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

Recent rulings of the Court of Justice of the European Union on public procurement

Belgrade, 30.10.2018

Republic of Serbia
Public procurement office

Implemented by

giz International Services

KPMG

EU Support for Further Improvement of Public Procurement System in Serbia

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PART I

ORGANIZATION AND ROLE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

Republic of Serbia
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EU Support for Further Improvement of Public Procurement System in Serbia

The Court of Justice of the European Union (CJEU)

- Established in 1952, seat in Luxembourg
- the judicial authority of the European Union which, in cooperation with the courts and tribunals of the Member States, ensures the uniform application and interpretation of EU law.
- its mission is to ensure that "the law is observed" "in the interpretation and application" of the Treaties.
- CJEU:

➢ reviews the legality of the acts of the institutions of the European Union,

➢ ensures that the Member States comply with obligations under the Treaties, and

➢ interprets EU law at the request of the national courts and tribunals.

The Court of Justice of the European Union (CJEU)

Consists of two courts:

- Court of Justice
- General Court

The Civil Service Tribunal, established in 2004, ceased to operate on 1 September 2016 after its jurisdiction was transferred to the General Court in the context of the reform of the European Union's judicial structure.

Court of Justice

- The CJ is comprised of judges and advocates general.
- One judge per MS = 28 judges
- 11 AG
- Both judges and AG chosen from persons „whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognised competence (Article 253 TFEU).
- All judges and advocates general are appointed by common accord of the governments of MS for a six -year term; their term of office may be renewed.
- They have equal status

Role of Advocates General

- Advocates General are responsible for presenting legal opinions on the cases assigned to them.
- Since 2003 they have been required to give an opinion on a particular case only if the CJ considers that the case raises a new point of law.
- The opinions of AG are advisory and do not bind the CJ but they are nonetheless very influential and are followed in the majority of cases.
- These opinions can also be very useful to practitioners, increasing their understanding of the CJ's judgments. They often contain more facts about the cases and discuss legal arguments in more detail than the judgments.

Court of Justice – jurisdiction

CJ deals with:

- actions for failure to fulfil obligations of EU MS
- references for a preliminary ruling following requests of EU MS national courts or tribunals
- actions for annulment of a secondary EU measure (e.g. directive, decision)
- actions related to failure to act by an EU institution
- appeals against judgments and orders of the General Court (CJ acts as a second instance court)

Actions related to public procurement

Three types of actions are mostly commonly used in relation to public procurement:

1. actions for failure to fulfil obligations under Article 258 Treaty of the functioning of the European Union (TFEU)
2. references for preliminary rulings under Article 267 TFEU
3. appeals against decisions of GC concerning procurement procedures of EU institutions

General Court

- made up of at least one judge from each Member State (45 judges in office as of October 8, 2018).
- the judges are appointed by common accord of the governments of the Member States after consultation of a panel responsible for giving an opinion on candidates' suitability to perform the duties of Judge.
- terms of office is 6 years (renewable)
- General Court does not have permanent Advocates General. However, that task may, in exceptional circumstances, be carried out by a Judge.

General Court – jurisdiction

- actions brought by natural or legal persons against acts or failures to act of the institutions, bodies, offices or agencies of the EU
- actions brought by the Member States against the Commission;
- actions seeking compensation for damage caused by the institutions or the bodies, offices or agencies of the European Union or their staff;
- actions concerning contracts concluded by the European Union which expressly give jurisdiction to the General Court;
- actions relating to intellectual property brought against the European Union Intellectual Property Office and against the Community Plant Variety Office;
- disputes between the institutions of the European Union and their staff concerning employment relations and the social security system.

