

WHY IS IT ALWAYS BETTER TO CONTEST THE DENIAL OF THE REQUEST FOR ACCESS TO THE BID DOCUMENTS?

The new decision of the Council of State, 29 September 2023 n. 8589, recalls and reiterates the consolidated principles of the administrative jurisdiction about the right of access to the bid documents. Specifically, it confirms that the request of access couldn't be proposed again if the denial hadn't been promptly contested. On the other hand, it affirms the illegitimacy of the denial – opposed by the administration against a same request – which is based on a *a priori* evaluation on the real decisiveness of the documents for the defense necessity of the applicant. We will present the case on which the judges decided and the effects of their decision in the next lines.

The case

The administrative proceeding under analysis is part of a broader pending civil proceeding, concerning the claim for compensation for damages suffered by a subcontractor because of the suspension of the execution of the contract by the contracting authority. Particularly, the silence-denial has been consolidated on a first request for access to documents from the subcontractor, as he didn't appeal the silence of the administration within the expiry time. Then, the progress of the civil proceedings arises the necessity of a new request for access to the same documents previously requested, plus others. In fact, the object of the new request, a year later the previous one, is expanded to include further documents relating to the original contract; however, this request is rejected with a formal denial.

The Regional Administrative Court Lazio – Rome, 6 March 2023 n. 3636, rejects the subcontractor's appeal and bases its decision on two assessments. From one point of view, it deems the new request as inadmissible, regarding the documents previously requested, because the silence-denial hasn't been promptly contested and is consequentially consolidated. In fact, as stated by constant jurisprudence, the reiteration of the request and the appeal of the consequent denial are not permitted, if the second request is merely confirmatory of the first one (Cons. Stato, sec. II, 25 January 2023 n. 884; sec. III, 3 November 2022 no. 9567; section V, 6 November 2017 no. 5996; State Council, Plen. Ad., 20 April 2006 no. 7). From another point of view, the judge of first instance considers that the concrete, direct and current interest of the claimant as a subcontractor – the quality which legitimizes him to appeal – is unproven.

The Council of State, in the sentence hereto, partially reforms the first instance decision. Specifically, retracing the case law mentioned by the TAR, it confirms the non-repeatability of an application whose denial hasn't been promptly contested. On the other hand, once the appellant's *status* as a subcontractor has been proven (through the production of the contracts stipulated with the original awardee of the contract), it partially accepts the appeal in relation to the denial of the request for

access to the documents, limited to those which weren't already requested with the previously denied request. In fact, retracing the jurisprudential orientation adopted by the recent decision of the Council of State in its highest composition, 8 March 2021 n. 4, it states that the administration and the administrative judges in the procedure regarding access to administrative documents must not *ex ante* do any further evaluations on the admissibility, influence or decisiveness of the document requested, since these assessments are out of the area of competence of the proceeding for access to documents. Except for the evaluation of the possible evident and absolute lack of connection between the document and the defense needs, which concerns the assessment of the legitimation of the appellant. The contested ruling is therefore partially reformed, partially annulling the denial provision and ordering the contracting authority to display only the documents requested for the first time in the last request for access to documents.

Conclusions

In conclusion, we highlight the importance of promptly contesting any tacit or express refusal opposed to requests for access to documents to the market operators; otherwise, in fact, the administration could no longer be ordered to permit such access. The question remains whether the same law principle should be applied also when renewed concrete and current interests in reiterating the request arise from new defense needs or factual subsequent occurrences.

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