Autorità di Regolazione dei Trasporti

Opinion No 14/2021

Opinion to the National Anti-Corruption Authority on draft Guidelines on "Indications on in-house award of contracts relating to services which are available on the market in a competitive environment pursuant to Article 192(2) of Legislative Decree No 50 of 18 April 2016 as amended.".

The Transport Regulation Authority (hereinafter: Authority), in its meeting of 15 July 2021,

whereas:

- the National Anti-Corruption Authority (hereinafter ANAC), by letter of 22 June 2021 (ref. ART 9837/2021), requested the Authority to provide an opinion on the adoption of Guidelines containing "*Indications on in-house award of contracts relating to services which are available on the market in a competitive environment pursuant to Article 192(2) of Legislative Decree No 50 of 18 April 2016 as amended*";
- ANAC submitted these Guidelines to a public consultation held between the 12th of February and the 31st of March 2021, to collect comments from public and private entities;
- the note was accompanied by the following supporting documents:
  - consultation document;
  - explanatory report;
  - contributions received.
- in its request for the Authority's opinion, ANAC underlines that, in the context of the inquiries aimed at analysing the contributions received in the consultation procedure, further issues should be expanded on and the Authority's opinion in this respect is regarded as particularly useful,

having examined the above documentation, has made the following considerations:

I. Legal and regulatory issues

The Guidelines on which ANAC requested the Authority's opinion refer to Article 192 (2) of Legislative Decree No 50 of 18 April 2016 (hereinafter also public procurement code), which imposes on contracting authorities a stricter obligation to state reasons, in the event of in-house awards, that implies the conduct of a comparative survey aimed at proving their cost-effectiveness as compared to public procurement procedures, and provides, in particular, as follows:

"For the purposes of the in-house award of a contract relating to services which are available on the market in a competitive environment, the contracting authorities shall carry out a prior assessment of the financial merits of the offerings of the in-house entities, having regard to the subject matter and the value of the service, and set out in the statement of reasons of the award decision the reasons for not having put the contract out to tender, as well as the benefits for society at large of the form of management chosen, by reference to, inter alia, the objectives of universality and social solidarity, efficiency, economy and quality of services and optimal use of public resources."

The need to make this provision effective has led ANAC to provide useful indications to guide the entities' action towards a conduct that are consistent with the provision of Article 192 (2) of the public procurement code in case of in-house awards, seeking to prevent and discourage the widespread practice relegating the statement of reasons to the formal requirements to be fulfilled by extensive recourse to standard clauses, with no actual thorough assessment that would be required by the provision.

Following the public consultation on the draft guidelines and in the context of the inquiries aimed at examining the contributions received, ANAC has decided to request the Authority's opinion on account of its powers, which, pursuant to Article 37 (2) (f) of Legislative Decree No 201 of 6 December 2011, converted with amendments into Law No 214 of 22 December 2011, defines, *inter alia*, tendering schemes for the award of transport services on an exclusive basis and model agreements to be included in the tender specifications, as well as model public service contracts for the services performed by internal operators or publicly-owned companies pursuant to Legislative Decree No 175 of 19 August 2016.

The Authority exercised the above powers by approving the relevant regulatory framework included in Annex A to Decision No 154 of 28 November 2019 (hereinafter referred to as Decision No 154/2019), in which, insofar as of interest here, information obligations have been introduced on the awarding entities, *inter alia* in order to tackle the information asymmetries that structurally characterise the sector. As part of the regulatory framework, the information to be made public shall be the subject of an *ad hoc* report, in accordance with Measure 2 (2) of Decision No 154/2019, i.e. the so-called report of contract award (hereinafter referred to as RCA).

The information provided in the RCA contributes to the additional obligations of the same type laid down in Article 34 (20) of Decree-Law No 179 of 18 October 2012, which, for local public services of economic interest, provides that, *"in order to ensure compliance with European law, equality between operators and economy of management and in order to guarantee that appropriate information is provided to the entities concerned, contracts for services shall be awarded on the basis of a report drawn up for that purpose, published on the website of the entity making the award; that report shall set out the grounds for the award and state that the conditions laid down by European law for the form of award chosen are fulfilled and shall specify the precise content of the public service and universal service obligations, stating the financial compensation where applicable"*.