Role of preliminary rulings

- National courts of EU MS in cooperation with CJEU interpret and apply EU law
- The procedure enabling co-operation between the CJ and national courts is the “preliminary ruling” procedure (Article 267 TFEU).
- National courts may, and sometimes must, refer to the CJ and ask for clarification and interpretation of EU law.
- Under the preliminary ruling procedure, it is not the parties in the national case that refer the question(s) to the CJ, but the national court.
- The national court, in the light of the special features of each case, determines:

- the need for a preliminary ruling

- the relevance of the question(s) that it submits to the CJ

- Questions asked by the national court must concern the interpretation of EU law.

Court of Justice – procedure

- national court submits questions to the Court **or** EU Institution initiates an action against a MS
- Registry notifies it to the parties to the national proceedings + all MS + EU institutions
- notice is published in the Official Journal stating names of the parties, content of the questions
- parties, MS + EU institutions have 2 months to submit written observations to the Court
- after written procedure: parties are asked to state within 1 month whether and why they want an oral hearing

Court of Justice – procedure (2)

- case is argued at a public hearing, before the bench and the Advocate General
- some weeks later, the Advocate General delivers his opinion before the Court of Justice
- AG analyses in detail the legal aspects of the case + suggests completely independently a solution to the Court
- Judges deliberate on the basis of a draft judgement drawn up by the Judge – Rapporteur; deliberations remain secret
- decisions are taken by majority vote, no record is made public of dissenting opinions
- judgement is signed by all judges and published on www.curia.eu

Role of rulings of CJEU

- EU law is found in Court judgements
- EU law is developed through Court judgements
- e.g. principle of **direct effect** of Community law in the MS; **primacy of Community law** over domestic law; interpretation of definition of ‘a body governed by public law’, application of EU principles to award of concessions, in – house exemption, use of environmental and social criteria in public procurement…

CJEU in statistics (2017)

- 1656 new cases brought
- 1594 cases completed
- **15 rulings related to public procurement**
- 23 new cases related to public procurement submitted (21 preliminary requests, 1 direct action, 1 appeal)

- Average duration of the procedure

CJ: 16.4 months

GC: 16.3 months

PART II

RECENT RULINGS OF THE COURT OF JUSTICE

Exemptions from EU Procurement Directives and the definition of public procurement

C- 178/16 “Commission v Austria”

C – 9/17 “Tirkkonen”

C-187/16 European Commission v Austria

- Complaint of the Commission against non-compliance with the EU law of the Austrian law and practice of award of public service contracts related to printing of official documents: chip passports, emergency passports, residence permits, identity cards, driving licences and other documents
- In accordance with the Austrian provisions printing of documents was entrusted to Österreiche Staattsdruckerei (ÖS), a company governed by public law, without publication of contract notice and without following of public procurement rules
- The European Commission was of the opinion that it was violation of public procurement rules: printing services were covered as the services listed in Annex IIA to the directives (‘priority services’) by the full public procurement regime above the EU thresholds

C-187/16

Arguments of Austria

- Need to protect its **essential security interests**
- need to **protect secret information**, to safeguard the **authenticity and veracity** of those documents, to ensure provisions (**guarantee delivery**) of those documents and to guarantee the **protection of sensitive data**
- **Article 4(2)** of 92/50 Directive (**Article 14** of 2004/18) and **Article 346** of FEU Treaty

C-187/16

Conclusions of the CJEU:

- Publishing and printing of relevant documents is performed on a fee or a contract basis, value of services exceeds the relevant EU thresholds, they are services listed in Annex IIA: **public procurement procedures from the Directives are, in principle, to be applied**
- The **derogations should be interpreted strictly**
- Exemptions related provisions (Article 4 and 14) afford MS **discretion** in deciding the measures considered necessary for the protection of its essential security interests but cannot be interpreted as allowing MS to simply invoke those interests: **MS should show that such derogation is necessary in order to protect its essential security interests**

C-187/16

Conclusions of the CJEU (2):

