



30.1.2015

NOTICE TO MEMBERS

Subject: Petition No 1767/2012 by Fulvio Albano and others (Italian) on the infringement of Directive 2004/18/EC on public contracts (Italy)

1. Summary of petition

The petitioners, who are owners of businesses in the health sector and whose petition is supported by the AssoBiomedica association, point out a possible infringement of EU law, and in particular of Directive 2004/18/EC, by the Italian authorities. They also point to a series of rules laid down in Law No 135 of 7 August 2012, which require public contracts in the health sector to be renegotiated and give the issuers of a tender the possibility to withdraw from a contract in the event of renegotiation, without having to pay compensation, and subsequently to award new contracts directly.

2. Admissibility

Declared admissible on 12 July 2013. Information requested from Commission under Rule 216(6).

3. Commission reply, received on 29 August 2014

Following the petition and a complaint received from the same association, the Commission services contacted the Italian authorities in order to receive the necessary information for an in-depth analysis of the matter.

First, the petitioner claims that the above-mentioned renegotiations would imply a material modification of public contracts, which would be in breach of EU public procurement rules.

However, not all modifications of public contracts are considered as material under EU law. In particular, the above-mentioned Italian law explicitly provides that the renegotiation of the supply and service contracts shall have the effect of reducing the unit prices. As stated by the Court of Justice in case *Pressetext Nachrichtenagentur GmbH* (C-454/06), an amendment of the price element in favour of the contracting authorities should not be considered as a material contractual amendment, and therefore should be considered allowed under EU law. The risk of distortion of competition in the event of price reductions is reduced compared to the situation of price increases, since the reduction in remuneration should work in favour of the contracting authority and, in general, improves the economic efficacy of the implementation of the contract.

However, it would appear that the above-mentioned Italian law is unclear as regards renegotiation and other essential elements of the contract such as, for example, the quality and quantity of the supplies and services.

As far as this matter is concerned, the Italian authorities have committed to issue a circular addressed to the health authorities that would prohibit, in line with the applicable EU law, renegotiations of other essential elements of contracts, such as quality or quantity of the supplies and services.

Second, the petitioner suggests that, in case the original contractor rejects the renegotiation, the above-mentioned law allows the contracting authority to award new contracts directly. In this respect, the Commission notes that the Italian authorities have issued an interpretative circular (ref. 5573 of 27 February 2013) which clarifies that this faculty can be used only for contracts below the thresholds set by the EU directives on public procurement and therefore cannot be used for contracts covered by the scope of EU law.

Conclusion

In the light of the foregoing, the Commission notes that the Italian authorities have committed themselves during the contacts with the Commission services to issue a circular which will remove any potential lack of clarity as regards the scope of application of the law and ensure conformity with the EU legislation. The Commission will continue to monitor this matter and follow up on the commitment made by the Italian authorities.

4. Commission reply, received on 30 January 2015

The Commission considered that the legal provision at stake was raising two aspects of potential breach of EU Public procurement law:

- the possibility for the health authorities to modify, during the renegotiations, other essential elements of the contract such as, for example, the quality and quantity of the supplies and services;
- the faculty, for the health authorities who withdrew from the contracts, to stipulate new contracts either by acceding to framework agreements, or by direct award at better conditions in extension of contracts concluded by other health authorities.

The Commission asked the Italian authorities, through the EU Pilot system, to take the necessary measures to ensure an interpretation of the national legal provisions at stake which would be compliant with EU Public procurement rules.

In order to avoid the establishment of an interpretative practice that would allow the health authorities to negotiate substantial modifications of the contracts, on 1 August 2014 the Italian authorities issued an interpretative circular (reference no. DGPROGS 0021563-P-01/08/2014) addressed to the Regions. The circular establishes that the obligation to renegotiate contracts refers only to the price of the goods or services, and cannot be extended to the other essential elements of the contract.

As regards the faculty, for the health authorities who withdrew from the contracts, to stipulate new contracts either by acceding to framework agreements or by direct award at better conditions in extension of contracts concluded by other health authorities, the Italian authorities issued the interpretative circular of the Ministry of Economy 5573 of 27 February 2013, which clarifies that this faculty can be used only for contracts below the community threshold. This interpretation ensures that this faculty cannot be used for contracts covered by the scope of Directive 2004/18/EC.

Conclusion

The Commission considers that the two above-mentioned circulars ensure an interpretation of the contested rules which are compatible with EU public procurement law.