II. Observations by the Authority

In the light of the outlined regulatory framework concerning the information requirements to be fulfilled by the awarding entities under the laws and regulations governing the award of public transport services, the Authority's assessments on each of the questions raised by ANAC are set out below:

1. **Definition of the subjective scope of Article 192 (2) of the public procurement code. In fact, the wording of the provision seems to support the general application of the indications provided therein to contracting authorities, contracting entities and private entities that are responsible for the application of the code.**

   The Authority is called upon to provide the interpretation of a provision of the public procurement code that is not expressly attributable to the Authority's responsibilities. As a rule, public transport services are usually entrusted according to the concession scheme and they are therefore excluded from the scope of the procurement code, in accordance with the provisions of Regulation (EC) No 1370/2007, which is referred to by ART's regulation for public transport services by road and rail.

   However, it should be noted that the wording of paragraph 1.1 of the draft guidelines identifies the subjective scope of Article 192 (2) with the contracting authorities and the contracting entities operating

through direct awards to their in-house companies as referred to in Article 5 of the code, that are registered in ANAC's list pursuant to the first paragraph of that article. This choice is acceptable because of the clear connection between the two paragraphs, both aimed at making transparent either the list of entities that may legitimately make in-house awards (paragraph 1) and the justifications, even economic, underlying that choice (paragraph 2). In addition, maintaining this connection facilitates the verification of compliance with the provision under paragraph 2.

2. **Objective scope of the provision and possible extension to contracts for works and supplies. In this regard, it should be pointed out that Article 192 (2) refers to services only, whereas Article 5 of Legislative Decree No 175/2017 allows in-house companies to carry out further activities. Questions are therefore raised about the reasoning underlying the provision of different rules for services, on the one hand, and works and supplies on the other.**

The above provision, in the identification of its objective scope, refers to the *"in-house award of a contract concerning services available on the market in a competitive environment"*, thus adopting a wording that is exclusively intended for services.

Moreover, it does not appear that the activities permitted under Article 4 of Legislative Decree No 175/2016 to in-house companies can affect the wording of the provision at issue by allowing its broad interpretation. While sharing the concerns about the reasoning underlying the different rules for services as compared to works and supplies, it therefore seems difficult to support an objective extension of the provision of Article 192 (2) also to other types of activity other than *"services available on the market in a competitive environment"*. However, in case of a "mixed" contract — and provided that, under Article 28 of the public procurement code, this is governed by Article 192 of the code due to the prevalence of the "service" component, — it might be appropriate to specify in the guidelines that contracting authorities, in the report that must account for the prior assessment of the positive effects of the in-house award, may also include any aspects concerning other contractual components (works and/or supplies). However, this circumstance has not been reflected in the awards referred to in the RCA that have been examined by the Authority thus far.

3. **Time of publication of the statement of reasons. On this issue, Article 192 (2) of the public procurement code requires contracting authorities to state the reasons for not having put the contract out to tender in the award decision. That indication could be regarded as referring only to the content of the measure in question and not to the time of publication of the statement of reasons which, therefore, would remain subject to the general provisions on transparency (timely publication on the buyer profile of all award-related documents). This interpretation would enable the underlying reasoning to be known prior to the award, making it possible for the parties concerned to exercise effective and substantial control and express objections, if any.**

As to the different solutions proposed in this question, the wording of the provision does not seem to leave room for interpretations that may depart from the letter of the law. In fact, different and anticipated timing of the publication of the statement of reasons would imply setting a time-limit or adopting a logically earlier measure containing the statement of reasons, which do not seem to be mentioned in the provision at issue.

Furthermore, the inclusion of the statement of reasons in the award decision mirrors Article 5 (1) of Legislative Decree No 175/2016, which provides that the decision to set up a public company "*must be analytically justified with reference to the company's needs for the pursuit of its statutory aims referred to in Article 4, highlighting the reasons and objectives justifying that choice, including in terms of economic viability and financial sustainability, as well as direct or outsourced management of the*

awarded service. The statement of reasons must also account for the compatibility of the choice with the principles of efficiency, efficacy and cost-effectiveness of the administrative action". Even in that case, although this obligation is aimed at making public the supporting evidence for the use of a publicly owned company, with content and purpose which are not very different from those at issue, the obligation to provide analytical statement of reasons is laid down in the act whereby the final decision is made.