- MS which wishes to rely on derogation must show that such derogation is **necessary in order to protect its essential security interests** (the same requirement applies also in the case when MS, in addition relies on Article 346 of FEU Treaty)
- Accordingly, MS must establish that the protection of such interests could not have been attained within a competitive tendering procedure as provided in the Directives
- **Austria was found guilty of breaching EU public procurement rules – did not prove need to rely on derogation**

C-9/17 “Tirkkonen”

The problem:

- In Finland farmers can have access to the list of consultants/advisors providing support related to some environment protection issues. Consultants are freely chosen by farmers from the list created for this purpose by the Environment Agency and remunerated for their services from the state budget
- anyone interested in being a consultant could submit application before the expiry of a time period
- The only requirements applied were related to the experience and expertise of candidates. Ms Tirkonnen applied for this post but her application was rejected as she did not complete one of the points of application form
- The court reviewing the complaint decided to ask the CJEU whether EU public procurement rules are applicable

C-9/17

Conclusion of the Court:

the Finnish scheme as presented above is not public procurement:

- open to everybody interested in providing consultancy services and satisfying the minimum requirements
- no evaluation and comparison of tenders but only examination of applications in order to check whether they satisfy minimum requirements
- for public procurement it is characteristic: competition, selection and selectiveness - in this specific case, in fact, there was no selection of consultants but only approval of those applicants who satisfied the minimum requirements
- No selection = no procurement

Technical specifications and restrictions in description of public procurement

C-296/15 “Medisanus”

C-14/17 “VAR and ATM”

C-296/15 “Medisanus”

- Slovenian hospital launched a public procurement procedure for the purchase of two types of **medicinal products derived from plasma,**
- TD required that the medicinal products were to be ‘obtained from Slovenian plasma’.
- Slovenian Institute of Transfusion Medicine (Institute) is responsible for the supply of blood and blood products to professional bodies (monopoly position).
- Medisanus challenges the requirement in TD finding it discriminatory and contrary to the EU law (no chances of getting contract because of monopoly position of Institute)

C-296/15

- National court (the review body) referred the issue to CJ

The hospital's requirement is based on Slovenian law:

- supplies must come, as a matter of priority, from medicinal products manufactured industrially from plasma collected in Slovenia.
- supply of blood based on principle of self-sufficiency – demand for blood medicinal preparations obtained from human blood and plasma must be, mostly, made by recourse to own resources.
- the law defines the role of the Institute in the system

C-296/15

- CJ (following analysis of a number of EU law provisions – more than referred by the RB):
- medicinal products derived from human blood or human plasma are covered by the definition of ‘goods’ – provisions of the Treaty on free movement of goods are applicable
- Requirement concerning of origin of plasma violates Article 2 of 2004/18 directive (equal treatment of bidders) and Article 23 on description of the subject matter – par. 2 (no equal access of bidders) and par. 8 – reference to the origin of goods without words ‘or equivalent’

but

C-296/15

is this justified on the basis of derogation from Article 34 TFEU (public health protection)?

- Two conditions must be satisfied:

- Legitimate objective

- Measures undertaken proportionate to the objective sough

- **National legislation pursues, widely understood, legitimate objectives of public health protection but no proof that the objective requires recourse to the national origin requirement: the requirement is disproportionate**

- **The requirements provided in the TD not compliant with EU law**

C-14/17 “VAR and ATM”

- **‘supply of original spare parts and/or original equipment and/or equivalent for buses and trolley-buses manufactured by Iveco’.**
- **Directive 2004/17 (Utilities) relevant**
- The list of spare parts referred expressly to FIAT/IVECO.
- ‘original spare parts’ - arts made by the vehicle manufacturer itself, but also those made by the vehicle manufacturer’s suppliers who could certify that the parts had been made in compliance with the specifications and manufacturing standards defined by the vehicle manufacturer.
- **‘Equivalent spare parts’ were defined as spare parts made by any undertaking which certifies that the quality of those parts matches that of components used for the assembly of the vehicle and the spare parts supplied by the vehicle manufacturer.**
- each product tendered as an ‘equivalent’ to IVECO’s must be designated by the tenderer as ‘EQ’.
- **in the event of the contract being awarded, the supply of equivalent parts would be accepted only if those parts were the subject of certifications or certificates of equivalence to the originals of the products tendered.**
- proof of equivalence could be presented after the award of the contract, at ‘the time of the first delivery’

