Corte costituzionale

JUDGMENT NO. 114 OF 2011

Ugo DE SIERVO, President

Alfonso QUARANTA, Author of the Judgment

JUDGMENT NO. 114 YEAR 2011

In this case the President of the Council of Ministers challenged regional legislation enacted in Friuli-Venezia Giulia relating to public sector contracts of regional interest, providing *inter alia* for special temporary fast-track procedures for the award of public sector contracts. The Court accepted the application in part, holding that, according to a principle expressed under State legislation, the mechanism whereby anomalous bids are automatically excluded may not be activated on regional level if it has been excluded on State level in cases in which there are fewer than ten participants, since the State rule concerned was established on competition law grounds. The Court also accepted further challenges to regional legislation purporting to amend the publicity requirements applicable to tender notices and concerning the minimum number of candidates involved in under-threshold direct award procedures.

(omitted)

JUDGMENT

in proceedings concerning the constitutionality of Article 4(28) of Friuli-Venezia Giulia Regional Law no. 12 of 16 July 2010 (Adjustment of the 2010 budget and the multi-year budget for 2010-2012 pursuant to Article 34 of Regional Law no. 21 of 2007), initiated by the President of the Council of Ministers by application served on 18 September 2010, filed with the registry on 21 September 2010 and registered as no. 93 in the Register of Applications 2010.

Considering the entry of appearance by Friuli-Venezia Giulia Region;

having head the Judge Rapporteur Alfonso Quaranta in the public hearing of 8 March 2011;

having heard the State Counsel [*Avvocato dello Stato*] Giacomo Aiello for the President of the Council of Ministers and Counsel Giandomenico Falcon for Friuli-Venezia Giulia Region.

(omitted)

1.— The President of the Council of Ministers initiated a question concerning the constitutionality of Article 4(28) of Friuli-Venezia Giulia Regional Law no. 12 of 16 July 2010 (Adjustment of the 2010 budget and the multi-year budget for 2010-2012 pursuant to Article 34 of Regional Law no. 21 of 2007), which introduced Article 1a into Friuli-Venezia Giulia Regional Law no. 11 of 4 June 2009 (Urgent measures concerning regional economic development, support for the income of workers and families and the acceleration of public works), due to the alleged violation of Article 4 of Constitutional Law no. 1 of 31 January 1963 (Special Statute of Friuli-Venezia Giulia Region), as well as Article 117(2)(e) and (l) of the Constitution.

2.— Before examining the individual challenges raised against the application, it must be noted that in judgments no. 221 and 45 of 2010, this Court already specifically examined the question of relations between the State and the regions governed by special statute and the autonomous provinces with regard to the division of their respective legislative powers over public sector contracts.

In particular, in judgment no. 221 issued in proceedings involving the current respondent (judgment no. 221 of 2010), the Court held as a preliminary matter that Article 4 of Constitutional Law no. 1 of 1963 approving the Special Statute granted Friuli-Venezia Giulia Region primary legislative powers in specifically designated areas, which also included public works of regional interest (no. 9).

The Court accordingly observed that, given this specific grant of powers, since the amended version of Title V of Part Two of the Constitution made no reference to the area of "public works", the provision of the Special Statute referred to above must apply – in accordance with the provisions of Article 10 of Constitutional Law no. 3 of 18 October 2001 (Amendments to Title V of Part Two of the Constitution).

However, with respect to the legislation governing tender contracts having an effect on regional territory, this does not mean that the regional legislature is at liberty to take action without limitation and that the provisions setting out general principles contained in Legislative Decree no. 163 of 12 April 2006 (Code of public works contracts, public supply contracts and public service contracts implementing directives 2004/17/EC and 2004/18/EC) cannot apply. Indeed, Article 4 of the Special Statute provides that the region's primary legislative power must be exercised "in accordance with the

Constitution, the general principles of the legal order of the Republic, the fundamental rules of socio-economic reform and the international law obligations of the State (...)".

There is no question that – insofar as they are related to the provisions set forth under Title V of Part Two of the Constitution, including in particular Article 117(2)(e) and (l) on competition law and the system of private law – the provisions contained in the Code of Public Works Contracts referred to must, due to their content of a general nature, be classified as fundamental rules of socio-economic reform, as well as rules by which the State implemented the international law obligations resulting from Italy's participation in the European Union.

It is significant in this regard that the settled view of this Court has asserted that "the principles resulting from the provisions of the Code of Public Works Contracts must be acknowledged as having the status of fundamental rules of socio-economic reform issued by the Republic, and as such impose legitimate limits on the primary legislative powers" of the regions governed by special statute and the autonomous provinces of Trento and Bolzano. And this is the case "specifically for those provisions of the aforementioned Code which relate on the one hand to the choice of the contracting party (the award procedures) along with on the other hand the conclusion of the contract and its related implementation" (see *inter alia* judgment no. 45 of 2010).