However, on the point at issue, a specification concerning local public services of economic interest appears to be necessary. In these cases, as correctly reported under paragraph 2.2 of the draft Guidelines, contracting authorities are required to publish the report pursuant to Article 34 (20) of Decree-Law No 179 of 18 October 2012, converted with amendments into Law No 221 of 17 December 2012; in this respect, in order to ensure compliance with European law, equality between operators and economy of management and in order to guarantee that appropriate information is provided to the entities concerned, the governing bodies shall set out the grounds for the award and state that the conditions laid down by European law for the form of award chosen are fulfilled, further specifying the public service obligations and the associated financial compensation. The provision does not lay down any time limits, but merely sets out that "*contracts for services shall be awarded on the basis of a report drawn up for that purpose, published on the website of the entity making the award*". From the wording of the provision, it may be assumed that the publication of the report shall in any event anticipate the act of awarding or at the most coincide with it, as confirmed by court judgements as well[1].

With regard to local public transport services, which are excluded from the scope of the code (under Articles 17 (1) (i) and 18 (1) (a)), in order to ensure the transparency of administrative choices and in the awareness of the positive impacts that a timely publication of the information may have with respect to the oversight of the legality of administrative actions, the above-mentioned ART's Decision No 154/2019 introduced a specific obligation to draw up, publish and transmit to the Authority a report of contract award including a set of information supplementing that provided for in the report under Article 34. In this case, the Authority has set a period of 45 days to provide its comments and, although the time for transmission/publication of this report is not specified, it is clear that, to enable the Authority to exercise the supervisory tasks under its remit, compliance must be ensured at least 45 days before the adoption of the award decision. Within this time-limit, following the inquiries carried out, *inter alia,* to assess the validity of the assumptions under the economic and financial plan (EFP) and, consequently, ascertain whether the conditions for equitable compensation of public service obligations and economic and financial equilibrium of the public service contracts are met, the Authority may submit comments, by providing, where necessary, for appropriate adjustments and requesting that the contents of the RCA and award-related documents be supplemented. Moreover, solely in relation to local public transport, in the case where the awarding entity exercises the power provided for by ART's Decision No 154/2019 to draw up, in a single document, the report of contract award and the report referred to in Article 34 (20) of Legislative Decree No 179 of 18 October 2012, the statement of reasons — and therefore the relevant oversight by the parties concerned — may be ascertained at a time prior to the award, as advocated by ANAC.

[1] Regional Administrative Court Lombardia, section III, judgment No 1781 of 3 October 2016.

4. Application of the guidelines, as advice on best practice, also to the awards that are excluded from the application of the public procurement code pursuant to Articles 17 (1) (i) (exclusion of contracts or concessions for services relating to public passenger transport by rail and underground) and 18 (1) (a) (concessions pursuant to Regulation (EC) No 1370/2007) and from 2014 EU Directives. This takes into account that similar indications to those contained in Article 192 of the code are found in sectoral legislation and regulatory acts.

As to this question, and, in particular, to sectoral legislation, some preliminary considerations should be made before replying to the request for opinion.

In order to overcome the structural existence, in the sector under the Authority's remit, of information asymmetries that constitute potential barriers to entry, the adoption of Decision No 154/2019 introduced an obligation for awarding entities to publicize a number of additional information in the report to be drawn up pursuant to Article 34, so as to illustrate the outcome of the consultation procedure (with particular reference to rules on essential/necessary capital goods, qualitative aspects of the service to be awarded, transfer of staff and data access plan), the criteria adopted to define the simulated EFP, the reasons for introducing any additional participation requirement (in the case of tenders), as well as any other aspects of the awarding procedure as deemed appropriate. In the regulatory framework of Decision No 154/2019, this additional information has been placed within the scope of the RCA, therefore in a separate document, with different content and more details than the report under Article 34, but with the same purpose, i.e. to illustrate the reasons for the awarding entity's choices and provide useful information also to operators interested in participating in the procedure.