C-14/17

- 2 companies: Iveco Orecchia (exclusive concessionaire, offering original spare parts), and VAR (equivalent spare parts)
- VAR first ranked and awarded a contract
- Iveco Orecchia requests annulment of the award on the ground that VAR had not, either when it submitted its tender or during the procurement procedure, provide proof that the products which it offered were equivalent to the original spare parts.
- Court upheld the action but VAR and the contracting authority appealed to the Council of State
- Council of State of the opinion that *national law does not specify at which moment a proof of equivalence must be submitted* but interpretation of Directive 2004/17 leads to conclusion that it should be furnished at the time when a tender is submitted.
- Questions referred to to CJ

C-14/17

Conclusions of the CJ

- technical specifications must afford equal access for tenderers and cannot create unjustified obstacles
- technical specifications may not refer to a specific make or source, or to a particular process, or to trade marks, patents, types or a specific origin or production but such a reference allowed an exceptional + the words ‘or equivalent’.
- Directive does not state when and by what means the ‘equivalency’ may be proved
- proof can be provided by ‘any appropriate means’, ‘an appropriate means might be constituted by a technical dossier from the manufacturer or a test report from a recognised body’

C-14/17

Conclusions of the CJ (2)

- the principle of equal treatment and transparency require that tenderers must be in a position of equality: 1. when they formulate their tenders and 2. when those tenders are assessed by the contracting authority
- If a tenderer were permitted to prove the equivalence of its products after it had submitted its tender, the tenders submitted by all of the tenderers would not be subject to the same conditions at the time when they are assessed.
- contracting entities must verify that the tenders submitted comply with the rules and requirements applicable to tenders.
- verification can take place only after the tenders have been opened, when they are assessed – contracting entity must have evidence at this stage but has a discretion in determining the means that may be used by tenderers to prove such equivalence in their tenders.

Exclusion of economic operators

C- 178/16 “Impresa di Costruzioni Ing. E. Mantovani and RTI Mantovani e Guerrato”

C- 178/16

- Procedure for financing, designing of the final executive project, construction and management of the new Bolzano correctional facility (prison) launched in July 2013
- The estimated value of contract: 165 400 000 EUR
- On December 16, 2013 Company Montovani submitted a request for participation in which it stated that Mr B., formerly chairman of the board of directors and [managing] director of the company, with powers to act on its behalf, had ceased to hold office on 6 March 2013 and that Mantovani was not aware of any judgment referred in the Italian procurement provisions providing for grounds for exclusion. Application contained two identical statements, dated December 4 and 16.

C- 178/16

- Montovani provisionally accepted to the procedure
- The contracting authority learnt from the article published in the local press that Mr B. had been the subject of a criminal prosecution for having instigated a system of false invoices and had negotiated a please entailing a conviction and sentence of 1 year and 10 months of imprisonment
- Mr B.'s criminal record showed that the conviction was handed down on December 5, 2013 and became final on March 29, 2014.
- The contracting authority requested clarifications from Montovani and then excluded it from the procurement procedure

C- 178/16

- Grounds for exclusion:

delayed and inadequate disclosure of the evidence required to demonstrate dissociation from the director who had been convicted. The conviction of the director preceded the submission of the declarations in the tendering procedure and Montovani could therefore have reported it

- Montovani challenged the decision on exclusion
- The court referred to the CJ preliminary questions

C- 178/16

Problem:

- does the EU law (2004/18) directive allows the contracting authority to take into consideration the criminal conviction of the director of a company for an offence relating to the professional conduct of that undertaking, where that **director ceased to perform his duties in the year preceding the publication of the tender notice** and
- to exclude that undertaking from participating in the public tender procedure at issue, on the ground that, by failing to declare the conviction which was not yet final, it had not fully and effectively dissociated itself from the activities of that director.