3.— Within this perspective, as this Court has previously held, consideration must be given in the first place to the limits resulting from the requirement to comply with the principles of competition law, which are fundamental for assuring Community freedoms, and in any case the provisions contained in the Code of Public Contracts directly implementing the requirements set forth under European law. Against this backdrop, the regional legislation cannot depart from the provisions enacted by the national legislature as implementation of Community law rules, and cannot therefore reduce the level of protection guaranteed under State legislation.

Secondly, the regional legislature must comply with the principles of the legal order of the Republic, which also include those pertaining to the regulation of private law institutions and relations pertaining above all to the conclusion and implementation stages of tender contracts, which must be uniform throughout the country due to the requirement to ensure respect for the principle of equality. It should be added to this that the stages referred to above also include arrangements which further unitary interests

and which may be deemed to be an expression of the limit of fundamental rules of socio-economic reform, thereby implying financial assessments and implications, which cannot differ throughout the State.

The examination of the questions of constitutionality raised by the State in its application must be conducted in the light of the constitutional framework set out above.

Contrary to the assertions of the region's representative, it cannot be argued that the application is inadmissible on the grounds that the State "simultaneously" invoked the provisions of the Special Statute along with those contained in the amended Title V of Part Two of the Constitution. According to an overall reading of the application, and in particular of the premise to the analysis of the individual challenges, it is clear that the applicant correctly referred to the provisions of the Statute insofar as they grant the Region powers over public works, providing in parallel for limits on the exercise of that power. Within this perspective, the reference also to the provisions contained in Article 117(2)(e) and (l) of the Constitution is justified by the consideration that the limits imposed under the Statute on the Region's legislative powers result from State legislation, as an expression of the general principles of the legal order of the Republic, which in this case was issued to implement precisely the constitutional requirements referred to above. In other words, the limits resulting from the requirement to abide by international law obligations, the fundamental rules of socio-economic reform and the general principles of the legal order of the Republic may be found in the provisions set forth by the Code of Public Contracts by which the State exercised the legislative powers granted to it under Title V, with particular reference to competition law and the system of private law.

4.— Having set out in general terms the structure of relations between the legislative powers of the State and those of Friuli-Venezia Giulia Region as a region governed by special statute over the matters at issue here, it is now possible to pass to an examination of the individual challenges raised in the application.

5.— First and foremost, Article 1a(1) and (2) of Friuli-Venezia Giulia Regional Law no. 11 of 2009 were challenged insofar as they provide that:

"1. In order to confront the extraordinary situation of the serious economic crisis, until 31 December 2011 work for an amount equal to or lower than 1 million Euros before VAT shall not represent a transboundary interest.

2. Work for an amount equal to or lower than the amount specified under paragraph 1 shall be awarded by the single individual with responsibility for the procedure following a market research seeking to identify the economic operators which meet the necessary prerequisites. The direct invitation to submit bids shall be addressed to at least fifteen parties where such a number of parties is available, to be selected on a rotating basis. The time limit for receipt of bids may not be shorter than ten days from the date of dispatch of the letter inviting the submission of a bid".

According to the applicant, these provisions violate Articles 56 (negotiated procedure following publication of a tender notice), 57 (negotiated procedure without publication of a tender notice), 70 (time limits for receipt of applications to participate and for the receipt of bids) and 122(6), (7) and (7a) (specific arrangements governing under threshold public works contracts) of Legislative Decree no. 163 of 2006, thereby violating Article 4 of Constitutional Law no. 1 of 1963 due to the failure to comply with the fundamental rules of socio-economic reform.

5.1.— The question is inadmissible.

As far as the first paragraph is concerned, it must be noted that since it is limited to stipulating that the work described thereunder shall not represent a transboundary interest, it has a normative content which is not liable to infringe the State powers referred to.

On the other hand, with regard to Article 1a(2), the challenge is inadmissible in the first place due to the generic nature of the grounds which are not supported by appropriate argument. In fact, the applicant limited itself to referring generically to the provisions mentioned above of Legislative Decree no. 163 of 2006, without specifying which parts of them were relevant and without stating the reasons for the alleged discrepancy between the regional legislation and the State provisions.

Secondly, these provisions are in any case immaterial. The regional provision regulates the simplified restricted procedure applied to contracts under the European threshold for significance. As was also pointed out by the respondent's representative,

the State provision regulating that procedure is contained in Article 123 of Legislative Decree no. 163 of 2006.

