



EUROPEAN COMMISSION

Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs

Single Market for Public Administrations
Director

Brussels, 15. 03. 2016
GROW/G3/CR/tt
grow.ddg2.g.3(2016)1390971

Mr Jacob Hald,
Director General Danish
Competition and Consumer
Authority,
Carl Jacobsensvej 35,
2500 Valby
kfst@kfst.dk

Dear Mr. Hald,

Thank you for your note of 2 February 2016¹, transmitted by email of 4 February 2016, in which you pose the question whether the new Public Procurement Directive, Directive 2014/24/EU², imposes that the evaluation method to be used to assess tenders shall be set out in the procurement document or whether the provision in the Danish implementing law³ concerning this obligation goes further than the obligation in the Directive.

Let me first of all apologise for the delay in answering you and let me also point out, for the sake of good order, that only the Court of Justice can deliver authentic interpretation of Union law. The following considerations are thus only an expression of the view of Commission Departments and does not bind the College of Commissioners.

That said, it should be noted that Directive 2014/24/EU does not contain any general provision which specifically mentions the "evaluation method". However, the answer can be deduced on the basis of a series of more general provisions, above all when these are read in connection with long-standing jurisprudence.

First of all, as you mention, the general obligation for contracting authorities set out in Article 18(1) to treat economic operators equally and without discrimination and to act in a transparent and proportionate manner. Another element that is relevant is the definition of "procurement documents" in Article 2(1)(13)⁴: the method used to evaluate the tenders is certainly covered by this definition since the evaluation is a central part of a crucial stage of the procedure, namely deciding which tender presents the best price-quality report. It is recalled that the procurement documents must be made available in accordance with Article 53.

¹ Internal references: Case OK-16/01426-2, ref. /RHN

² 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, OJEU L 94, 28.3.2014, p. 65

³ Article 160(1) of Law n. 1564 of 15.12.2015: "A contracting authority must in the procurement documents mention the criteria for the award, describe the evaluation method and describe what is important when evaluating tenders."

⁴ "...any document produced or referred to by the contracting authority to describe or determine elements of the procurement or the procedure ...".

Concerning award criteria and their evaluation, it should first of all be noted that the first subparagraph of Article 68(2) explicitly obliges contracting authorities to "... indicate in the procurement documents the data to be provided by the tenderers and the method which the contracting authority will use to determine the life-cycle costs ...".

In respect of contracts awarded in the basis of the best price-quality ratio **not** using a life-cycle cost approach, the implications of the general principle of transparency are set out in the third subparagraph of Recital 90: "To ensure compliance with the principle of equal treatment in the award of contracts, contracting authorities should be obliged to create the necessary transparency to enable all tenderers to be reasonably informed of the criteria **and arrangements** which will be applied in the contract award decision. ...". It is furthermore significant that the substantially unchanged⁵ corresponding Recital 46 of Directive 2004/18/EC referred explicitly to the fact that this obligation to ensure transparency was – already then – "established by case-law".

In this context, several judgments are relevant (directly or by analogy). First of all, the Court's judgment in the so-called "Universale-Bau" case⁶ concerning a contracting authority's voluntary use of a "scoring method" for the evaluation of selection criteria. The contracting authority concerned had established this scoring method from the beginning of the procedure and had deposed a copy thereof with a notary, it had announced to the participants that their requests for participation would be "scored" but it had not published the method itself (i.e. made it accessible to the participants). In its reasoning (see points 84 - 100), the Court first reiterates from earlier case-law that "the principle of equal treatment ...implies an obligation of transparency in order to enable verification that it has been complied with"⁷. After a series of other considerations, referring to the selection criteria as well as to the award criteria, the Court concludes, in point 99, that "the interpretation according to which, where ...the contracting authority has laid down ... the rules for the weighting of the selection criteria it intends to use, it is obliged to bring them to the prior knowledge of the candidates, ... is the only one which is apt to guarantee an appropriate level of transparency and, therefore, compliance with the principle of equal treatment in the procedures awarding contracts to which that directive applies."

Exactly the same reasoning and the same result applies to the award criteria, their weighting and the rules (or arrangements) for their weighting. This is also confirmed by the fact that subsequent judgments concerning specifically award criteria and their ponderation contain explicit cross-references to the Universale-Bau judgment⁸.

⁵ We are aware that the wording of Recital 90 was slightly adapted in certain language versions, including Danish, compared to that of Recital 46 – however, it remained unchanged in a number of other languages, including the de facto original English language version.

⁶ Judgment of the Court of 12 December 2002. *Universale-Bau AG, Bietergemeinschaft: 1) Hinteregger & Söhne Bauges.m.b.H. Salzburg, 2) ÖSTÜ-STETTIN Hoch- und Tiefbau GmbH v Entsorgungsbetriebe Simmering GmbH*. Case C-470/99. ECR 2002 I-11617
Point 91

⁷ Point 91
⁸ See e.g. **Case C-448/01**, judgment of the Court of 4 December 2003. *EVN AG and Wienstrom GmbH v Republik Österreich*. ECR 2003 I-14527; **Case C-331/04**, judgment of the Court of 24 November 2005. *ATI EAC Srl e Viaggi di Maio Snc, EAC Srl and Viaggi di Maio Snc v ACTV Venezia SpA, Provincia di Venezia and Comune di Venezia*. ECR 2005 I-10109; **Case C-226/09**, judgment of the Court of 18 November 2010. *European Commission v Ireland*. ECR 2010 I-11807.

In another judgment, Case C-19/00⁹, the Court explains, in points 42 to 44, that " the award criteria must be formulated ... in such a way as to allow all reasonably well-informed and normally diligent tenderers to interpret them in the same way." They must furthermore be interpreted in the same way throughout the whole procedure and be applied objectively and uniformly to all tenderers. These consequences of the principle of equal treatment should be read in the light of the above-mentioned requirements for sufficient transparency to allow for verification of observance of the principle and its concrete corollaries.

In our view, it follows that the obligation to publish (i.e. render accessible as part of the procurement documents) applies to "all the details pertaining to the evaluation methodology ..., including specification of the formula for converting price to points or vice versa, points that can be used in and other means to identify" the best price-quality ratio (formerly the most economically advantageous tender).

Yours sincerely,



Joaquim Nunes de Almeida

Contact:

Claudio ROMANINI, Telephone: +32 229-6 23 60,
Claudio.Romanini@ec.europa.eu

⁹ Judgment of the Court of 18 October 2001. SIAC Construction Ltd v County Council of the County of Mayo. ECR 2001 I-07725. Some of the judgments mentioned under footnote 7 also cross-refer to the SIAC-case.