C- 178/16

Conclusions:

- two grounds for exclusion of EO due to offence concerning its professional offence: 1. convicted by a judgment having force of res judicata 2. guilty of grave professional misconduct proved by any means which contracting authority can demonstrate
- legal persons act through their representatives.
- a conduct contrary to the professional ethics of those representatives may constitute a relevant factor in assessing the professional conduct of an undertaking.
- participation in the issuing of false invoices by the director of a company may be regarded as an offence involving professional misconduct.

C- 178/16

- a conduct of a director who had ceased to hold office on the date of the submission of the application to take part in the tender procedure, does not preclude the application of that ground for exclusion.
- that ground for exclusion relates to the wrongful conduct of an economic operator before the procedure for the award of a public contract.
- It is up to the Member States to determine, respecting the principle of proportionality, the date from which such conduct may justify the exclusion of the tenderer.

C- 178/16

- Member States may lower the requirements governing the application of the optional grounds for exclusion, for example in the event of a dissociation between the tenderer and the conduct constituting an offence. They may also require that the tenderer inform the contracting authority of a conviction of its director, **even if the conviction is not yet final.**
- The bidder may submit all the evidence which, in its view, is evidence of such a dissociation.
- If that dissociation cannot be proved the necessary consequence is exclusion.
- If a judgment relating to an offence concerning the professional conduct is not yet final the contracting authority may which has been found guilty of grave professional misconduct, established by any means which the contracting authorities can provide proof of.

Conflict of interests and links between bidders

C – 538/13 “eVigilo”

C- 144/17 “Lloyd’s”

C-531/16 “Specializuotas transportas”

C – 538/13 “eVigilo”

- In January 2010, the Lithuanian contracting authority published an open invitation to tender related to a system for warning and informing the public by mobile telephone connections.
- The estimated value of procurement was approximately EUR 4 344 002- the procurement was covered by Directive 2004/18.
- LT law requires that members of tender committee and experts signed a declaration of impartiality – they cannot take part in its work without signing such a declaration
- evaluation criteria were: the overall price of that warning system, the number of operators taking part in the project with the tenderer and the general and functional requirements. The tender committee, following advice of 6 experts select the best tender. The contracting authority upheld this decision.

C – 538/13

- eVigilo, which was among losing companies, submitted the first complaint, arguing in particular that the conditions of the call for tenders lacked clarity.
- Then it submitted second complaint that the price of winning tender exceed the level of financing allocated to the project at issue.
- In March 2011 the contract was concluded, though the proceedings between eVigilo and the contracting authority were still pending.
- eVigilo was adding subsequently new arguments to its application, and finally invoked new facts - *bias of the experts who evaluated the tenders and existence of professional relations between the latter and the specialists referred to in the third parties' tender. In particular, the fact that the specialists referred to in the tender submitted by the successful tenderers were, at the Technical University of Kaunas, colleagues of three of the six experts of the contracting authority who drew up the tender documents and evaluated the tenders.*

C – 538/13 “eVigilo”

- eVigilo’s applications were rejected by the court – it appeal against this decision.
- The appealing court decided to suspend the procedure and refer to the CJ.
- It was asking basically about interpretation of 2004/18 and 89/665 directive – whether *the evaluation of tenders is unlawful solely because the tenderer has had significant connections with experts appointed by the contracting authority who evaluated the tenders*, without other evidence on whether experts who may have been biased had no effect on the (final) decision to award the contract or without tangible proof submitted by unsuccessful tenderer proving that those experts were biased.

