Regional Administrative Court Tuscany – Florence, Section 1 judgment 28 February 2018 no. 328

In this case the plaintiff company asked for the annulment of two decisions of the executive of the Municipality of Massarosa, with which the proposal of project finance of another company, which has as object the energy efficiency of the thermic system of some buildings and of the lighting systems owned by the Municipality, was positively evaluated.
The plaintiff claimed: (i) the lack of an adequate motivational support by the Administration, in the rejection of the proposal; (ii) unequal treatment while evaluating the two received proposals, in consideration of the dispute that arise among the other party and the Administration, with the request of potentially needed design adjustments to better adapt the proposal to the public needs; (iii) violation of the regulation on the award of local public services and of the operational limits of the publicly owned companies, since the other party resulted to be 100% owned by another company that is in turn participated, in a small percentage, by the Municipality of Massarosa.
Sub (i) the Court has believed the grounds to be adequate, since several critical aspects of the proposal in question were specified: firstly, the uncertain allocation of the risk, which would be at least partly borne by the Administration, the draft contract foresees the payment, in favour of the private operator, of a fixed charge that would have in any case covered the realization costs of the intervention, independently from the results of energy efficiency obtained by virtue of it.
At the same time it was disputed the lack of economic benefit of the proposal and the lack of correspondence of it with the public interest.
Sub (ii) for what concerns the supposed unequal treatment, the Court has highlighted that art. 183 paragraph 5 of the Legislative Decree 50/2016 leaves much discretion to the Administration, in the ambit of the assessment of the feasibility of the proposal. Although the cited regulation does not expressly discipline the procedure of comparative appraisal, however, "it cannot be denied that the simultaneous dispute of more proposals related to the same object, by different operators, forces the Administration, as the addressee, to give to each of them the same consideration in the feasibility assessment. This burden does not limit the possibility to differently set up the investigation, having regard to the quality of the proponents and/or the contents and the degree of the deepening of the received proposals, within the limits of reasonableness and non-contradictory".
In this specific case, the Court has argued that the different treatment of the plaintiff and of the other party's proposals it is not unreasonable, given the opposition of the former to the public interest and by taking into consideration the three moths time limit within which the Administration had to make a decision about the latter.
Sub (iii) in relation to the third point, the Court has decided that the scarcity of the Municipality participation was overtly insufficient to guarantee a dominant autonomous influence on the work of the other party. Furthermore, accordingly to the national case law, being the subsidiary of a company owned by the Municipality is not an element that prevent the participation to a tender issued by the same public entity, which is joint holder of the share capital, since it is not possible to assume that from the sole participation of the contracting Administration in the competing company arises an automatic violation of the market principles and equal treatment, in absence of evidence regarding the existence of specific violation of the open public procedures. The same observations also apply in the case the public companies submits proposals of project finance, unless it has been verified that the administration has benefitted the proposer participated by it. Specifically, the *favor* would have been solved by the dispute of the Municipality about the objective inability of the proposal to be a feasible alternative.