



AUTORITÀ GARANTE
DELLA CONCORRENZA
E DEL MERCATO



ANAC

Autorità Nazionale Anticorruzione



ART

Autorità
di Regolazione
dei Trasporti

courtesy translation

Joint position of 25 October 2017

pursuant to article 22 of Law no. 287 of 10 October 1990,
article 2 (6) of Law no. 481 of 14 November 1995,
article 213 (2) and (3) of Legislative decree no. 50 of 18 April 2016,
and article 37 (3) (a) of Decree-Law no. 201 of 6 December 2011

on

Procedures concerning the direct award of regional transport services by rail

sent to

Regions

Autonomous province of Trento

Autonomous province of Bolzano, South Tyrol

State-Regions Conference

Ministry of Infrastructure and Transport

Ministry of Economy and Finance

Joint position of 25 October 2017

Procedures concerning the direct award of regional transport services by rail

In the performance of their institutional activities the Competition Authority (Autorità Garante della Concorrenza e del Mercato - AGCM), the National Anti-Corruption Authority (Autorità Nazionale Anticorruzione - ANAC) and the Transport Regulatory Authority (Autorità di Regolazione dei Trasporti - ART) found it would be appropriate to provide joint indications on the procedures to be applied by the competent territorial authorities for the direct award of regional public transport services by rail (hereinafter referred to as "competent authorities" or "contracting entities").

Having regard to article 22 of Law No. 287 of 10 October 1990, article 2 (6) of Law No. 481 of 14 November 1995, article 213 (2) and (3) of Legislative Decree No. 50 of 18 April 2016 and article 37 (3) (a) of Decree-Law No. 201 of 6 December 2011, AGCM, ANAC and ART, each in respect of its own responsibilities, intend to make the following considerations on the interpretation and definition of the rules applicable to the procedures for direct award of regional public transport service by rail.

1. Applicable rules for the award of regional public transport service by rail

Article 18 (1) (a) of a.m. Law No. 50/2016 (hereinafter referred to as "Public Contracts Code") excludes from its scope of application the concessions of public passenger transport services pursuant to Regulation (EC) No. 1370/2007 of 23 October 2007 (hereinafter referred to as "Regulation"). This is reaffirmed by article 17 (1) (i) of the Code, that excludes public passenger transport services by rail or by underground.

The award of public passenger transport services by rail is therefore governed by articles 5 and 7 of the Regulation.

In particular, article 5 (3) provides that the service be awarded through public and open tendering procedures: *"The procedure adopted for competitive tendering shall be open to all operators, shall be fair and shall observe the principles of transparency and non-discrimination. Following the submission of tenders and any preselection, the procedure may involve negotiations in accordance with these principles in order to determine how best to meet specific or complex requirements."*

Despite the use of public and open tendering procedures is supported throughout the Regulation¹, in-house award of services (cf. Article 5 (2)) and direct award (cf. Article 5

¹ Such support is also found in Regulation (EU) No. 2338/2016 of 14 December 2016 amending Regulation (EC) 1370/2007 concerning the opening of the market for domestic passenger transport services by rail, which shall enter into force on 24 December 2017, and, in particular, under Recital 19 providing that *"Public service*

(6)) constitute further organisational arrangements which, by way of derogation from tendering procedures, may be freely chosen by competent authorities to award public transport service by rail ².

The choice to derogate from the principle of public and open tendering procedures and, in particular, to award public service contracts directly is nevertheless subject to certain detailed statutory obligations as to provision of information and statement of reasons³.

In fact, article 7 (2) of the Regulation provides that, at least one year before the direct award, irrespective of the chosen awarding procedure, each competent authority shall publish a prior information notice in the *Official Journal of the European Union* including name and address of the competent authority, type of award envisaged, services and areas potentially covered by the award.

Further, pursuant to article 7 (3) of the Regulation, in case of direct award of the service, the same competent authority shall make public the following information within one year of granting the award: name of the contracting entity, its ownership, duration of the public service contract, description of the services to be performed and of the parameters of the financial compensation, quality targets and conditions relating to essential assets.

Finally, article 7 (4) of the Regulation provides that, when so requested by an interested party, a competent authority shall forward to it the reasons for its decision for directly awarding the public service contract.

For the purpose of ensuring compliance with EU legislation, article 34 (20) of Decree-Law No. 179 of 18 October 2012 established that the award of the service is made on the basis of an *ad hoc* report, to be published on the website of the contracting entity, which illustrate the reasons as well as and existence of the requirements laid down in Community law for the chosen form of award.