C – 538/13

Conclusions of the Court:

- all tenderers must be afforded equality of opportunity when formulating their tenders, which therefore implies that all tenders must be subject to the same conditions
- A conflict of interests entails the risk that the contracting authority may be biased towards a given tenderer.
- Such a conflict of interests is liable to constitute an infringement of Article 2 of Directive 2004/18.
- the fact that the contracting authority appointed experts acting on its mandate in order to evaluate the tenders submitted does not relieve that authority of its responsibility to comply with the requirements of EU law
- the finding of bias on the part of an expert requires assessment of facts and evidence which is within the competence of the contracting authorities and the administrative or judicial control authorities.

C – 538/13

- neither Directive 89/665 nor Directive 2004/18 contains specific provisions in that regard (directive 2014/24 not applicable).
- it is up to EU MS to lay down the detailed rules of administrative and judicial procedures for safeguarding rights of individuals
- the detailed procedural rules governing the remedies must not compromise the effectiveness of Remedies Directives
- It is not contrary to EU principles for an expert's bias to be established solely on the basis of an objective situation
- the contracting authorities are to treat economic operators equally and non-discriminatorily and to act in a transparent way - they have an active role in the application of those provisions
- the contracting authority is, at all events, required to determine whether any conflicts of interests exist and to take appropriate measures

C – 538/13

- No burden of proving on economic operators that the experts appointed by the contracting authority were in fact biased.
- if the unsuccessful tenderer presents objective evidence undermining the impartiality of one of the contracting authority's experts, it is for that contracting authority to examine all the relevant circumstances in order to prevent and detect conflicts of interests and remedy them, including, where appropriate, requesting the parties to provide certain information and evidence.
- *Evidence such as connections between the experts appointed by the contracting authority and the specialists of the undertakings awarded the contract, in particular, the fact that those persons work together in the same university, belong to the same research group or have relationships of employer and employee within that university, if proved to be true, constitutes such objective evidence as must lead to a thorough examination by the contracting authority or, as the case may be, by the administrative or judicial control authorities.*
- the concept of 'bias' and the criteria for it are to be defined by national law.
- Legal effects of possible bias are to be defined by national law.

C- 144/17 “Lloyd’s”

- A request for a preliminary ruling from an Italian court concerning the interpretation of the principles of transparency, equal treatment and non-discrimination (TFEU) and Directive 2004/18
- Calabria’s agency (Arpacal) had launched an open tendering procedure for the award of a contract for insurance cover services
- amongst others, two Lloyd’s syndicates participated in the call for tenders.
- the tenders were both signed by the Special Agent of Lloyd’s General Representative for Italy.
- Arpacal excluded two syndicates of Lloyd’s from the procedure

C- 144/17

- Grounds for exclusion: *tenders signed by the same person, who must have known the content of both tenders – tenders were not submitted independently, collusion, breach of fair competition*
- the decision was challenged at a national court
- arguments of Lloyd's syndicates: their participation was compliant with the Italian law on public procurement and on insurance services
- Italian court: the contracting authority is wrong and breaches the Italian legislation but is not sure whether it is compliant with the EU law is so refers questions to CJ about interpretation of EU procurement principles

C- 144/17

Conclusions of the CJ:

- Purpose of the EU law is to create a single market without barriers and restrictions, EU procurement directives aim at ensuring the widest possible competition of economic operators
- EU directives recognize various forms of economic operators in different members states
- National legislation may provide for rules excluding companies due to collusion and infringement of fair competition rules but the exclusion may not be automatic
- Lloyds participation in the form of syndicates is fine – the contracting authority was wrong – to exclude it should proved that tenderers did not submit tenders independently
- Italian legislation is fine – it was wrongly interpreted by the contracting authority

C-531/16 Specializuotas transportas

- Lithuanian reference for preliminary question
- Centre for Waste Management announced a call for tenders for the provision of municipal waste collection and transportation services in the municipality of Šiauliai.
- 4 tenders were submitted: bidders A, B, Ekonovus and VSA Vilnius
- Bidders A and B were linked to (subsidiaries of) Ecoservice UAB
- Tender dossier (nor LT PPL) did not require submission by bidders of information about links with another companies
- Bidder B 'spontaneously' submitted a declaration that it was taking part in the call for tenders on an autonomous basis and independently of any other economic operators which might be connected to it, and it requested the waste management centre to treat all other persons as competitors. It further stated that it undertook, should it be so required, to provide a list of economic operators connected to it.

