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Clarifying and supplementing tenders in EU public procurement law and rulings of the Court of Justice

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Shortcomings and errors in tenders: How to react?

- In theory, four possibilities to respond in cases of non – compliance of tenders with the procurement requirements
 - *Accepting the non-conforming tender*
 - *Rejecting the non-conforming tender*
 - ***Permitting amendments on the tender to establish compliance***
 - *Conducting a new tender*

Arguments in favour of allowing corrections of errors

- corrected tender may represent the ‘best value for money’ which may be not achieved if such an offer is simply rejected
- the consequence of rejection of such a tender can be seen as disproportionate
- a discouraging effect on potential tenderers which might be reluctant to bear the costs of participating in tendering procedures



Arguments against allowing corrections of errors

- procedural rules aim, in particular, at ensuring **transparency** and **equal treatment** of the tenderers
- risk of perception of **unequal** and **unfair treatment** in relation to those tenderers who fully observed requirements
- risk of abuse: a tenderer may deliberately ‘forget’ to insert a particular figure and then, after finding out about the prices, may insert the highest possible price to win a contract
- discretionary character of the decision: decision of whether or not to allow correction may act in favour of domestic bidders against foreign ones



A right or obligation to allow bidders to correct errors?

- *Are there situations in which contracting authorities are obliged to give the tenderer the opportunity to correct an error?*
- *If there is no such obligation, may a Member State, under the EU procurement directives, permit its contracting authorities to make a correction?*

2004 Directives

- **Directive 2004/18** did not deal explicitly with changes to bids
- Article 2 contains the general principles of awarding public contracts: *“Contracting authorities shall treat economic operators **equally** and **non-discriminatorily** and shall act in a **transparent** way.”*
- CJEU has used these principles to define the boundaries of the discretion of Member States to allow amendments of tenders
- Article 51: “The contracting authority may invite economic operators to supplement or clarify the certificates and documents submitted pursuant to Articles 45 to 50” [Criteria for qualitative selection].
- **No equivalent provision in 2004/17** – Utilities Directive did not contain detailed provisions on qualification of economic operators

2014 Directives

- General principles of equality, transparency and **proportionality** - Article 18 (1) of directive 2014/24 and Article 36 (1) of directive 2014/25
- New principle of ‘proportionality’
- The possibility for contracting authorities to contact tenderers in case that a tender submitted contains shortcoming or deviations is now expressly stated in Article 56 (3) directive 2014/24 and Article 76 (4) of directive 2014/25

Directive 2014/24/EU

Article 56 (3)

*“Where information or documentation to be submitted by economic operators is or appears to be incomplete or erroneous or where specific documents are missing, **contracting authorities may, unless otherwise provided by the national law implementing this Directive, request the economic operators concerned to submit, supplement, clarify or complete the relevant information or documentation within an appropriate time limit, provided that such requests are made in full compliance with the principles of equal treatment and transparency.**”*

Case law of Court of Justice and the Grand Court

- T-19/95
- T-211/02
- T-195/08
- C-599/10
- C-336/12
- C-42/13
- C- 387/14
- C-131/16
- C-523/16 and C-536/16



T-19/95 “Adia interim v Commission”

- Case concerned an open invitation to tender for the framework agreement for the supply of agency staff
 - tender price was to be calculated in accordance with the instructions laid down in the tender specifications
- *Adia interim* proposed much higher price than its competitors
- Even though the selection committee detected the presence of a **systematic calculation error**, it was unable to ascertain its exact nature or cause
- The court held that a **tenderer could not insist on being allowed to correct the error**, when the intended figures are not clear, since any contact made with the applicant would involve a risk that the price may be adjusted in a way that infringes the principle of equal treatment
 - **No duty to allow corrections if the error has an effect on the merits of the tender and if the intended content of the tender is not clear**

T-211/02 “Tideland Signal”

- The case concerned an invitation to tender issued by the European Commission for the procurement of navigation equipment
- The contracting authority required that tenders must be valid at least 90 days since the expiry of the time period for receipt of tenders i.e. 28/07/02
- *Tideland* submitted tender containing required statement that its tender is valid until 28/07/02
- The contracting authority extended the time period for receipt of tenders – accordingly validity period was to expire later
- *Tideland* resubmitted tender without changing its content nor the wording of the required statement
- Its tender was rejected on the basis that it did not include an agreement to keep the tender valid for a requested time period
- ***Tideland* claimed it should be requested to clarify and confirm validity of a tender**

T-211/02 “Tideland Signal” (2)

