Reports of Cases

Case C-568/13

Azienda Ospedaliero-Universitaria di Careggi-Firenze
v
Data Medical Service srl

(Request for a preliminary ruling from the Consiglio di Stato)

(Reference for a preliminary ruling — Public service contracts — Directive 92/50/EEC — Articles 1(c) and 37 — Directive 2004/18/EC — First subparagraph of Article 1(8) and Article 55 — Concepts of 'service provider' and 'economic operator' — Public university hospital — Entity with legal personality and business and organisational autonomy — Principally non-profit-making activity — Institutional purpose of offering health services — Possibility of offering similar services on the market — Admission to participate in a tendering procedure for the award of a public contract)

Summary — Judgment of the Court (Fifth Chamber), 18 December 2014

1. *Approximation of laws — Procedures for the award of public service contracts — Directive 92/50 — Exclusion from participation in a contract — National legislation providing for the exclusion of a public hospital authorised to supply certain services on the market from participation in a tendering procedure for the award of a public contract relating to those services — Unlawful*

   (Council Directive 92/50, Arts 1(a) and (c) and 26(2))

2. *Approximation of laws — Procedures for the award of public service contracts — Directive 92/50 — Award of contracts — National legislation authorising the participation of tenderers receiving public funding allowing them to submit tenders under non-competitive conditions — Lawfulness — Condition — Obligation for the contracting authority to examine the abnormally low nature of the tender — Scope — Elements to be taken into consideration*

   (Council Directive 92/50, Art. 37)

1. Article 1(c) of Directive 92/50 relating to the coordination of procedures for the award of public service contracts precludes national legislation which excludes a public hospital from participation in tendering procedures for the award of public contracts as a result of its status as a public economic entity, if and in so far as that entity is authorised to operate on the market in accordance with its institutional and statutory objectives.

It follows from both the EU rules and the case-law that any person or entity which, in the light of the conditions laid down in a contract notice, believes that it is capable of carrying out the contract is eligible to submit a tender or to put itself forward as a candidate, regardless of whether it is governed by public law or private law, whether it is active as a matter of course on the market or only on an occasional basis. In that regard, as is apparent from the wording of Article 26(2) of Directive 92/50, the Member States do, admittedly, have discretion as to whether or not to allow certain categories of economic operators to provide certain services and can, inter alia, determine whether or not such

entities are authorised to operate on the market, according to whether the activity in question is compatible with their objectives as an institution and those laid down in their statutes. However, if and to the extent that such entities are entitled to offer certain services in return for remuneration on the market, even occasionally, the Member States may not prevent those entities from participating in tendering procedures for the award of public contracts relating to the provision of those services. Such a prohibition would not be compatible with Article 1(a) and (c) of Directive 92/50.

(see paras 35, 36, 38, operative part 1)

2. The provisions of Directive 92/50, and in particular the general principles of freedom of competition, non-discrimination and proportionality which underlie that directive, must be interpreted as not precluding national legislation which allows a public hospital participating in a tendering procedure to submit a tender which cannot be matched by any competitors as a result of the public funding which it receives. However, in the course of the examination of the abnormally low character of a tender on the basis of Article 37 of that directive, the contracting authority may take into consideration the existence of public funding which such an entity receives in the light of the option to reject that tender.

In that regard, it is true that, in certain specific circumstances, however, the contracting authorities are required, or at the very least permitted, to take into account the existence of subsidies, and in particular aid incompatible with the Treaty, in order, where appropriate, to exclude tenderers in receipt of such aid. However, since Article 37 of Directive 92/50 does not contain a definition of the concept of an abnormally low tender, it is for the Member States and, in particular, the contracting authorities to determine the method of calculating an anomaly threshold constituting an abnormally low tender within the meaning of that article. In that regard, the contracting authority may, in the course of its examination of the abnormally low character of a tender, take into consideration, for the purpose of ensuring healthy competition, not only the situations set out in the second paragraph of Article 37 of Directive 92/50 but also all the factors that are relevant in the light of the service at issue.

Moreover, the fact that the public entity concerned has separate accounts for its activities on the market and for its other activities may make it possible to establish whether a tender is abnormally low as a result of the effect of an element of State aid. However, the contracting authority may not conclude from the absence of such separate accounts that such a tender was made possible by the grant of a subsidy or State aid which is incompatible with the Treaty.

(see paras 44, 45, 49-51, operative part 2)