

Finally, we request to kindly confirm receipt of this correspondence in the field below, returning it to the e-mail [compras@itaipu.gov.br](mailto:compras@itaipu.gov.br).

Best regards,



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Curitiba, August 22, 2018

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