



A company bidding for the supply of consumable products may be obliged to offer measuring devices free of charge

Resolution No 88/2014, of 5 February 2014, of the Central Administrative Court of Public Procurement Appeals

Background

In a public tender procedure for the award of a supply agreement of test strips to measure parameters or indicators for the diagnosis, it is frequent that the winner be also obliged to supply, free of charge, measuring devices as well as any other equipment necessary for their use.

This obligation was provided for in the Framework Agreement called by the Public Health Service (INGESA) in order to select suppliers of medical devices for various Autonomous Regions and Government Agencies. The Technical Specifications forced the winner of the test strips supply agreement to deliver the reading devices of such strips free of charge.

The analysis that the Court has made on this issue has raised some concern.

Position of the Court

The plaintiffs put forward that the condition of supplying the reading devices free of charge was not related to the supply agreement and that it involved an irregular way of financing other activities different from the supply agreement itself. In short, it was claimed that the procedure to buy strips had to be separated from the procedure to buy reading devices.

The Court examines the appeal in a manner that seems skillfully designed to agree with the administration. Moreover, the arguments seem easy from the legal point of view. According to the Court, if the agreement has a purpose and a specific price, it will be valid; and if it doesn't it will be void. On the basis of these ideas, and in relation with the Agreement's purpose, the Court considers that the delivery of the reading devices must not be necessarily set up as a separate tender because according to the Court it is obvious that the supply of measuring devices cannot be considered unrelated to the test strips supply agreement.

With respect to the price, the Court's position is that the Public Procurement Sector is based on the general principle of "good and valuable consideration", and it considers that the delivery of reading devices is not free because the consideration is included in the overall price paid for the test strips.

On the other hand, the Court understands that the invitation to tender of INGESA establishes in a sufficient manner the unit price for each of the goods because they accurately state the ratio for delivery of reading devices (2000 thousand strips per device). In this manner, the judgment says, tenderers will be able to make their offers knowing how the cost of the reading devices will affect the unit price of the test strips.