



16.4.2021

## NOTICE TO MEMBERS

**Subject: Petition No 1394/2015 on behalf of Pia Matihaldi (Finnish) on behalf of Service Foundation for People with an Intellectual Disability and approximately 10 signatures, on the European Union's Procurement Directive and its national implementation which causes discrimination based on disability**

### 1. Summary of petition

The petitioner states that the EU's Procurement Directive (2014/24/EU) allows for erroneous interpretations at national level regarding the organisation of housing services for the disabled and that the current Public Procurement Act (30.3.2007/348) in force in Finland enforces the discriminatory practice regarding the disabled on a local and regional scale. This discrimination is centered on the organisation and realisation of social services for individuals, such as housing services and help provided by another person.

According to the Public Procurement Act in force in Finland, if the municipality does not organise the services itself, it must organise a call for tenders for the organisation of the services in certain situations exceeding a threshold. For social and health care services, the procurement threshold is EUR 100 000. In Finland, all social and health care services are covered by the Public Procurement Act, even though this is not required by EU legislation. This has led to a situation where services for the disabled are organised in a way that does not take into account their individual needs or basic human rights. The disabled and their close relatives have no part or influence on the matters concerning them. The petitioner wishes that the EU would influence the revising of Finland's current procurement act so that the disabled people's right to be heard can be considered, and when these special services are procured via tendering, the disabled and the organisations for the disabled need to be guaranteed efficient ways to impact their cause.

### 2. Admissibility

Declared admissible on 10 May 2016. Information requested from Commission under Rule 227(6) (current 216(6)).

### 3. Commission reply, received on 31 August 2016

The petition concerns the housing services provided by the City of Tampere and the City of Oulu, and requests more particularly an investigation into the procurement practices and rules adopted by the Finnish Government.

As regards the Tampere housing services, the petitioners stress that the competent public authorities decided not to provide the services themselves and instead procured them from a different entity. They used a tender procedure based on the Finnish Act on Public Contracts, which transposes the 2004 EU public procurement Directives<sup>1</sup>. The incumbent tenderer lost to a different economic operator, who will therefore replace it. The petitioners state that families were not consulted during the procedure, but were only informed of the existence of an ongoing procedure, and, subsequently, of the replacement of the incumbent provider. The lack of consultation and the change of provider caused the beneficiaries of the service intense distress, amounting to a violation of their rights under Article 10 and 12 of the EU Charter of Fundamental Rights.

Concerning the housing services in Oulu, the petitioners claim that, following a 5-year contract with an operator, the contract was re-tendered and families of the concerned people were consulted. However, the award was based mainly on the cost criterion and a new operator won the tender. As in Tampere, the change of provider caused suffering to the beneficiaries.

The petitioner essentially argues that a public tender is not the appropriate means to organise special services for the disabled. The frequency of tenders, to be repeated every few years, and the application of the general procedures set forth in the Finnish law are not suitable for meeting the needs of vulnerable people. Furthermore, according to the petitioner, rules on consultation of the beneficiaries in the tender procedure do not allow for real involvement of the concerned vulnerable people in the process of organising social services for them. Additionally, the petition seemingly highlights that Finland transposed EU public procurement Directives so that rules on above-threshold contracts would also apply to contracts of a lower value, even though this was not required under EU law, and so that procedures under the Act on Public Contracts strictly apply when procuring Annex II B social and health services.

