

27 June 2006: Sector of collective nursery

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Conseil de la concurrence orders association managing nurseries (*Bouches-du-Rhône département*) to suspend application of amendment to employees' work contract

to ensure good development of next solicitation for public bidding

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Following a referral on February 22th by Bouc Bel Air town (Bouches-du-Rhône département) relative to practices implemented by the Bouc'choux association, managing three infancy facilities of the town, the Conseil de la concurrence ordered the association to suspend, for emergency reasons, the application of an amendment to the work contracts of 33 of its employees.

In the current state of the procedure, the Conseil estimated that the amendment had the object and the effect to deter Bouc'Choux competitors from entering the market for the management of the town nurseries.

An amendment to the work contract of Bouc'Choux employees could hinder competition on the market for the management of nurseries in the town of Bouc Bel Air

The new French Code of procurement contracts (Code des marches publics) and European legislation hold that the management of infancy services are subject to solicitation for bids. Businesses subject to a procurement contract procedure are subject to the application of Article 122-12 of the Code of labour law (Code du travail), which holds that the employer coming in takes back all the work contracts of the previous employer.

In this context the Bouc'Choux association adopted in June 2005, an amendment to the work contracts of 33 of its employees, offering each of them a lump sum

of 100,000 euros, as soon as the number of employees exceeds 60 persons. The association is not concerned by this amendment since it limits its staff to approximately 40 employees, however most of its competitors could be concerned by the amendment.

The Conseil has observed that the mechanism introduced by the amendment makes the payment of the 100,000 euro bonus to be borne not by the current employer, who signed the amendment, i.e. the association itself, but by the successor in case of successful bidding. According to Article 122-12 of the Code of Labour Law, the successor should take back all the employees. This provision would force the new employer, holder of the contract, to pay 3.3 million euros in total to the employees who signed the amendment, which deters competing companies from submitting their applications for the management of nurseries.

The interim measure ordered by the Conseil aims at avoiding that a new distortion of competition arises during the next solicitation for public bidding

The Conseil noted that the effects of the amendment on the procedure of public bidding were obvious during the solicitation for bids in Summer 2005. Keeping the amendment would therefore substantially hinder effective and fair competition during the next solicitation for bids which will be launched by Bouc Bel Air town in Summer 2006 for the management of nurseries from 2007.

The Conseil has observed that numerous potential competitors of the Bouc'Choux association could exceed the 60 employee threshold after integration of the employees of the association.

As part of an interim measure, the Conseil therefore ordered Bouc'Choux, to suspend the application of the amendment until the decision is taken on the merits of the case or until the amendment is effectively and legally removed, and to inform each employee. Within one month, the association will also have to present the situation of its employees' work contracts to the Conseil.

Decision 06-MC-02 of June 27th 2006 relative to a request for interim measures by Bouc Bel Air town.

The decision is available in full on the website: www.conseil-concurrence.fr