C-531/16

- Offer of bidder A was rejected because of non compliance with technical specification – it did not contest this decision
- Contract was awarded to bidder B
- VSA Vilnius (ranked immediately after B) submitted complaint that both offers A and B should be rejected as submitted by linked companies
- Various LT courts upheld the complaint but both the contracting authority and B appealed and finally the case was dealt with the supreme court which referred to CJ questions concerning interpretation of principles of EU procurement law

C-531/16

Conclusions – answers of the Court

- in lack of express legislative provision or specific condition in the notice or TD, related tenderers submitting separate offers in the same procedure are not obliged to disclose, on their own initiative, the links between them to the contracting authority.
- the contracting authority, when it has evidence that undermines the autonomous and independent character of the tenders submitted by certain tenderers, is obliged to verify, requesting, where appropriate, additional information from those tenderers, whether their offers are in fact autonomous and independent.
- If the offers prove not to be autonomous and independent, general principles of Directive 2004/18 prohibit the award of the contract to the tenderers having submitted those tenders

Award criteria and evaluation of tenders

C- 6/15 “Dimarso”

C- 546/16 “Montte”

C- 6/15 “Dimarso”

- The Flemish Region launched a tendering procedure for service contract for performing large-scale survey of housing and housing consumers in Flanders (Belgium).
- two award criteria:

‘1 Quality of the tender (50/100)

Quality of the preparation, organisation and execution of the work on the ground, and of the encryption and initial data processing. The services proposed must be described in as much detail as possible. It must be clear from the tender that the tenderer is capable of taking on the whole contract (minimum 7 000 samples / maximum 10 000 samples) within the prescribed 12-month delivery deadline.

2 Price (50/100)

- Cost of delivering the contract in relation to the basic sample (7 000 samples) and cost per additional batch of 500 addresses supplied (amounts inclusive of VAT).’

C- 6/15

- 4 tenderers submitted tenders,
- The method used to evaluate the tenders was **set out as in the award report**:
- '*The committee then evaluated the tenders.*
- *The four tenders were evaluated and compared with each other on the basis of the criteria set out above. First, the tenders were examined and evaluated on the basis of the "quality" criterion. For this, each tender was unanimously assigned a given score (high — satisfactory — low). Then, the price criterion was applied.*
- *On the basis of those scores, a final ranking was then established.'*
- *As regards the first criterion, namely the quality of the tenders, Dimarso and two other tenderers were awarded a 'high' score, while the fourth tenderer was assessed as 'low'.*
- Following application of the second criterion (the price) the contracting authority made a ranking list of bidders.
- Dimarso was ranked third as its price was higher than two offers which were also evaluated as high.
- The cheapest offer was submitted by the fourth company quality of which was evaluated as low, so it was ranked fourth.
- The contracting authority awarded a contract.

C- 6/15

- Award decision was appealed by Dimarso on the following grounds:

- Application of methodology not mentioned in the TD

- Insufficient examination, comparison and final assessment of the tenders

- The national court reviewing the case noted that *Directive 2014/18 refers only to the 'criteria' and the 'relative weighting' given to each of them, and that the method of evaluation and weighting rules are not expressly mentioned anywhere. The choice of method of evaluation is not neutral and may, on the contrary, play a decisive role in the outcome of the evaluation of the tenders on the basis of the award criteria.*