Firstly, it should be noted that rules on public procurement are established with the objective of safeguarding competition between economic operators, however they do not oblige national authorities to contract out the provision of services that they wish to organise otherwise or that they wish to provide themselves. It is therefore a free choice of the Finnish authorities to tender out the contracts for the provision of services to disabled people. Furthermore, whilst EU public procurement legislation harmonises procurement procedures in the EU across all sectors, it is the responsibility of national authorities to ensure that, whenever a public procurement procedure is launched, it is run and completed in a way that is fully respectful of the fundamental rights of the beneficiaries. In this respect, the principles of the UN Convention on the Rights of Persons with Disabilities, namely article 19, which recognises the equal right of all persons with disabilities to live in the community, with choices equal to others, should be

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<sup>1</sup> [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L\\_2014.094.01.0065.01.ENG](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_2014.094.01.0065.01.ENG)

complied with.<sup>2</sup>

Secondly, there is no element in the petition suggesting that the described public procurement procedures in Tampere and Oulu were carried out in violation of EU rules. Indeed, contracting authorities may choose, under Article 53 of Directive 2004/18/EU, to award the contract on the basis of a variety of criteria, ranging from the lowest price only to the so-called "most economically advantageous tender" (MEAT), which may imply the consideration of qualitative aspects. This is in order to allow a maximum of flexibility to contracting authorities, so that they may be able to adapt and adjust the award criteria on a case-by-case basis to any type of subject-matter they wish to procure, based on (among other things) on their characteristics. The EU therefore in no way prescribes the award of contracts on the basis of the lowest cost only. The assessment related to the choice and weighting of the award criteria is left to the contracting authorities, who are better positioned to determine which are the most appropriate ones.

In respect of the petitioner's claim that the beneficiaries were not consulted, it should also be clarified that such a consultation is not expressly provided for by the EU legal framework. However, this does not imply that such consultation cannot be organised, in full compliance with EU law.

Finally, with regards to the Finnish transposition of rules on below-threshold and Annex IIB contracts, the Act on Public Contracts establishes some specific optional national procedures for these categories of public contracts. EU rules on public procurement do not require Member States to establish specific national procedures for contracts which are not regulated under the Directives, however, it does not forbid it either.

In conclusion, after assessing the information provided by the petitioners, the Commission's services could not find evidence of a breach of EU public procurement law by the Finnish authorities which could justify an investigation. It is worth mentioning, however, that the new Directives on EU public procurement whose transposition deadline expired on 18 April 2016<sup>3</sup> have further clarified the possibility offered to contracting authorities to take into account qualitative and social aspects in the context of public procurement.

### Conclusion

The Commission cannot assist the petitioner as regards the public procurement aspects of this petition.

#### **4. Commission reply, received on 16 April 2021**

In their latest submission, the petitioners reply to the letter of the Finnish authorities of April 2019 and a statement of the Ministry of Social Affairs and Health of June 2019.

The Commission welcomes the details provided by the Finnish government concerning the activities carried out at national and local level to assess and improve the legal framework and practices linked to procurement of services for persons with disabilities. It also observes and welcomes the significant efforts which have been made at all levels of government to address

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<sup>2</sup> <http://www.un.org/disabilities/conventionfull.shtml>

<sup>3</sup> Directives 2014/23, 24 and 25 EU.

this issue by boosting the awareness and the professionalisation of public buyers. Notably, the concrete initiatives to provide local authorities which are responsible for the provision of these services with guidance and training, provide a substantial basis for improving the procurement of these services.

The Commission also duly takes note of the issues raised by the petitioners, who stress the persistence of practices which affect the correct delivery of the services at stake, with serious repercussions on the rights of the persons with disabilities benefitting from them. The petitioners' contribution highlights in particular implementation problems linked to the following elements:

- Practices which entail over-reliance on price elements in the award procedure, and incorrect/under-estimation of cost and price elements. These affect in particular the estimation of costs linked to the staff performing the service, sometimes resulting in a shortage of staff;
- Insufficient consideration of staff working conditions and staff continuity in the design and launch of the tendering procedure. This impacts negatively on the continuity of the service, the performance of the staff and therefore ultimately on the quality of the service and the protection of the rights of the users;
- Lack of consultation of users both in the preparation of the tender process, leading to a failure to properly assess and take into account the needs of the users in the design and execution of the procedure;
- Shortage of monitoring of the execution of the service or inability to enforce contract clauses or possibly insufficient contract guarantees and obligations shielding both the contracting authority and the users from inappropriate behaviour of the contractor. This ultimately jeopardises the correct execution of the service with direct negative effects on the rights of the users.

