



31.3.2014

NOTICE TO MEMBERS

Subject: **Petition 0238/2013 by Giannis Maniatis (Greek), on behalf of the Citizens' Initiative for Megalopolis, on compliance with environmental legislation on waste disposal in the city of Megalopolis (Greece)**

1. Summary of petition

The petitioners are protesting about the adoption of the Municipal Solid Waste Treatment Plan adopted by the Peloponnese Region in 2011, which, in their view, would cause environmental damage to the region in question.

Amongst other things, the petitioners point out inconsistencies and administrative discrepancies in the implementation of this plan, particularly with regard to the public calls for tender.

2. Admissibility

Declared admissible on 6 November 2013. Information requested from Commission under Rule 202(6).

3. Commission reply, received on 31 March 2014

The petitioner, Citizens' Initiative of Megalopoli (Social Forum) ("Petitioner"), is protesting against the procedure which the Regional Authority of Peloponnese ("RAP") followed to award a public contract for waste management services in the region of Peloponnese. In particular, the Petitioner alleges that the RAP breached:

- (i) Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJEU [2004] L 134/114)

("Directive 2004/18") , and especially the principles of transparency, non-discrimination, and equal treatment stipulated therein, since the information published on 07/09/2011 in the Official Journal of the European Union ("OJEU") by the RAP in the prior information notice (2011/S 171-281213) ("PIN") had discrepancies and inconsistencies with the information published on 04/01/2012 in the OJEU by the RAP in the contract notice (2012/S 1-001582) ("CN") for the same project. According to the Petitioner the discrepancies/inconsistencies related to: (a) the subject matter of the contract (the PIN referred to a "public works contract", whereas the CN to 'public service contract'); (b) the applicable public procurement procedure by the RAP (the PIN provided for the 'open international procedure', while the CN for the 'competitive dialogue procedure'); and (c) the competent contracting authority (the PIN referred that the RAP will launch the procedure to cover needs of/on behalf of another contracting authority, while the CN states that the RAP will launch the procedure to cover its needs); and

(ii) Directive 85/337/EC on the assessment of the effects of certain public and private projects on the environment (OJEU [1985] L 175/40) ("Directive 85/337") , since the RAP decided to follow a tendering procedure excluding the possibility of various alternative solutions being assessed in light of environmental criteria.

The Commission's observations

The representative of the Petitioner ("Petitioner/Complainant") had also submitted by a letter dated 8/3/2013 a complaint to the European Commission alleging that RAP breached Directive 2004/18 and Directive 85/337 on grounds identical to those included in the Petition.

The EU Commission services assessed the allegations of the Petitioner/Complainant and finally closed the case having found that his allegations did not indicate/establish any breach of 2004/18 and Directive 85/337. In particular:

As to the possible breach of Directive 2004/18 arising from the discrepancies between the PIN and the CN (i.e. on the subject matter of the contract, the applicable public procurement procedure and the competent contracting authority), the European Commission informed the Petitioner/Complainant that the purpose of the prior information notice is to provide upfront information to potential tenderers on the forthcoming contract opportunities, which may then be advertised by means of a contract notice. The prior information notice does not oblige a contracting authority to proceed later with a procurement procedure, but merely informs the economic operators that a procurement procedure may be initiated within the next twelve (12) months. The contract notice is the document which amounts to the formal commencement of the tendering procedure and any interested economic operators may submit their requests or tenders in response to the publication of the contract notice.

Article 35(1)(5) of Directive 2004/18 provides that the publication of a prior information notice is compulsory only where the contracting authority takes the option of shortening the time limits for the receipt of tenders as laid down in Article 38(4) of Directive 2004/18. This was confirmed by the European Court of Justice in case C- 225/1998 *Commission v. France* (see paragraph 38). However, in this case, according to available information, since the RAP did not shorten the time limit for submission of tenders, thus, Article 35(1)(5) of Directive 2004/18 did not apply and, therefore, the PIN was not compulsory for the RAP.

Hence, any discrepancies between the PIN and the CN could not *per se* give rise to a breach

of Directive 2004/18/EC. In any event, the information provided by the Petitioner/Complainant has failed to establish that the discrepancies between the PIN and the CN resulted in any EU operators operating in the waste management sector being excluded or deprived from the public procurement procedure in question.

As to the alleged infringement of Directive 85/337, which was repealed by Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment (OJEU [2012] L 26/1) ("Directive 2011/92"), the European Commission also rejected the allegations of the Petitioner/Complainant as Directive 2011/92 obliges Member States to provide Environmental impact assessments (EIAs) for private and public projects but does not empower the European Commission either to influence the decisions of the national authorities (necessity to carry out a specific project, location of a project etc.), or to control the observations of the environmental elements included in the report unless there is a manifest error of appreciation (please note that the existence of a second report which draws different conclusion from those of the EIA report does not constitute such a manifest error). These issues are regulated by Member States and the European Commission cannot intervene. In any event, under Article 5(3)(d) of Directive 2011/92 it is up to the developer to provide an outline of the main alternatives studied by him and an indication of the main reasons for his choice (in selecting a given location), taking into account (and not "based on") the environmental effects.

Conclusion

On the basis of the information provided by the Petitioner and in light of its previous complaint to the European Commission on identical grounds which was closed following assessment, the European Commission cannot detect a violation of the EU public procurement rules arising from the procedure which the RAP followed to award a public contract for waste management services in the region of Peloponese.

For the reasons mentioned above, there is currently no breach of EU environmental legislation. Such a breach could possibly be established if the facility is constructed and starts operating in breach of other relevant Directives (i.e. if due to a bad functioning it causes environmental damages).

On the basis of the information provided by the petitioner, the European Commission cannot detect a violation of EU environmental legislation.