ACCESS TO TENDER DOCUMENTS AND PROTECTION OF PRIVACY

VITTORIA BONINO

Key-words: protection of privacy - access to the tender - protection of technical and commercial secrets

Category: Legal Area

The right of access the documents of a call for tenders must be integral, it prevails over privacy and the protection of secrecy.

The right of access to the tender's documents must be recognized even when there is opposition from other counter-interested parties for the protection of technical and commercial secrets, as it is prevalent with respect to the need for privacy or secrecy.

Regional Administrative Court (Tribuanle amministrativo Regionale - TAR) of Puglia (Italy), with the Ordinance no. 49/2019, established, at the request of the applicant company, the full access to the tender documentation concerning the other party, after the administration had granted access by obscuring parts of the technical project and part of the proof of the anomaly, in addition to other documents considered sensitive.

Extent and limits of the right to access provided in the Procurement Code.

The right of access to administrative documentation relating to a tender is specifically regulated, first by art. 13 of the Legislative Decree no. 163/2006, and then by art. 53 of the Legislative Decree no. 50/2016 on the same content.

The Procurement Code, therefore, allows access to the competitor who requests it in view of defending his interests in Court in relation to the contract awarding procedure within which the access request is formulated.

It is therefore evident, according to the TAR, the access referred to in the aforementioned provisions must also allow the extraction of copies without any limitation.

The case of technical and commercial secrets and the need for full access.

In accordance of the aforementioned provision, access to the tender documents is in any case (i.e. also when a technical or commercial secret has been legitimately opposed pursuant to art. 13, para. 5, letter a) and b) of Legislative Decree. no. 163/2006) allowed only to the competitor who

participated in the call for tenders, as long as the required documentation is actually functional to the defense of the applicant's rights.

The right of access to the documents of a tender must be recognized even when there is opposition, as occurred in the specific case subject to judgment, of other counter-interested participants for the protection of technical and commercial secrets, as it prevails over to the need for confidentiality or secrecy.

Moreover, according to the Puglia's TAR, participation in public tenders involves the implicit acceptance by the applicants of the rules of transparency and impartiality that characterize the selection.

Even if the obligation for the applicant to use the documents acquired exclusively for the care and defense of his own legal interests remains, in the decision of an undertaking to participate in public tenders there is an inevitable acceptance of the risk of disclosure of industrial or commercial secrets. The disclosure happens when the information is used for the purpose of gaining a competitive advantage within a public tender, precisely due to the nature of publicity and transparency that assist a public tender.

It was therefore recognized that the applicant company holds a direct, actual and concrete interest (pursuant to artt. 22, para. 1, lett. b) of Law no. 241/1990 and art. 2, para. 1, Decree of the President of the Republic (d.p.r.) no. 184/2006) of full access to the technical offer of the other party and to the rest of the documentation, instrumental to the protection in Court of their own subjective legal positions.

Source: Giurdanella & Partners Law Firm

Link:https://www.giurdanella.it/2019/02/11/accesso-appalti-riservatezza-segreti-tecnici-commerciali?sfns=mo