Firstly, the Commission notes that the issues highlighted in the petitioners' latest contribution relate mostly to the execution of the contract and effects of execution shortcomings on users. While usually these problems can only be concretely tackled during the performance of the service, to address them effectively it is crucial to prepare the tendering process thoroughly. EU rules on public procurement offer great flexibility to take into account several aspects of the process which help ensure that the service is executed in such a way that it meets the needs of the users and fully respects their rights. In this context, the Commission stresses that under the 2014 directives, compliance with mandatory social and labour rules in the performance of the contract is not a choice, but an obligation (Article 18(2) of Directive 2014/24/EU<sup>4</sup>). It is not only important but compulsory for public buyers to respect the United Nations Convention on the Rights of Persons with Disabilities when planning and organising a tender procedure, as pointed out by Recital 3 of Directive 2014/24/EU. This becomes essential when the objective of the procurement is to deliver social and care services, which are precisely meant to provide support to people with disabilities and their families.

In this context, the Commission would like to recall possible elements which could be taken

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<sup>4</sup> Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC Text with EEA relevance, *OJ L 94, 28.3.2014, p. 65–242*.

into consideration to address the issues raised by the petitioners, and which are all allowed under EU public procurement rules:

- Consultation and involvement of the users throughout the procurement process. It is crucial, in particular, that users' needs are assessed ahead of the preparation of tender documents and any possible negotiation of contract elements. This assessment can be key in developing quality requirements and performance criteria that are based on the actual needs of the beneficiaries. It can also help strengthen the monitoring and management of the contract during its performance. Contract monitoring and management may also involve users' participation, to allow the responsible authority to better understand how the service meets the standards of quality, personalisation, continuity and accessibility set forth in the contract and that users' needs are actually fulfilled;
- Contract obligations and award criteria should be the result of market knowledge and user consultation. Based on this information, tender requirements and contract clauses should provide incentives for the contractor to deliver on quality, rather than with the aim of driving down costs. Furthermore, introducing effective monitoring elements and escalation mechanisms in the contract may reinforce the possibility for the responsible authority to intervene when quality standards are not upheld in the performance of the contract;
- Staff continuity, their working conditions and the costs associated with their work within the performance of contracts (e.g. salaries, but also equipment for the proper execution of their tasks) should be carefully assessed and taken into account in the preparation of the tender procedure. Care and social services are services delivered to persons mainly through the employment of qualified staff. Underestimating staff-related aspects is likely to have a direct effect on the quality of the service and, ultimately, on the protection of the rights of the users. Any labour and contractual obligation should also be attentively monitored during the performance of the service.

Using these kind of considerations clearly implies a paradigm shift from more traditional procurement practices, heavily based on price competition, to a strategic concept of procurement as a tool to address societal issues and deliver quality services to citizens. Such a shift requires public administrations to become more professional in handling procurement and acquiring multiple skills which go well beyond the ability to apply rules and procedures correctly. The Commission understands that these changes require a major long-term effort from governments and local authorities alike, which will not succeed without the involvement and commitment of all relevant actors.

In a cooperative spirit, the Commission is working to support national and local authorities in this transition, by developing tools to encourage and help them in achieving public procurement systems and practices that focus more on quality and social value delivered to citizens. In particular, the Commission is working on major updates of its guidance document on socially responsible public procurement, to provide public buyers with concrete indications on how to achieve better social outcomes through procurement, including in social and care services. It will also continue to pursue activities to foster awareness-raising and dissemination of good practices in this domain. At the same time, the Commission is developing a competency framework for public procurement practitioners, to help public buyers map and assess all the

skills needed for their organisations to improve their procurements.

### Conclusion

The Commission remains committed to supporting and encouraging national authorities in their efforts to improve their procurement systems. In the context of the issues raised with this petition, it remains available for further exchanges with both the petitioners and the Finnish authorities, and to provide support, should it be needed.