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GAS DISTRIBUTION TENDERS: THE ITALIAN COUNCIL OF STATE HAS FOUND IN FAVOUR OF ITALGAS, REPRESENTED BY T&P, AND CANCELLED THE ATEM VENEZIA 1 NATURAL GAS SUPPLY DISTRICT TENDER.

In its sentence no. 2202 of 3 April 2019, Section V of the Italian Council of State established important principles in the area of tenders for the award of natural gas distribution services, dealing with absolutely new topics. The Court rejected the appeal lodged by the City of Venice and therefore confirmed the ruling (no. 655/2027) by which the Veneto Regional Administrative Court (so called "TAR") found in favour of the petition submitted by our firm, representing Italgas Reti S.p.A., and cancelled the ATEM Venezia 1 Natural Gas Supply District tender documents.

Italgas Reti contested various provisions of the tender's specifications "*lex specialis*", arguing that they were not lawful since they did not allow the formulation of an appropriate, fully informed bid, and the Veneto TAR ruled in its favour with regard, in particular to:

- (i) the absence of prior verification by the Regulatory Authority (ARERA) of the RIV/RAB gap, in breach of art. 15, comma 5 of Legislative Decree no. 164/00;
- (ii) the violation of art. 9 of Ministerial Decree no. 226/2011, which requires prior examination of the call for bids, the tender regulations and the contextual planning guidelines with the minimum development conditions, also by ARERA.

Confirming the decision of the Veneto TAR - in favour of the petition filed by Italgas Reti – the Council of State underlined that ARERA's involvement in the verifications relating to the RIV/RAB gap is necessary for the "*correct structuring of the bidding conditions*", to provide the competitors interested in participating in the bidding process with the information necessary for the correct calculation of their bids.

With regard in particular to the first (i) of the two points of the ruling confirmed by the higher court, the dispute related to "*the crucial matter of the inclusion in the tariff of the RIV*" payable to the outgoing operator.

The RIV/RAB gap is the difference between the residual value of the plant payable by the incoming operator - i.e. the successful bidder - to the outgoing operator ("*Residual Industrial Value*") and the RAB (*Regulatory Asset Base*), which is the value of the plant considered by the Regulator when assessing the tariffs which can be charged.

Obviously, this value is extremely important for competitors preparing their bids, since it is crucial for the future economic viability of the successful operator.



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Therefore, as the Italgas claim highlighted, by omitting to involve the Authority with regard to the clear definition of such an important factor, the procedure adopted by the contracting authority meant that no party wishing to participate in the tender could be certain that tariffs subsequently approved by ARERA would adequately compensate their investments, since the latter's opinion with regard to the correct RIV/RAB gap was not known at the time of participation.

This ruling is of fundamental importance for the industry and constitutes a leading case, with the principles of which contracting authorities will be required to comply with regard to future Natural Gas distribution tenders.

Therefore, as a result of the Council of State's ruling, the City of Venice will have to restart the procedure and issue a new call for bids, taking care to **i)** ensure that ARERA makes the necessary prior evaluations and **ii)** ensure that the information set to be provided to bidders complies with the provisions of Ministerial Decree no. 226/2011 and the relevant regulatory framework.

The Council of State ruling therefore marks the end of a long and complicated legal process, which also included a tussle over jurisdiction between the Veneto and Lazio Regional Administrative Courts, as well as two precautionary Court orders in favour of Italgas Reti, supporting the arguments submitted by T&P (Lazio TAR order no. 2500/2016 and Council of State order no. 3870/2016).

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For further information or explanations on the topics covered in this article, please contact **Fabio Todarello** via email (f.todarello@tplex.eu) or through our Milan office.

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Todarello & Partners supplies legal advice on all matters relating to the topics covered in this article. The firm's lawyers have impressive experience in this area, since they regularly advise some of the market's biggest players, representing them before the courts in all competent jurisdictions.

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