Conclusions of the Court

- The contracting authority should be able to establish precisely what a tender means, and in particular whether it complies with the conditions set out the tender dossier
- If a tender is ambiguous and the contracting authority does not have a possibility to ascertain quickly what and efficiently the bidder actually meant it does not have a choice but to reject such a tender,
- however, the tender specifications empowered explicitly the Evaluation Committee to seek clarifications of tenders within 24 hours subject to the condition that any such clarification may not seek the correction of formal errors or major restrictions affecting performance of the contract or distorting competition
- The statement contained in the offer was ambiguous – this ambiguity might be quickly clarified

T-211/02 “Tideland Signal” (3)

- The Evaluation Committee, faced with the ambiguous tender, had a choice: to reject the tender outright or to seek clarifications
- It was likely that the tender was intended to remain valid for 90 days in accordance with the tender specifications
- If the Evaluation Committee had used its power to seek clarifications, Tideland would have been obliged to provide within 24 hours clarifications: the tender procedure would have suffered only minimal disruption and delay
- **The Evaluation Committee's decision to reject the tender without seeking clarification of its intended period of validity was clearly disproportionate and thus vitiated by a manifest error of assessment**

Which conditions must be fulfilled for a duty to allow corrections ?

With regard to *Tideland* four conditions can be identified, under which, at least if they are cumulatively fulfilled, an **obligation to allow corrections** exists:

1. An error has been made that was clear in the tender itself
2. That error is known by the contracting authority
3. It can be established from the tender what the intended content is
4. Correcting the error does not affect the merits of the tender, for example by affecting criteria that are used in the comparison of tenders

T-195/08 “Antwerpse Bouwwerken”

- Decision concerned a contract for the construction of a production hall awarded by the European Commission
- Originally, Antwerpse Bouwwerken (AB) was informed by the Commission that its tender had been selected for the award of the contract after two competitors’ offers were rejected on the grounds of non-conformity (because of missing price quotations in the works cost estimates)
- Following complaint from the rejected tenderer the Commission agreed that the missing prices could be ‘deduced’ on the basis of other items that other priced items which identically worded
- The tender was allowed to be ‘corrected’ - the same procedure was applied to other tender which contained the same shortcomings – AB’s tender slipped in the rank to the third place
- **AB challenged the decision of the Commission to allow those corrections**

T-195/08 “Antwerpse Bouwwerken” (2)

- The court held that:

“a tender is not incomplete and need not be rejected if the missing price for a particular item can be deduced with certainty from the price quoted for another item in the same cost estimation summary or, at the very least, after obtaining clarification of the terms of that tender from the tenderer who submitted it.”

- ***Duty to allow corrections if the error does not have an effect on the merits of a tender but the intended content can be established from the tender itself***

C-599/10 “SAG ELV Slovensko”

- Two consortia were excluded from a restricted procedure for a contract for toll collection services for failing to comply with certain conditions set out in the tender specifications
- The national court was asking whether the Directive’s principles (Article 2) preclude the contracting authority from being able to reject a tender on a ground of non-compliance with the tender specifications without first having asked the tenderer to clarify that failure

C-599/10 “SAG ELV Slovensko”(2)

- Once the economic operators have submitted their bids, in principle, those bids can no longer be amended
- *Requiring* the contracting authority to contact the tenderer whose tender it regards as imprecise to provide clarification would amount to a breach of the principles of equal treatment and transparency
- The contracting authority may reject those tenders without seeking any clarification
- There is no general duty under the directives to allow tenderers to correct their tenders

C-599/10 “SAG ELV Slovensko”(3)

No obligation but **right to allow** correction of tenders

Article 2 of the directive (2004/18):

- does not preclude, the correction or amplification of details of a tender where appropriate, on an exceptional basis, particularly when it is clear that they require mere clarification, or to correct obvious material errors, provided that such amendment does not in reality lead to the submission of a new tender
- does not preclude a provision of national legislation according to which, in essence, the contracting authority may ask tenderers in writing to clarify their tender without, however, requesting or accepting any amendment to the tender

C-599/10 “SAG ELV Slovensko” (4)

The contracting authority enjoys discretion but there are conditions which must be satisfied for corrections or clarifications to be allowed:

1. various tenderers must be treated equally and fairly
2. a request for clarification may not favour or disadvantage the tenderer or tenderers to which the request was addressed, once the procedure for selection of tenders has been completed and in the light of its outcome
3. a request may be made only after the contracting authority has looked at all the tenders

C-599/10 “SAG ELV Slovensko”(5)

4. a request must be sent in an equivalent manner to all undertakings which are in the same situation, unless there is an objectively verifiable ground capable of justifying different treatment of the tenderers in that regard, in particular where the tender must, in any event, in the light of other factors, be rejected

