



21.1.2010

NOTICE TO MEMBERS

Subject: Petition 0911/2009 by Avilio Presutti (Italian), on behalf of Consorzio Laziale Rifiuti (CO.LA.RI), on calls for tender for the construction of waste treatment plants in Sicily

1. Summary of the petition

Calls for tender for the construction of a number of waste treatment plants were originally published in 2002 and contracts attributed in 2003. In 2007 the European Court of Justice ruled that European public procurement rules had not been respected and therefore the procurement was declared null and void. New calls for tender were published in April 2009. However, the specification invited tenderers to build on the work of the previously illegally contracted contractors and even pay them for it, rather than allowing them to offer state of the art solutions for the whole project. The lawyer representing CO.LA.RI alleges that these conditions effectively exclude his client from tendering and represent a distortion of the ruling of the ECJ. He therefore asks the competent European authorities to take steps for this second call for tender to be cancelled.

2. Admissibility

Declared admissible on 22 October 2009. Information requested from the Commission under Rule 202(6)

3. Commission reply, received on 21 January 2010.

In a tender notice published on 29 April 2009, Sicily's Regional Office for Waste and Water Treatment put out four calls for tenders for the reallocation of public service contracts concerning the use of that part of the municipal waste produced in the municipalities of the Region of Sicily.

These services were the subject of agreements reached by the Sicilian Region in 2002, which were subsequently declared illegal by a ruling of the Court of Justice of 18 July 2007 in case C-382/05. This ruled that:

‘Owing to the fact that the *Presidenza del Consiglio dei Ministri – Dipartimento per la protezione civile – Ufficio del Commissario delegato per l'emergenza rifiuti e la tutela delle acque in Sicilia* (Office of the Prime Minister, Civil Defence Department, Office of the Commissioner for Waste Emergencies and Water Protection in Sicily) initiated the procedure for the conclusion of agreements concerning the use of that part of municipal waste produced in the municipalities of the Region of Sicily and remaining after the collection of selected material and concluded those agreements without following the procedures laid down by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, as amended by Commission Directive 2001/78/EC of 13 September 2001, and, in particular, without publishing the appropriate contract notice in the Official Journal of the European Communities, the Italian Republic failed to fulfil its obligations under that Directive, in particular under Articles 11, 15 and 17 thereof’.

On 24 February 2009 the Commission delivered a considered opinion to Italy under the terms of Article 228 of the Treaty requesting that the measures necessary to implement said ruling be adopted (infringement procedure No 2002/5260).

The relevant authorities put out the calls for tenders cited by the petitioner in order to reallocate the services that have been the subject of unlawful agreements and subsequently to terminate said contracts. No bids have been submitted in response to the calls for tenders.

New calls for tenders were therefore issued by way of contract notices published in the OJ on 23 July 2009. Implementation of the unlawful agreements has meanwhile been suspended.

These new calls for tenders were also unsuccessful because of a lack of bids. Nevertheless, by decrees Nos 339, 340, 341 and 342 of 11.09.2009 the relevant authorities terminated the unlawful agreements that were the subject of the ruling by the Court of Justice and said agreements therefore became ineffective.

The petitioner is a consortium that operates in the waste treatment sector. It denounces the alleged unlawfulness of the aforementioned calls for tenders as issued in April 2004.

The petitioner's complaint particularly relates to the situation in which the contracting authority has launched a tender procedure for the resumption of the activities of the previous contractors so as to safeguard the operations already undertaken by the latter. It is claimed that this constitutes a breach of the Court's ruling.

Moreover, according to the petitioner, the original project, which has also been used for the reallocation of said contracts by way of the aforementioned new calls for tenders, would henceforth be obsolete from a technological point of view. The contracting authority should therefore allow competing bidders to put forward new projects based on the latest technologies.

This petition has also been addressed to President Barroso, and the Commission services sent a reply to the petitioner on 17 July 2009.

Comments submitted by the Commission concerning said petition

The infringement established by the Court of Justice in its ruling of 18 July 2007, which relates to case C-382/05, concerns a breach of Community rules on public procurement during the awarding of contracts concerning the use of municipal waste produced in the municipalities of the Region of Sicily.

The Commission maintains that, in principle, the infringement of the freedom to provide services resulting from the illegal awarding of a public contract continues to remain throughout the period of execution of said contract (refer to the judgement of the Court of Justice dated 18.07.2007, case C-503/04).

From this it follows that implementation of the aforementioned ruling would require the unlawful contracts to be terminated.

In its considered opinion of 24 February 2009 the Commission took the view that the termination of these contracts following the re-tendering of the contracts for the services in question by way of a new call for tenders was an appropriate action to take in order to implement the Court ruling.

As regards the decision taken by the contracting authority to launch a tender procedure for the resumption of the activities undertaken by the previous contractors in order to safeguard those operations already carried out by the latter, the Commission pointed out that this decision appeared to be justified by the need to ensure the continuity of waste treatment operations in Sicily, as provided for by the Regional Plan on Waste Management, and that in this respect it did not seem to be detrimental to the correct execution of the Court's ruling.

As for the view that the original project would be obsolete, the Commission maintained that this particular circumstance was also unlikely to affect the proper execution of the ruling, whose purpose was to put an end to unlawfully agreed arrangements and not to revise the technical preferences of the awarding authorities.

In this connection, it should be noted that Community law on public procurement lets the awarding authority decide on the technical aspects that define the nature of the contract. The assessment of the appropriateness of the selections made in respect of the objectives being pursued does not therefore fall within the remit of the procedure for monitoring the application of Community law on public contracts, which is the Commission's responsibility.

In any case, it has to be accepted that in spite of two separate calls for tenders (in April and July 2009), the awarding authority was unable to reallocate the contracts in question owing to the fact that no bids were forthcoming, yet, even so, it proceeded to terminate the unlawful contracts.

In view of the fact that said contracts, as concluded in violation of Community law, are now ineffective, the Commission has accepted that the ruling made by the Court of Justice has been executed and it therefore decided to dismiss infringement procedure 2002/5660 on 20 November 2009.

Conclusion

The Commission has taken all the appropriate steps to ensure the execution of the ruling made by the Court of Justice on 18 July 2007 in Case C-382/05. In this context, it has confirmed that the Italian authorities have implemented the measures needed to comply with the Court's ruling, namely termination of the unlawful contracts.

No further action is therefore contemplated at this stage.