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Market price in the presence of a monopsony (demand monopoly) of the Public Authorities

Even where a monopsony (demand monopoly) of the Public Authorities is given, there is room for establishing a market price within the meaning of public price law

Even in case of a monopsony (demand monopoly) of the Public Authorities a market price within the meaning of public price law can be given. This requires that the service in question is merchantable and that the supplier has repeatedly succeeded in establishing his price against the one contracting authority.

In a ruling dated April 13, 2016, the Federal Administrative Court (Bundesverwaltungsgericht) ruled that a market price within the meaning of the public pricing law ("öffentliches Preisrecht") can even be determined in case of a monopsony of the public authorities.

I. Facts of the case
In the present case the court had to decide whether the official order to conduct a price review regarding several public contracts that had been concluded between the plaintiff and a former federal authority was lawful. Subject matter of these contracts was the provision of IT-support. For each contract the parties had agreed a cost-reimbursement-price ("Selbstkostenerstattungspreis").

With the official order the federal authority also obliged the plaintiff to hand in specific documents in order to examine whether the cost prices were permissible.

The plaintiff considers the official order to be unlawful, as for the services in question, a market price exists. The plaintiff alleges, that due to the existence of a market price, a review based on a supposed cost price is inadmissible. The legal actions initiated by the plaintiff were not successful at first and at second instance.

II. Public pricing law
Public pricing law aims at implementing market economy based principles within the area of public procurement. It regulates the highest permissible price that may be agreed upon within a public contract and stipulates a strict primacy of market prices over cost prices. A market price requires a merchantable service for which a customary price can be determined on the relevant market (§ 4 Abs. 1 VO PR 30/53). Only when a market price cannot be established, parties may agree on a cost price. The agreed prices – market prices as well as cost prices – can be subject to an official price review proceedings. The scope of documents that the authorities may lawfully demand in the context of such proceedings depends on the type of price that the parties have agreed upon. In case of a market price, the authorities may not demand that internal documents regarding the calculation be made available.

If the parties agree on an improper price the agreement remains valid, but the permissible price according to price law regulations applies. A violation of price law regulations constitutes a risk for both parties: Overshoot/excess proceeds can be recalled and the named violation may represent a regulatory offence which is usually being punished by an administrative fine imposed on the violator.

III. Ruling of the Federal Administrative Court
Following the plaintiff`s successful appeal, the Federal Administrative Court set aside the Court of Appeal`s judgement and referred the case back to the Court of Appeals. Mainly, it had to decide whether a market price can be established.

1. Customary price possible in case of a monopsony
The Federal Administrative Court confirms that where a monopsony, i.e. market structure in which only one buyer interacts with many would-be sellers of a particular product is given, only the "subjective market price" can be considered as customary price. Contrary to the findings of the Court of Appeals a subjective market price does not require that the supplier

has established his price against various different consumers on the market. The subjective market price is generally characterized by a supplier who has repeatedly established his price for the same merchantable service under competitive conditions. In case of a public monopsony, it is sufficient if the price has been repeatedly established only against one contracting authority. This can be proven by former contracts regarding the same or similar services, as long as they show a timely proximity to the agreement in question.

2. Merchantable service
In addition, the findings of the Court of Appeals do not justify the conclusion, that the service the plaintiff provided was not merchantable. A service is merchantable, when – in case no particular market has been created as a result of a public call for tenders – it has been repeatedly realized on the market under competitive conditions. In other words: other suppliers must actually have offered the service to a specific price. It is not enough though, that they hypothetically could have rendered the services, as a fictitious competition is not sufficient.

3. Outlook
The Court of Appeals will have to decide if the plaintiffs` service can be considered as merchantable. If this can be affirmed, he will have to verify whether a subjective market price can be determined as customary Price.

IV. Practical Advice
The judgement underlines the primacy of market prices. This major principle may not be constrained by restricting the scope and the interpretation of the term “market price”. In order to avoid financial damages (restitution or fines) parties who intend to conclude a public contract should carefully verify if a market price for the respective services can be determined before they agree upon a cost price.

In view of the upcoming reform of the public price law it remains to be seen whether the scope and classification of the market price will be easier and more precise in the future.

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