5. a request must relate to all sections of the tender which are imprecise or which do not meet the technical requirements of the tender specifications, without the contracting authority being entitled to reject a tender because of the lack of clarity of a part thereof which was not covered in that request



C-599/10 “SAG ELV Slovensko” (6)

Digression: an example of how CJEU’s rulings create EU law

Article **55 of 2004/18** directive:

*“If, for a given contract, tenders appear to be abnormally low in relation to the goods, works or services, the contracting authority **shall, before it may reject those tenders, request in writing details** of the constituent elements of the tender which it considers relevant.”*

Conclusion of the Court:

*“It follows clearly from those provisions, which are stated in a mandatory manner, that the **European Union legislature intended to require the awarding authority to examine the details of tenders which are abnormally low**, and for that purpose obliges it to request the tenderer to furnish the necessary explanations to prove that those tenders are genuine.”*

C-599/10 “SAG ELV Slovensko”(7)

- Article 67 of Directive 2014/24:

“Contracting authorities shall require economic operators to explain the price or costs proposed in the tender where tenders appear to be abnormally low in relation to the works, supplies or services.”

C-336/12 “Manova”

- Danish Education Ministry launched a call for tenders in respect of services required for the operation of seven occupational guidance and advice centres (‘guidance centres’) - contract divided into lots
- Two stage procedure
- TD related to ‘Qualitative selection criteria’ required from economic operators to submit a copy of the most recent balance sheet in so far as the tenderer is obliged to draw up such a document
- The applications from the USD and the UC did not include copies of their balance sheets
- the Ministry found that the tenders from the USD and the UC were economically more advantageous than the tenders submitted by Manova
- Manova appealed against award of those lots to USD and UC



C-336/12 “Manova” (2)

The problem:

- Does the principle of equal treatment preclude a contracting authority from asking a candidate, after the deadline for applying to take part in a tendering procedure, to provide documents describing that candidate’s situation – such as a copy of its published balance sheet – which were called for in the contract notice, but were not included with that candidate’s application?
- Article 2 does not preclude the correction or amplification of details of a tender, on a limited and specific basis, particularly when it is clear that they require mere clarification, or to correct obvious material errors
- There are some requirements that must be satisfied (“SAG ELV Slovensko”)
- This interpretation is valid also for applications filed at the screening stage for candidates in a restricted procedure.



C-336/12 “Manova” (3)

- A contracting authority may request the correction or amplification of details of such an application, on a limited and specific basis, so long as that request relates to particulars or information, such as a published balance sheet, which can be objectively shown to pre-date the deadline for applying to take part in the tendering procedure concerned,
- however, this would not be the case if the contract documents required provision of the missing particulars or information, on pain of exclusion
- It falls to the contracting authority to comply strictly with the criteria which it has itself laid down.

C-42/13“Cartiera dell’Adda”

- CEM Ambiente launched a tendering procedure for the conclusion of a contract for the supply of paper and cardboard from separate municipal solid waste collections
- TD provided for a series of grounds for exclusion of bids, including situations where one of the documents and/or one of the sworn statements is incomplete or irregular, except where any irregularity is of a *purely formal nature* and may be remedied but is not decisive for the assessment of the tender
- CEM Ambiente excluded Cartiera dell’Adda and CCM from the procurement procedure on the ground that its tender did not contain the statement relating to Mr Galbiati, described as CCM’s technical director, and certifying that there were no criminal proceedings pending against him and that he had not been convicted of an offence by a judgment having the force of *res judicata*
- The only other tenderer having also been excluded from that selection procedure, CEM Ambiente declared the procedure void and launched a new tendering procedure



C-42/13“Cartiera dell’Adda” (2)

- CCM stated that none of the grounds for exclusion applied to Mr Galbiati
- Mr Galbiati had been identified as technical director in error, as he was simply a member of CCM’s board of directors with no power of representation: no statement was required concerning Mr Galbiati
- The problem referred by the national court: is the contracting authority obliged to exclude a tenderer who has failed to declare in his application for participation that a person designated as its technical director has not been the subject of criminal proceedings or convicted of an offence, even if the tenderer proves: 1. that person had been described as the technical director in error and, 2. that person fulfilled the conditions for making the statement required in any event



C-42/13“Cartiera dell’Adda” (3)

