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# Project “Support for further improvement of Public Procurement system in Serbia”, IPA 2013

## “Oslanjanje na kapacitete drugih subjekata”

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EU Support for Further Improvement of  
Public Procurement System  
in Serbia

# List of selected cases of CJEU on reliance of economic operators on third parties' resources

C-389/92 “Ballast Nedam”

C-5/97 “Ballast Nedam II”

C- 176/98 „Holst Italia”

C-314/01 „Siemens ARGE”

C-94/12 „SWM Construzioni”

C-324/14 „Apelski”

C-387/14 „Esaprojekt”

C-406/14 “Wrocław - Miasto na prawach powiatu”

C-234/14 “Ostas celtnieks”

C-227/15 “Pizzo”

C-223/16 “Casertana Costruzioni”



# Reliance on resources of subsidiaries (1)

C-389/92 “Ballast Nedam” 14.04.1994

## The problem

- Belgian authorities denied to register in the register of qualified bidders for construction works of a company relying on resources of other companies belonging to the same holding (subsidiaries)
- ECJ stated that in assessing economic and financial standing and technical and professional abilities it is possible to rely on resources of companies belonging to the same group (subsidiaries)
- ECJ concluded that contracting authorities are allowed to take account of those resources where the firm in a group *„actually has available the resources of those companies for carrying out the work”*



# Reliance on resources of subsidiaries (2)

## C-5/97 “Ballast Nedam II” 18.12.1997

A national court felt need for clarification how to interpret “Ballast Nedam” ruling – in its opinion the wording of the ruling was ambiguous;

- it asked ECJ whether the contracting authority is only permitted or it is obliged to take account of resources of other entities the bidder relies on?
- ECJ concluded that contracting authorities are actually obliged to consider resources of subsidiaries in order to verify the capacity of the bidder



# Reliance on resources of other members of a holding

## C- 176/98 „Holst Italia” 02.12.1999

- Italian case – ruling related to a complaint of a bidder who challenged the decision of the contracting authority to accept reliance of his competitor on resources of other companies belonging to the same group
- the case concerned services (and not ‘works’ as in “Ballast” cases) and reliance was used not by a dominant company in a holding (as in “Ballast” cases) but by the company which did not enjoy such a status
- ECJ concluded that such a reliance is always possible but a bidder should establish that he actually disposes the resources of other entities not owned by the bidder and deemed necessary for the performance of the contract



# Reliance on subcontractors

## C-314/01 „Siemens ARGE” 18.03.2004.

Reliance on resources of other entities may take a form of recourse to **subcontractors**:

- subcontracting is explicitly mentioned in the Directive among references used in order to prove technical capacity and professional ability of economic operators
- EU directive does not preclude by the contracting authority a prohibition or restriction on the use of subcontracting for the performance of substantial parts of the contracts in those cases where the contracting authority has not been in the position to verify the technical and economic capacities of the subcontractors when examining tenders



# Limitations concerning reliance

## C-94/12 „SWM Construzioni” 10.10.2013

### The problem

- the Italian public procurement legislation allowed for reliance by the bidder on only one other entity
- The case was about financial and economic standing
- ECJ concluded that such a limitation as the Italian one is not allowed under the directive
- Use of plural form in the provision on reliance - „other entities”- means the national law may not limit the number of those entities on which the bidder relies on

However, there may be cases where it is possible to limit the number of entities whose capacities may be relied on



# C-94/12 „SWM Construzioni”

- Possibility of applying such a limitation as used in Italy is not excluded in the case of works with special requirements necessitating a certain capacity which may not be obtained by simply combining the capacities of various entities which separately do not adequate capacity
- But this is an exception from the rule
- Italian provision making a rule out of a exception is wrong





# Limitations concerning forms of reliance

C-234/14 “Ostas celtnieks” 14.01.2016

## The problem

- the contracting authority required in the tender dossier that in the event of the tenderer relying on the capacities of other contractors, it should mention all those contractors and provide evidence that it has the necessary resources at its disposal
- if that tenderer is to be awarded the contract, it must have concluded a cooperation agreement with the contractors concerned before the award and forwarded this to the contracting authority. That agreement must provide for a content specified in the tender dossier

# C-234/14 “Ostas celtnieks” 14.01.2016

## Conclusion of CJEU

- according to Directive 2004/18 a contracting authority may not require from a tenderer who relies on the capacities of other entities, before the contract is awarded, **to conclude a cooperation agreement with those entities or to form a partnership with them**



# Reliance on knowledge and experience

**C-324/14 „Apelski” – 07.04.2016**

Procurement for winter and summer cleansing of streets in Warsaw

10 questions asked by the national review body (6 different issues) concerning mostly the issue of reliance on third parties resources, in particular, „knowledge and experience”, of a third party consisting in *provision of consultation and training services*

## Issues:

- what does it mean that the economic operator may rely „where appropriate” – is it a rule or exceptional possibility?
- what are the requirements concerning proving that „experience and knowledge” is available to a bidder relying on the capacities of other parties?
- in the case of reliance on „knowledge and experience”, is it necessary that a party on which the bidder relies on is involved in the performance of the contract or
- advice and consulting from that party is sufficient?
- is the assessment of technical and professional capacity a mere formalism or it is a meaningful exercise?