C- 6/15

Problem

- *Do provisions of Directive 2004/18 mean that in the case of a public service contract to be awarded pursuant to the criterion of the most economically advantageous tender in the opinion of the contracting authority, that authority is always required to bring to the attention of potential tenderers, in the contract notice or the tender specifications relating to the contract at issue, the method of evaluation or the weighting rules on the basis of which tenders will be assessed in the light of the award criteria published in those documents or, where no such general obligation exists, if the specific circumstances of the relevant contract may impose such an obligation.*

C- 6/15

Observations of the CJ

- where the contracting authority decides to award a contract on the basis of MEAT it must specify in the contract notice or TD the relative weighting it gives to each of the award criteria chosen in order to determine MEAT
- all tenderers should be reasonably informed of the criteria and arrangements which will be applied to identify MEAT
- tenderers must be in a position of equality both when they formulate their tenders and when those tenders are being assessed by the contracting authority
- the subject matter and the criteria governing its award must be clearly defined from the beginning of the award procedure
- the contracting authority must interpret the award criteria in the same way throughout the procedure

C- 6/15

- the relative weighting of award criteria must be clearly defined from the beginning of the award procedure
- the relative weighting of award criteria cannot be changed throughout the procedure
- no obligation in EU law to disclose, by publication in the contract notice or in TD, the method of evaluation applied by the contracting authority
- an evaluation committee has some leeway in carrying out its task and, thus, it may, without amending the contract award criteria structure its own work of examining and analysing the submitted tenders

C- 6/15

- the method of evaluation of tenders cannot, in principle, be determined after the opening of the tenders by the contracting authority
- method of evaluation disclosed after the publication of the contract notice or the tender specifications **cannot have the effect of altering the award criteria or their relative weighting**
- the contracting authority indicated two award criteria, namely quality and price, with the indication '(50/100)' in respect of each criteria
- the two award criteria are of equal importance
- the evaluation committee used a scale ranging from 'high' to 'low' through 'satisfactory'

C- 6/15

- Answer of the CJ:

in the case of a public service contract awarded pursuant to MEAT criterion the contracting authority **is not required to bring to the attention of potential tenderers, in the contract notice or the tender specifications relating to the contract at issue, the method of evaluation used by the contracting authority in order to specifically evaluate and rank the tenders.**

However, that method may not have the effect of altering the award criteria and their relative weighting.

C-546/16 “Montte”

The Spanish case

The contracting authority in Basque Country launched the open procurement procedure for delivery of a number of musical equipment and instruments

The choice of the best offer based on two criteria:

1. Presentation and description of the Project: max 50 pts
2. Discount offered from the budget price: max 50 pts

‘two stage evaluation of tender’ - only tenders which obtained 35 pts and more from the technical evaluation admitted to the financial evaluation where the discount offered was taken into consideration

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Montte objected and complained against award criteria:

- not explicitly allowed in the open (or restricted) procedure, mentioned directly only with regard to other procurement procedures (competitive procedure with negotiations, competitive dialogue and innovation partnership)
- discriminatory, does not allow companies which do not receive minimum number of points to compete on the basis of proposed price which could be competitive
- 'neutralises' competitive advantage of companies which are to able to propose lower prices and this way 'compensate' the shortcoming of technical proposals

The national court (review) body summitted to the CJ questions:

- is such a two stage evaluation of tenders allowed in the open procedure?
- is such an evaluation allowed, regardless of the number of tenders admitted to the second stage of evaluation?

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Answers of the CJ

1. The directive does not prohibit the national law (or practice) which allows contracting authorities to lay down, in the TD for the open procedure, minimum requirements as regards the technical evaluation, so that the tenders submitted which do not reach a predetermined minimum score threshold at the end of that evaluation are excluded from the subsequent evaluation based on both technical criteria and price.

2. The directive does not prohibit the national law (or practice) to lay down, in TD for the open procurement procedure, requirements described in point 1 **regardless of the number of tenderers remaining in the second stage**.

Thank you

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