It follows that the failure to refer to that state provision, as the only amenable for consideration as an interposed rule in this case, means that there can be no examination on the merits of the question of constitutionality raised in the application.

6.— Article 1a(3) is also challenged insofar as it provides that "the work falling under paragraph 2 shall be awarded preferably according to the criterion of the bid offering the best value for money". Such work "may be allocated according to the criterion of the lowest price where it is considered by the tendering authority according to a reasoned opinion to be more appropriate than the criterion of the best value for money. If the criterion of the lowest price is applied this will in any case give rise to the application of the system which automatically excludes anomalous bids".

According to the applicant, this provision breaches Article 81 (criteria governing the choice of the best bid) and Article 12(9) (specific provisions governing under threshold public works contracts) of Legislative Decree no. 163 of 2006 on the choice of the award criterion and anomalous bids. In particular, it is argued that whilst the tendering authority may specify in the notice that any bid containing a percentage discount equal to or higher than the threshold for anomalies is to be automatically excluded from the tender, this right of automatic exclusion cannot be exercised when the number of bids admitted is lower than ten. It is hence concluded that the State's exclusive legislative powers pursuant to Article 117(2)(e) and (l) of the Constitution have been violated.

6.1.— The question is only in part well founded.

The contested provision contains two different yet related principles.

In the first part it provides that the work falling under the regulation must be awarded preferably according to the criterion of the bid offering the best value for money. The criterion of the lowest price may only be used if considered more appropriate by the tendering authority. On State level, Article 81(1) of Legislative Decree no. 163 of 2006, which was invoked by the applicant, places the two criteria on an essentially equal footing, providing that "the best offer shall be selected according to the criterion of the lowest price or the criterion of the bid offering the best value for money".

In this regard, this Court has already had the opportunity to assert that in cases, such as that under examination, in which the regional legislature has not excluded one of the possible award criteria in an incontrovertible and theoretical manner, but has limited itself to specifying an order of priority in the choice, this difference in the arrangement is not capable of modifying the rules governing the functioning of the market, and is therefore not liable to have a negative effect on the levels of protection for competition set forth under State legislation (judgment no. 221 of 2010).

It follows that, with regard to the provision examined above, the provision under examination is not unconstitutional as objected.

The second part of the provision specifies that "if the criterion of the lowest price is applied, this shall in any case result in the application of the system for automatically excluding anomalous bids".

With regard to this aspect the question is by contrast well founded.

Article 122(9) of Legislative Decree no. 163 of 2006 – as amended by Article 1(1)(bb)(ii) of Legislative Decree no. 152 of 11 September 2008 (Further provisions to correct and supplement Legislative Decree no. 163 of 12 April 2006 enacting the Code of public works contracts, public supply contracts and public service contracts pursuant to Article 25(3) of Law no. 62 of 18 April 2005) – provides that the right of automatic exclusion "cannot be exercised when the number of bids admitted is lower than ten". This Court has already had the opportunity to assert that this amendment was imposed by the requirement to "increase the area of competitiveness" (judgment no. 160 of 2009).

Since regional legislation has not provided that automatic exclusion may not be ordered in the situations considered under State law – it introduced legislation differing from the State legislation, which is liable to have a negative effect on the level of competition which must be guaranteed to businesses operating on the market.

It follows that Article 1a(3) is unconstitutional insofar as it provides that, "if the criterion of the lowest price is applied, this shall in any case result in the application of the system for automatically excluding anomalous bids".

It must in any case be specified that any finding that the regional provision concerned is unconstitutional will entail the application of the mechanism for assessing anomalous bids determined on State level.

7.— Article 1a(4) is challenged insofar as it provides that "the awards falling under paragraph 2 shall be published in the Register of the tendering authority and notified to the Regional Monitoring Centre".

According to the applicant, this provision breaches Article 122(3), (4) and (5) of Legislative Decree no. 163 of 2006 on publicity requirements within award procedures, resulting in a substantial encroachment upon the State's exclusive legislative powers under Article 117(2)(e) and (l) of the Constitution.

7.1.— The question is well founded.

This Court has already had the opportunity to assert that "the adoption of adequate publicity measures constitutes an indispensable element for guaranteeing the highest possible level of awareness and consequent participation in the tender" (judgment no. 401 of 2007).

As has already been highlighted above, in the case under examination the contested regional legislation limits itself to specifying that "awards" must be published in the register of the tendering authority and notified to the Regional Monitoring Centre.