# C-324/14 „Apelski”

## Conclusions of the CJEU:

- a contracting authority may require candidates or tenderers to meet minimum levels of economic and financial standing and technical and professional ability
- every economic operator has right to rely, for a particular contract, upon the capacities of other entities, regardless of the nature of the links which it has with them, provided that it proves to the contracting authority that it will have at its disposal the resources necessary for the performance of the contract
- provision that an economic operator may rely on the resources of other entities ‘where appropriate’ cannot be interpreted as meaning that only exceptionally such an operator may rely on the resources of third party entities
- the tenderer is nonetheless required to produce evidence that it actually has available to it the resources of those entities or undertakings, which it does not itself own, and which are necessary for the performance of the contract
- a tenderer may not rely on the resources of other entities in order to satisfy in a purely formal manner the conditions required by the contracting authority



# C-324/14 „Apelski”

## Conclusions of the CJEU (2):

- Directive 2004/18 does not preclude the exercise of the right from being limited in exceptional circumstances
- in specific circumstances, due to the nature and objectives of a particular contract, the capacities of a third party entity, which are necessary for the performance of a particular contract, cannot be transferred to the tenderer; in such circumstances, the tenderer may rely on those capacities only if the third party entity directly and personally participates in the performance of the contract concerned
- Involvement of third party, consisting simply in the provision of consultation and training services, cannot be regarded as sufficient in order to guarantee that bidder would have at its disposal the resources necessary for the performance of that contract
- although the tenderer must prove that it will actually have at its disposal the resources of the other entity, which it does not itself own and which are necessary for the performance of the contract, it is nonetheless free to choose the legal nature of the links it intends to establish with the other entities on whose capacities it relies in order to perform a particular contract and free to choose the type of proof of the existence of those links
- **Therefore, the contracting authority cannot, in principle, impose express conditions which may impede the exercise of the right of all economic operators to rely on the capacities of other entities, in particular, by indicating in advance the detailed rules according to which the capacities of those other entities may be relied on**



# Reliance on experience and knowledge obtained within a consortium

## C-387/14 “Esaprojekt” (04.05.2017)

The problem (one of many) concerned the following aspect of reliance on third parties resources:

Does the Directive (2004/18) enables the economic operator which participates individually in the award procedure for a public contract to rely on **the experience of a groups of undertakings, of which it was a part** in connection with another public contract, *irrespective of the nature of its participation* in the performance of that contract?

# C-387/14 “Esaprojekt”

- where an economic operator relies on the experience of a **group of undertakings** in which it has participated, that experience must be assessed in relation to the effective participation of that operator and, therefore, to its actual contribution to the performance of an activity required of that group in the context of a specific public contract
- in practice an economic operator acquires experience not by the mere fact of being a member of a group of undertakings without any regard for its contribution to that group, but only by directly participating in the performance of at least part of the contract, the whole of which is to be performed by that group
- an economic operator cannot rely on the supplies of services by other members of a group of undertakings in which it has not actually and directly participated as experience required by the contracting authority
- **EU law does not allow an economic operator, which has individually participated in an award procedure for a public contract, to rely on the experience of a group of undertakings of which it was a member, in connection with another public contract, if it has not actually and directly participated in the performance of the latter**



# Reliance on subcontractors (2)

## C-406/14 “Wroclaw miasto na prawach powiatu” 14.07.2016

Procurement for construction of ring road in Wroclaw (PL)

- Tender dossier envisaged limitation of subcontracting (at least 25 % of works should be performed by the contractor ‘using its own resources’, thus no more than 75 % of the value of contract may be subcontracted)
- Procurement was co – financed from EU funds
- There were no appeals from economic operators
- Audit of procedure resulted in imposing a financial penalty – the contracting authority lost, due to alleged non compliance with EU rules (limitation of subcontracting) a part of EU co- financing (5 %)
- Financial penalty was appealed by the contracting authority to the administrative court which referred a question to the CJEU concerning compliance of this limitation with the EU law (directive 2004/18)





# C-406/14 “Wroclaw miasto na prawach powiatu”

The Polish PPL at the time of the procedure provided for a possibility that the contracting authority limits the use of subcontracting by providing maximum percentage of the value of contract which may be a subject of subcontracting

## Conclusions of the CJEU:

The Directive 2004/18:

- provides for the possibility, for tenderers, to prove that they meet the minimum levels of technical and professional capacities fixed by the contracting authority by relying on the capacities of third party entities
- establishes the possibility, for tenderers, to use subcontractors for the performance of a contract, and that in a way which is, in principle, unlimited



# C-406/14 “Wroclaw miasto na prawach powiatu”

## Conclusions of the CJEU (2):

- nevertheless, where the procurement documents require tenderers to indicate, in their tenders, the share of the contract they may intend to subcontract and the proposed subcontractors, the contracting authority is entitled to prohibit use of subcontractors whose capacities could not be verified at the level of examination of tenders and selection of the contractor, for the performance of essential parts of the contract
- Such is not however the effect of a stipulation such as that at issue in the main proceeding, which imposes limitations on the use of subcontractors for a share of the contract fixed in abstract terms as a certain percentage of that contract, and that irrespective of the possibility of verifying the capacities of potential subcontractors and without any mention of the essential character of the tasks which would be concerned
- In all those respects, such a stipulation is incompatible with Directive 2004/18

## Thus:

**a contracting authority is not authorised to require, by a stipulation in the tender specifications of a public works contract, that the future contractor of that contract perform with its own resources a certain percentage of the works covered by that contract**

# Subcontracting – pending case - C-63/18 “Vitali”

- Is compliant with the EU law (directive 2014/24) Italian provision pursuant to which **subcontracting** cannot exceed 30% of the total amount of the contract for works, services or supplies?



# Hvala na pažnji!