In case of direct award (and the same considerations would apply in case of in-house award), the publication of the prior information notice and of the information concerning the awarded contract as well as the statement of reasons for the choice of direct award in place of tendering procedure, do not entirely cover the obligations imposed on contracting entities; indeed, the latter are additionally required to carry out a competitive comparison

contracts for public passenger transport services by rail should be awarded on the basis of a competitive tendering procedure, except for those cases set out in this Regulation."

² In fact, it is considered that the general principle of free administration by public authorities referred to in article 166 of the Public Contracts Code applies to the concessions of local public transport services as well. Therefore, administrations are free to choose the procedure they consider most appropriate for awarding the service.

³ This approach may be found, even more noticeably, in a.m. Regulation (EU) No. 2338/2016, which under article 1(5), only with reference to public passenger transport services by rail, indicates the cases where, exceptionally, the competent authority may decide to award public service contracts directly unless prohibited by national law (see below).

between the tenders submitted by any other interested operators and that of the operator to whom they intend to award the service directly (or to make a comparison with appropriate benchmarks in case of in-house award).

Actually, it is considered that the provisions of the Regulation should be read in the light of the general principles of transparency, non-discrimination and equal treatment laid down in the Treaty on the Functioning of the European Union, and referred to in article 4 of the Public Contracts Code, which represents a general rule that may be also applied to public passenger transport services by rail and provides that: *"The award of public contracts for public works, services or supplies...", which are excluded, in whole or in part, from the scope of application of this Code, is carried out in accordance with the principles of cost effectiveness, efficiency, impartiality, equal treatment, transparency, proportionality, publicity, environment protection and energy efficiency".* The above-mentioned principles can be translated as follows:

- *cost-effectiveness*: requires competent authorities to make efficient use of the resources employed in the selection or in the performance of the contract, whereby, before awarding the contract, they are required to assess whether the (public) subsidy is adequate. In view of the nature of the services at issue and of the importance of the quality of their provision, cost savings are not the only guiding criterion for the choice to be made by the contracting entity;
- *effectiveness*: requires that the acts put in place by contracting entities are adequate for the achievement of the underlying public purpose and interest. In this case, the entity shall give priority to the project that best guarantees the pre-determined transport objectives;
- *impartiality*: requires a fair and impartial evaluation of competitors and, therefore, the absolute prohibition of partiality and discrimination; consequently, this principle requires that the contract be awarded in accordance with the rules of procedure laid down at the beginning and that the contracting entity adopts its final decision acting as a third party with respect to all the parties concerned;
- *equal treatment*: requires that economic operators find themselves in a situation of "formal equality", i.e. on a level playing field with respect to the procedural approach adopted by the contracting entity;
- *transparency*: consists in ensuring to each potential tenderer an adequate level of awareness of tendering procedures, including the reasons underlying the choices made by the contracting entity, also for the purpose of allowing control on the impartiality of the selection;
- *proportionality*: requires adequacy and suitability of the administrative action with respect to the purpose and amount of the award;
- *publicity*: requires the contracting entity to publish, communicate or make available its documents, acts and procedures; in the context of public regional transport by rail, the

same Regulation defines strict publicity criteria which administrations shall abide by (see below).

These principles are also referred to in Recitals 29 and 30 of the Regulation. In particular, under Recital 30 “[d]irectly awarded public service contracts should be subject to greater transparency”. Recital 29 reads “[w]ith a view to the award of public service contracts, with the exception of emergency measures and contracts relating to modest distances, the competent authorities should take the necessary measures to advertise, at least one year in advance, the fact that they intend to award such contracts, so as to enable potential public service operators to react”.

2. Obligations for contracting entities to provide information

With regard to the information obligations, Recital 29 was interpreted by the EU Commission in its Communication 2014/C92/01 on the direct award of public passenger transport services by rail and by road (hereinafter referred to as "Communication") as meaning that the prior information notice shall "enable potential public service operators to react", i.e. it should allow the parties concerned to be placed in a position to formulate questions a long time before the contract is awarded ⁴. For the purpose of implementing the above-mentioned principles of impartiality, equal treatment, transparency and publicity, the EU Commission considers the prior information notice not as a mere act of publicity, but rather instrumental to the participation of potentially interested third parties in the awarding procedure.

