



31.8.2016

## NOTICE TO MEMBERS

**Subject: Petition No 1394/2015 on behalf of Pia Matihaldi (Finnish) on behalf of Service Foundation for People with an Intellectual Disability and approximately 10 signatures, on the European Union's Procurement Directive and its national implementation which causes discrimination based on disability**

### 1. Summary of petition

The petitioner states that the EU's Procurement Directive (2014/24/EU) allows for erroneous interpretations at national level regarding the organisation of housing services for the disabled and that the current Public Procurement Act (30.3.2007/348) in force in Finland enforces the discriminatory practice regarding the disabled on a local and regional scale. This discrimination is centered on the organisation and realisation of social services for individuals, such as housing services and help provided by another person.

According to the Public Procurement Act in force in Finland, if the municipality does not organise the services itself, it must organise a call for tenders for the organisation of the services in certain situations exceeding a threshold. For social and health care services, the procurement threshold is EUR 100 000. In Finland, all social and health care services are covered by the Public Procurement Act, even though this is not required by EU legislation. This has led to a situation where services for the disabled are organised in a way that does not take into account their individual needs or basic human rights. The disabled and their close relatives have no part or influence on the matters concerning them. The petitioner wishes that the EU would influence the revising of Finland's current procurement act so that the disabled people's right to be heard can be considered, and when these special services are procured via tendering, the disabled and the organisations for the disabled need to be guaranteed efficient ways to impact their cause.

### 2. Admissibility

Declared admissible on 10 May 2016. Information requested from Commission under Rule 216(6).

### 3. Commission reply, received on 31 August 2016

The petition concerns the housing services provided by the City of Tampere and the City of Oulu, and requests more particularly an investigation into the procurement practices and rules adopted by the Finnish Government.

As regards the Tampere housing services, the petitioners stress that the competent public authorities decided not to provide the services themselves and instead procured them from a different entity. They used a tender procedure based on the Finnish Act on Public Contracts, which transposes the 2004 EU public procurement Directives<sup>1</sup>. The incumbent tenderer lost to a different economic operator, who will therefore replace it. The petitioners state that families were not consulted during the procedure, but were only informed of the existence of an ongoing procedure, and, subsequently, of the replacement of the incumbent provider. The lack of consultation and the change of provider caused the beneficiaries of the service intense distress, amounting to a violation of their rights under Article 10 and 12 of the EU Charter of Fundamental Rights.

Concerning the housing services in Oulu, the petitioners claim that, following a 5-year contract with an operator, the contract was re-tendered and families of the concerned people were consulted. However, the award was based mainly on the cost criterion and a new operator won the tender. As in Tampere, the change of provider caused suffering to the beneficiaries.

The petitioner essentially argues that a public tender is not the appropriate means to organise special services for the disabled. The frequency of tenders, to be repeated every few years, and the application of the general procedures set forth in the Finnish law are not suitable for meeting the needs of vulnerable people. Furthermore, according to the petitioner, rules on consultation of the beneficiaries in the tender procedure do not allow for real involvement of the concerned vulnerable people in the process of organising social services for them. Additionally, the petition seemingly highlights that Finland transposed EU public procurement Directives so that rules on above-threshold contracts would also apply to contracts of a lower value, even though this was not required under EU law, and so that procedures under the Act on Public Contracts strictly apply when procuring Annex II B social and health services.

Firstly, it should be noted that rules on public procurement are established with the objective of safeguarding competition between economic operators, however they do not oblige national authorities to contract out the provision of services that they wish to organise otherwise or that they wish to provide themselves. It is therefore a free choice of the Finnish authorities to tender out the contracts for the provision of services to disabled people. Furthermore, whilst EU public procurement legislation harmonises procurement procedures in the EU across all sectors, it is the responsibility of national authorities to ensure that, whenever a public procurement procedure is launched, it is run and completed in a way that is fully respectful of the fundamental rights of the beneficiaries. In this respect, the principles of the UN Convention on the Rights of Persons with Disabilities, namely article 19, which recognises the equal right of all persons with disabilities to live in the community, with choices equal to others, should be complied with.<sup>2</sup>

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<sup>1</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L..2014.094.01.0065.01.ENG>

<sup>2</sup> <http://www.un.org/disabilities/convention/conventionfull.shtml>

Secondly, there is no element in the petition suggesting that the described public procurement procedures in Tampere and Oulu were carried out in violation of EU rules. Indeed, contracting authorities may choose, under Article 53 of Directive 2004/18/EU, to award the contract on the basis of a variety of criteria, ranging from the lowest price only to the so-called "most economically advantageous tender" (MEAT), which may imply the consideration of qualitative aspects. This is in order to allow a maximum of flexibility to contracting authorities, so that they may be able to adapt and adjust the award criteria on a case-by-case basis to any type of subject-matter they wish to procure, based on (among other things) on their characteristics. The EU therefore in no way prescribes the award of contracts on the basis of the lowest cost only. The assessment related to the choice and weighting of the award criteria is left to the contracting authorities, who are better positioned to determine which are the most appropriate ones.

In respect of the petitioner's claim that the beneficiaries were not consulted, it should also be clarified that such a consultation is not expressly provided for by the EU legal framework. However, this does not imply that such consultation cannot be organised, in full compliance with EU law.

Finally, with regards to the Finnish transposition of rules on below-threshold and Annex IIB contracts, the Act on Public Contracts establishes some specific optional national procedures for these categories of public contracts. EU rules on public procurement do not require Member States to establish specific national procedures for contracts which are not regulated under the Directives, however, it does not forbid it either.

In conclusion, after assessing the information provided by the petitioners, the Commission's services could not find evidence of a breach of EU public procurement law by the Finnish authorities which could justify an investigation. It is worth mentioning, however, that the new Directives on EU public procurement whose transposition deadline expired on 18 April 2016<sup>1</sup> have further clarified the possibility offered to contracting authorities to take into account qualitative and social aspects in the context of public procurement.

### Conclusion

The Commission cannot assist the petitioner as regards the public procurement aspects of this petition.

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<sup>1</sup> Directives 2014/23, 24 and 25 EU.