



180° turn: errors made by the winner of a tender when submitting formal documents may now be remedied

Resolution 747/2018 of the Central Public Tender Court of 31 July 2018

Background

In this Resolution, the Central Public Procurement Court ("Court") ruled on an appeal against the award of a tender to a temporary consortium of companies. The consortium, having classified as the best offer in the tender, was required to submit certain documentation within a period of 10 days counted from the request of the contracting authority. When submitting these documents, the consortium made a mistake regarding the contents of a bank guarantee. The contracting authority decided to grant the consortium a period to remedy such mistake. Once the mistake was remedied, the contracting authority decided to award the tender to the consortium.

The awarding decision was challenged by other tenderers on the grounds that the offer of the consortium should have been rejected by the contracting authority because the mistake could not be remedied. The appellants said that the contracting authority should have rejected the possibility of remedying the mistake because it affected documentation which the winner should have submitted within the 10-day term.

The appellants pointed out that the Spanish tendering courts have systematically interpreted that this sort of mistakes cannot be remedied. The legal basis for this position of the courts was that although the Spanish law does not allow, nor does it prohibit the possibility of remedying mistakes, such law does indeed provide that if a valid request to submit the documentation is not appropriately fulfilled, the offer of the tenderer will be deemed as withdrawn and a penalty will be imposed to such tenderer.

A 180° turn

In this Resolution, the Court states that it is necessary to change the doctrine that has been followed up until now, because the interpretation of the Spanish tendering courts on the possibility of the tenderer to remedy this sort of mistakes has been too strict.

In this regard, the Court differentiates two situations: the case where the request of the contracting authority is not fulfilled at all, and the case where such request is defectively fulfilled.

The Court considers that in the first case it should not be allowed to remedy the situation. However, when the request is defectively fulfilled, the Court considers that the right of the winner of the tender to have a remedy period must prevail.

To justify this thesis, among other arguments, the Court considers that it makes no sense that after a long tendering procedure to choose the best offer, the winner is rejected because of a mistake in the documentation, and that the Spanish general rules on the administrative procedure foresee the possibility of correcting mistakes. Therefore, in this case, said administrative procedure rules must be applied, whilst respecting the deadlines established in the public procurement law.

Through this Resolution, the Court confirms a 180° doctrinal turn that was previously announced in its Resolution 338/2018, according to which the Court considered that the request to remedy this kind of mistakes was consistent with the law.