By contrast, the State legislation referred to by the applicant requires that for public works contracts falling under the Community threshold, the tender notice shall be published "on the commissioning body's profile", if established, and "on information sites" (paragraph 3). Notices and tenders relating to contracts for amounts equal to or greater than five hundred thousand Euros shall be published, *inter alia*, also in the Official Journal of the Italian Republic.

Due to the function, mentioned above, which must be attributed to publicity, this difference in the legislation has a negative impact on the level of competition

Accordingly, Article 1a(4) must be ruled unconstitutional insofar as it does not provide that, in addition to the forms of publicity required under regional legislation, those imposed by Article 122 of Legislative Decree no. 163 of 2006 also apply.

8.— Finally, Article 1a(5) is challenged insofar as it provides that "until 31 December 2011, engineering and architectural services for amounts equal to or exceeding 50,000 Euros before VAT shall be awarded by the tendering authority according to a selection procedure based on an examination of the curricula of three parties identified by the single individual with responsibility for the procedure according to the criteria of professionalism, rotation and impartiality".

According to the applicant, this provision violates Article 91(2) of Legislative Decree no. 163 of 2006 on the award of services relating to architecture and engineering, thereby infringing the exclusive legislative powers of the State pursuant to Article 117(2)(e) and (l) of the Constitution.

8.1.— As a preliminary matter, the objection raised by the Region's representative that the objections are inadmissible due to their generic nature cannot be accepted since the applicant has, albeit in summary form, clearly set out the contrast between the contested provision and the legislation provided for under the Code of Public Contracts.

8.2.— On the merits, the question is well founded.

The State provision relied on by the applicant provides that "awards relating to planning, safety coordination during the planning stage, works direction, safety coordination during the implementation and final inspection stage meeting with the requirements of Article 120(2a) and having a value lower than the threshold specified under paragraph 1 may be awarded by the tendering authorities, under the responsibility of the individual with responsibility for the procedure, to the parties specified under paragraph 1(d), (e), (f), (fa), (g) and (h) of Article 90, subject to compliance with the principles of non-discrimination, equal treatment, proportionality and transparency and according to the procedures set forth under Article 57(6); such invitations shall be addressed to at least five parties, if there is such a number of potential candidates".

Both the State and the regional legislation contemplate awards which are not subject to the requirement of compliance with rigid rules and procedures, except in relation to one issue. The national Parliament has in fact specified that such invitations must be addressed to at least five parties, if there is such a number of potential candidates. By contrast, the regional legislation provides that the choice must be made between three parties identified by the individual with responsibility for the procedure. The reduction of the economic operators entitled to participate in the selection procedure results in a difference in which is liable to have a negative impact on the overall level of protection of competition in the particular market segment taken into consideration. The contested legislation must therefore be ruled unconstitutional insofar as it provides that the selection procedure must involve three and not "at least five parties".

ON THOSE GROUNDS

THE CONSTITUTIONAL COURT

a) *rules* that the questions concerning the constitutionality of Article 1a(1) and (2) of Friuli-Venezia Giulia Regional Law no. 11 of 4 June 2009 (Urgent measures concerning regional economic development, support for the income of workers and families and the acceleration of public works), introduced by Article 4(28) of Friuli-Venezia Giulia Regional Law no. 12 of 16 July 2010 (Adjustment of the 2010 budget and the multi-year budget for 2010-2012 pursuant to Article 34 of Regional Law no. 21 of 2007), raised with reference to Article 4 of Constitutional Law no. 1 of 31 January 1963 (Special Statute of Friuli-Venezia Giulia Region) and Article 117(2)(e) and L) of the Constitution by the application referred to in the headnote, are inadmissible;

b) *declares* that Article 1a(3) of Regional Law no. 11 of 2009 is unconstitutional insofar as it provides that "when the criterion of the lowest price is applied in any case the system whereby anomalous bids are automatically excluded shall be adopted";

c) *declares* that Article 1a(4) also of Regional Law no. 11 of 2009 is unconstitutional insofar as it does not provide that, alongside the forms of publicity provided for thereunder, those also required under Article 122 of Legislative Decree no. 163 of 12 April 2006 (Code of public works contracts, public supply contracts and public service contracts implementing directives 2004/17/EC and 2004/18/EC) shall also apply;

d) *declares* that Article 1a(5) of Regional Law no. 11 of 2009 is unconstitutional insofar as it provides that the selection procedure must involve three and not at least five parties;

e) *rules* that, with the exception of the matters referred to under point b), the question concerning the constitutionality of Article 1a(3) of Regional Law no. 11 of 2009, raised with reference to Article 4 of Constitutional Law no. 1 of 1963 and Article 117(2)(e) and (l) of the Constitution by the application referred to in the headnote, is groundless.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 4 April 2011.

(omitted)