



The Supreme Court validates defects that do not change the result of the awarding and the assessment of documents by the Administration

Judgment of the Contentious-Administrative Chamber (Section 7) of the Supreme Court of 3 November 2011

Background

The judgment of the Supreme Court resolves the complaint lodged against the awarding by open procedure and through tender of an agreement for the supply of a vaccine. The appellant contested the awarding of the agreement on the ground of: a) improper assessment of the awarding criterion “lower economic cost” since it did not concur with the provisions of the Specifications; b) failure to publish the sub-criteria used for distributing the score for the criterion “improvements of the technical characteristics”; and c) error in the assessment of one of such sub-criteria.

Decision of the Supreme Court

The Supreme Court rejected the appeal on the basis of the following arguments:

a) The assessment of the awarding criterion “lower economic cost” was made according to the most profitable economic offer in accordance with the economic saving generated. The principle of proportionality was applied to the score of the offers, which is the formula usually employed in public tenders for the supply of vaccines in which the appellant had already participated without expressing disagreement to this regard. The difference between the wording employed in the Report of the Contracting Board (“major saving” and “discount”) and in the Specifications (“lower cost” and “price”) does not mean that the

assessment was made on the basis of a criterion other than the lower cost criterion established in the Specifications;

b) Although the sub-criteria on the basis of which the assessment of the criterion “improvements of the technical characteristics” was distributed had not been published and the Administration assigned the points in a way different from the one initially communicated, the Supreme Court confirmed the ruling of the Superior Court of Justice (TSJ) of Madrid. The TSJ considered that such anomalies could have been a sufficient basis for accepting the appeal but nevertheless rejected the appeal for practical reasons, since even if the sub-criteria had been assessed as the appellant defended, it would not have changed the result of the award, which would have still been given to the company that had been awarded the contract;

c) According to its leaflet and SmPC, the vial caps of the product of the awarded company contained natural dry rubber, which may cause hypersensitivity reactions to persons with a history of latex allergy. However, the awarded company submitted a certificate issued by itself, together with a certificate issued by the manufacturer of the product, indicating that the cap was not made of latex. According to the Supreme Court, the Administration, which found the submitted certificates to be sufficient in order to consider that the product was latex-free, must be given a margin regarding its faculty of assessment.