However, it should be noted that the disclosure requirements laid down in the RCA (for all types of contracts) differ from those imposed (only for in-house) by Article 192 (2) of the code. The RCA, in fact, does not require to provide differentiated information[2] depending on the type of award indicating a preference for one or the other, nor to report on the comparative analysis previously carried out by the awarding entity[3]. Actually, the Authority's regulation is in line with the principles laid down in Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road, which is the main reference for the award of LPT services and allows the award of contracts by competitive tendering (Article 5.3) and in-house (Article 5.2) on an equal footing; nevertheless, in the latter case, the use of direct awards is conditional on the absence of an express prohibition under domestic legislation, thus allowing Member States to prohibit or introduce restrictions for certain types of award. The national legislator has not introduced any prohibitions as to the use of in-house awards for LPT services[4].

Against this background, given the potential positive impacts that an increased use of tendering procedures could generate on efficiency, quality and innovation in LPT services — so much that the EU legislator, in the last amendment to Regulation (EC) No 1370 of 2007, introduced by Regulation (EU) No 2338 in 2016, has established time-limits and specific conditions for direct award procedures, showing a

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[2] If not to the extent this is unavoidable in view of the characteristics of the procedure.

[3] Regarding the comparative analysis, however, it is possible that, should the awarding entity decide to submit a single report, by including the content provided for in Article 34 (20) of Decree-Law No 179/2012, that assessment could, incidentally, also be known, but this would be a choice by the awarding entity rather than an obligation imposed by ART's regulation.

[4] The only material limitation appears to be the provision under Article 4-a of Decree-Law No 78 of 1 July 2009, converted with amendments into Law No 102 of 3 August 2009, which provides that *"In order to promote efficiency and competition in individual public transport sectors, in the application of the provisions referred to in Article 5 (2) of Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007, competent authorities shall award through concurrent public procedure at least 10% of the services concerned to entities other than those over which they exercise similar control."*

preference for competitive procedures — the extension of ANAC's Guidelines as advice on best practice — without prejudice to the discretion of the awarding entities as to the choice of the procedure and assuming a factual verification of its manageability with a truly "market" model of the transport service concerned, the results of which must be presented to the Transport Regulation Authority — can be welcomed if it is expressly provided that, in such case, full compatibility of this advice with the regulation adopted by the Authority must be ensured.

Clearly, where the Guidelines referred to in this opinion would constitute a reference, even though as best practices, also for services that are excluded from the application of Article 192 of the code, account should be in any case taken of the adoption of specific regulatory acts by sectoral authorities.

In fact, in addition to the aforementioned information obligations under Decision No 154/2019 and to the economic contents of the RCA, for the purposes of assessing the economic adequacy of the in-house company's offer for rail transport services, also relevant are the Authority's Decision No 120/2018 of 29 November 2018 on *"Conclusion of the proceeding initiated by Decision No 69/2017. Approval of regulatory measures laying down methodologies and criteria to ensure efficient management of regional rail transport services",* as well as, with reference to the assessment of the societal benefits of the chosen form of management, Decision No 16/2018 of 8 February 2018 on *""Minimum quality standards for national and local passenger transport services by rail, that are subject to public service obligations, pursuant to article 37 (2) (d) of Decree-Law no. 201 of 6 December 2011, converted, with amendments, into Law no. 214 of 22 December 2011, , initiated by Decision No 54/2015. Conclusion of the proceeding".*

Decision No 120/2018 applies in fact to rail transport services that are awarded in all the ways permitted by the law (and therefore also through "in-house providing"), and includes methodologies, criteria and procedures aimed at ensuring efficient management and transparency, absence of cross-subsidies and accessibility of relevant information, including to ensure adequate proportionality of fees and compensations for the services. By Decision No 16/2018, the Authority approved the minimum quality standards (indicators and levels) that must be included in public service contracts for the award of rail passenger transport services.

This opinion is sent to the National Anti-Corruption Authority and published on the Authority's website.

The President

Nicola Zaccheo
(digitally signed pursuant to
Legislative Decree 82/2005 as amended)