The provision referred to in article 5 (7) of Regulation (EC) No. 1370/2007 may be read accordingly: “Member States shall take the necessary measures to ensure that decisions taken in accordance with paragraphs 2 to 6 may be reviewed effectively and rapidly, at the request of any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement, on the grounds that such decisions have infringed Community law or national rules implementing that law”.

Such participation in the proceedings, however, is not limited to the mere possibility of requesting and obtaining from the competent authority information on the characteristics of the service; indeed, the holding of technical and economic information by the contracting entities to the benefit of third parties cannot be considered an end in itself: it is evident that the knowledge of these data is functionally linked to the willingness of third parties to submit tenders. Therefore, the interest of third parties necessarily extends to the possibility of submitting alternative tenders to those of the historical operator (or the operator initially chosen by the entity) and is satisfied with a timely, complete and exhaustive provision of any relevant useful information (see below).

⁴ Cf. paragraph 2.5.3 of the Communication.

3. Obligations for contracting entities to provide a statement of reasons for their decision

When the competent authorities decide to award public service contracts directly, they are subject to a stricter obligation as to the statement of reasons for their decision than when they decide to adopt an awarding procedure in accordance with the provisions of the Public Contracts Code (i.e. open, restricted, competitive with negotiation or competitive dialogue procedures), which would require less effort in terms of statement of reasons; being regulated at EU and national level, the above procedures already comply with the criteria set out in article 4 of the Code (in this respect, it might be desirable that contracting entities "bind themselves" to comply therewith, in order to reduce the risk of litigation on awarding procedures).

The stricter obligation as to the statement of reasons in case of direct award concerns both the choice of the procedure to follow and the choice of the concessionaire. This obligation is particularly severe when, following the publication of the information referred to in article 7 (2) of the Regulation, two or more expressions of interest are received. In this case, the contracting entity shall not only adequately justify the reasons why it considers that public service objectives are better guaranteed, in terms of effectiveness and efficiency, compared to an open procedure, and why this satisfies the proportionality test, but, with respect to the chosen operator, it shall also clarify how the principles of impartiality and equal treatment are complied with. This implies that, in the event of alternative expressions of interest, the obligation to state the reasons referred to in article 7 (4) of the Regulation and article 34 of Decree-Law No. 179 of 18 October 2012, shall also include the reasons underlying the choice itself of an operator in place of another. In turn, this necessarily assumes that the choice is supported by a comparative analysis of the tenders that have been submitted. On the other hand, if this were not the case and if the contracting entity did not consider any other tenders it might have received, it could not account, as it is supposed to do, for the correctness of its choice in terms of efficiency, cost-effectiveness and quality of service⁵, as well as for the optimal use of public resources⁶. In fact, the contracting entity could not prove - or would do so without being

⁵ Clear obligations to provide a statement of reasons based on a criterion of greater efficiency of the choice of direct award can be found in Regulation (EU) No. 2338/2016 with respect to a specific case of direct award of local public transport service. Cf. Recital 25 which reads: *"Where certain conditions related to the nature and structure of the railway market or the railway network are fulfilled, competent authorities should be entitled to award public service contracts for public passenger transport services by rail directly where such a contract would result in an improvement in the quality of services or cost-efficiency, or both"*. See also article 5 (4a) which provides that *"[u]nless prohibited by national law, the competent authority may decide to award public service contracts for public passenger transport services by rail directly: (a) where it considers that the direct award is justified by the relevant structural and geographical characteristics of the market and network concerned, and in particular size, demand characteristics, network complexity, technical and geographical isolation and the services covered by the contract; and (b) where such a contract would result in an improvement in quality of services or cost-efficiency, or both, compared to the previously awarded public service contract. [...]"*.

⁶ Cf. on the point at issue also Recital 27 which reads: *"Where a competent authority plans to award a public service contract without putting it out to competitive tender, it should also respect detailed rules ensuring that the amount of compensation is appropriate and reflecting a desire for efficiency and quality of service"*.

supported by an appropriate statement of reasons for so doing - that the tender submitted by the initially selected operator is preferable to the others. In any case, taking into account the principle of economic efficiency referred to above, under no circumstances can the contracting entity be exempted from conducting a test of adequacy based on appropriate benchmarks, referred to in *ex ante* studies and assessments. Especially when such evidence is not available, it is advisable to alternatively use the tender data of other potential competitors.

