



Criteria to justify abnormally low prices offered in tender procedures

Judgement of the Administrative Court of Public Procurement of Madrid of 16 of November of 2017

Background

Through this Judgement, the Administrative Court of Public Procurement of Madrid decided on an appeal which was filed against the award of a contract to a company that had offered a discount of 36,38% over the tender budget. The appeal was filed by a competitor which ended up classified in the second place, on the grounds that it considered that it was not possible to perform the contract with such a reduced price.

During the procedure, the contracting authority requested the winning company to justify the economic terms of its tender because the price offered was considered abnormally low. The company submitted a justification report which was accepted by the contracting authority, and the contract was finally awarded to this company.

Justification of the discounts

By means of this Judgement, the Court clarified what is the content of the justification report for abnormally low tender offers and how such justification must be assessed by the contracting authorities. Likewise, the Court determined that, in this case, the justification of the tender provided by the winner of the tender was not valid despite the fact that it had been accepted by the contracting authority.

The Court established that it is only possible to exclude an abnormally low offer from the tender procedure when, in view of the justification provided, it is deemed that the contract cannot be executed. According to the Court, in order to determine if a contract can be executed or

not, tenderers must prove the seriousness of their offers in all their elements. Therefore, the justification of the offer must be complete. This does not mean that the offer will be considered insufficient due to the mere omission of elements of minor importance. The higher the discount offered, the higher the level of detail required in the justification to be provided to the contracting authority. Moreover, the Court highlighted that it is essential that the report of the contracting authority evaluating the justification of the offer submitted by the company is motivated and accounted for by the contracting authority in the tender dossier, and that such assessment must be rational and reasonable. In case the contracting authority fails to adequately motivate its report, the decision of such authority might be considered as arbitrary.

Personnel cost

The Court considered that the personnel cost offered by the tender winner was insufficient to cover the salaries of company's employees, according to the collective bargaining agreement. However, such insufficiency in this case does not automatically mean that the offer is abnormally low, since it can be compensated with the price of other benefits or with the general structural costs of the company. Therefore, the Court considered that the tender complied with the labor Law. However, the Court concluded that the offer was abnormally low, since it proposed to carry out activities that were not included in the costs of the contract, and that such costs should have been included in the offer. The Court annulled the award decision of the tender to the company which had offered such low price.