4. Competitive comparison of tenders and applicable procedure

In the light of the above interpretation of the applicable rules for direct award of regional public transport services by rail, it is ultimately considered that, in case of several expressions of interest, the contracting entities shall make available to any interested third parties the information necessary to submit a tender and shall carry out a comparative assessment of the tenders received.

Based on the existing legislation, no specific methodology has been laid down for carrying out the competitive comparison. However, indications in this respect may be provided by best practices adopted by competent authorities (awarding procedures of local authorities), which, by clearly embracing the above-mentioned substantive interpretation of the Regulation, have applied the regulatory framework of general application provided for in the Public Contracts Code.

In particular, some contracting entities, that intended to award directly regional rail services under their jurisdiction, have carried out beforehand competitive comparisons between the operators interested, on the basis of the competitive procedure with negotiation or the competitive dialogue referred to in articles 62 and 64 of the Public Contracts Code.

Conversely, other entities would be contemplating to apply a procedure borrowed from the project financing referred to in article 182 of the Code, considering the current incumbent as the promoter.

In this respect, the project financing procedure does not appear to be compatible with the criteria set out in article 4 of the Public Contracts Code. Actually, unlike what happens in the case of project financing, where the promoter is chosen as a result of a first tendering procedure, in the case of direct award the promoter is necessarily identified with the existing manager, who would be thus assigned an additional competitive advantage since he has access to all the necessary information to prepare the tender, is already aware of the context and features of the service and may simply match the tender of other competitors. As a consequence, giving the incumbent a right of pre-emption would infringe the principles of impartiality and equal treatment and reduce the incentives of new entrants to provide an alternative tender as they would be aware that the incumbent could benefit therefrom.

Conversely, the procedures referred to in articles 62 and 64 of the Public Contracts Code would provide the advantage of allowing contracting entities to improve the public

service quality as they would become aware of new solutions offered by the market. However, for the service to be awarded through competitive comparison procedures, it is necessary that the principles of transparency and non-discrimination are complied with, by providing appropriate safeguards, including prior indication of minimum award requirements, which cannot be modified in the course of negotiations/consultations, and award criteria and their weighting.

5. Information accessible by third parties in the context of the competitive comparison procedure

Following the above pro-competitive interpretation of the rules applicable to the award of regional public transport service by rail, it is considered that, with respect to an interested party requesting to be put in a position to submit a binding tender on equal terms as the undertaking that has been identified directly as potential contractor, the information provided by the contracting entities cannot be confined to the information which is explicitly required under article 7 (2) of the Regulation; the contracting entities shall rather act to make available and accessible, in accordance with the transparency obligation referred to in Recital 30 of the Regulation, any data and information on the format of the service, at least in terms of levels and dynamics of demand, instrumental goods for the provision of the service, rolling stock and staff to be directly allocated to the service.

In this respect, account may be taken of the data and information referred to in ART Decision No. 49/2015 ⁷ (cf. Table 1), to which the above-mentioned entities are considered to be already fully entitled, including on the basis of appropriate provisions of public service contracts. In case of confidentiality requirements with respect to commercially sensitive data and information relating to the historical operator and not included in the table referred to above, the contracting entity will reconcile these requirements with the right of third parties which are potentially interested in the award to access any necessary information to submit an alternative tender, by defining detailed rules for access to available data, such as conditions for admission, management of questions, procedures to obtain confidential information, commitments and confidentiality, etc.

⁷ Cf. <http://www.autorita-trasporti.it/wp-content/uploads/2015/06/TPL-All-A-Finale.pdf>.

The above-mentioned Table 1 includes the following groups of information:

- subsidies, compensations and charging structure;
- characteristics (related to infrastructures, socio-demographic features, income, etc.) of territorial area concerned and planned services;
- performance and service quality indicators;
- effective mobility demand by mode of transport (data on passenger numbers);
- information on networks, immovable property and rolling stock used;
- list of staff to be transferred to the new operator.

The Authorities trust the above considerations may encourage the implementation of the legal and regulatory provisions contained in the Regulation on direct award of public transport services by rail in a way that is more consistent with competition principles, especially where the competent authorities receive expressions of interest from operators other than the initially chosen potential contractor.

For the Competition Authority
THE PRESIDENT
Giovanni Pitruzzella

For the National Anti-Corruption Authority
THE PRESIDENT
Raffaele Cantone

For the Transport Regulation Authority
THE PRESIDENT
Andrea Camanzi