- Conclusions:
- the ‘sworn statement’ concerning the person designated as technical director of the economic undertaking concerned had to be annexed to the bid submitted by the undertaking, on pain of exclusion from the tender procedure
- TD allowed to remedy *a posteriori* merely irregularities which were purely formal and not decisive for the assessment of the bid
- the contracting authority must comply strictly with the criteria which it has itself established, so that it is required to exclude from the contract an economic operator who has failed to provide a document or information which he was required to produce under the terms laid down in the contract documentation, on pain of exclusion - that strict requirement on the part of contracting authorities has its origins in the principle of equal treatment



C-42/13“Cartiera dell’Adda” (4)

- Article 45 of Directive 2004/18, does not preclude the exclusion of a tenderer on the ground that he has omitted to annex to his bid a sworn statement relating to the person identified in the bid as technical director. **In particular, in so far as the contracting authority takes the view that that omission is not a purely formal irregularity, it cannot allow the tenderer subsequently to remedy the omission in any way after the expiry of the deadline for submitting bids**
- Article 51, which provides that the contracting authority may invite operators to supplement or clarify the certificates and documents submitted pursuant to Articles 45 to 50 of the directive, cannot be interpreted as permitting that authority to accept any rectification of omissions which, as expressly provided for in the contract documentation, must result in the exclusion of the bid.



C-387/14 “Esaprojekt”

- The case concerns a public tender to supply hospital IT systems in Poland
- ‘KK’ was initially awarded the contract
- Esaprojekt challenged that award before the national procurement review body (PRB)
- The award was annulled by PRB because the experience relied on by KK was insufficient and not compliant with TD
- PRB ordered the contracting authority to ask KK to clarify its list of experience
- Clarifications showed that experience was, indeed, not sufficient, but the contracting authority allowed KK to supplement the documents proving its satisfies the TD
- KK amended that list and relied **on new, third-party’s experience**
- KK was again awarded the contract
- Esaprojekt again appealed, leading to the request for a preliminary ruling in this case



C-387/14 “Esaprojekt” (2)

The national court put to the Court a series of questions that sought to determine:

- **the conditions under which tenderers can modify their lists of experience and rely on the experience of third parties**
- whether bidders may rely on the experience obtained as a part of a group of economic operators
- clarification of the conditions under which information provided by a tenderer amounts to a ‘misrepresentation’ under Article 45(2)(g) of Directive 2004/18/EC



C-387/14 “Esaprojekt” (3)

AG’s metaphor

- the information and documents submitted by the tenderer upon the lapse of the submission period represent a **snapshot**
- only what is already contained in that picture may be taken into account by the contracting authority
- it does not prevent the contracting authority from zooming in on any details of the picture that were a bit blurry and requesting an increase in the picture’s resolution in order to see the detailed clearly but
- **the basic information must already have been, albeit in low resolution, in the original snapshot**



C-387/14 “Esaprojekt” (4)

Conclusions:

- KK submitted documents which were not included in its initial bid, after the expiry of the time limit laid down for submitting applications for the public tender concerned
- Such a supplementation, far from being merely a clarification made or a correction of obvious material errors, is in reality **a substantive and significant amendment of the initial bid, which is more akin to the submission of a new tender**
- It affects the essential elements of the award procedure, namely the very identity of the economic operator which may be awarded the public contract concerned, and the verification of the capacities of that operator and, therefore, its ability to perform the contract concerned



C-387/14 “Esaprojekt” (5)

- By allowing the presentation by the economic operator concerned of the documents in question in order to supplement its original tender, the contracting authority unduly favours that operator as compared with other candidates and, thereby, breaches the principles of equal treatment and non-discrimination of economic operators
- **Articles 51 and Article 2 of Directive 2004/18, precludes an economic operator from submitting to the contracting authority, in order to prove that it satisfies the conditions for participating in a public tender procedure, documents which were not included in its initial bid, such as a contract performed by another entity, after the expiry of the time limit laid down for submitting tenders for a public contract.**



C-387/14 “Esaprojekt” (6)

➤ **Reliance on experience obtained within a group:**

- 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
- 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**



C-387/14 “Esaprojekt” (7)

Serious misrepresentation in supplying information

- Provision of the Directive does not contain any reference to intentional behaviour by the economic operator:
 - in order to consider an economic operator as being guilty of ‘serious misrepresentation’ in order to exclude it from a public contract, it is sufficient if he is guilty of some degree of negligence which may have a decisive effect on the decisions to exclude candidates from being selected or awarded as public contract
 - in order to sanction an economic operator which has submitted false declarations by excluding its participation in a public contract, the contracting authority is not required, to provide evidence of the existence of wilful misconduct on the part of that economic operator



C-387/14 “Esaprojekt” (8)

- ‘serious misrepresentation’ can be specified and explained in national law, provided that it has regard for EU law
- the exclusion of an economic operator from participation in a public contract, in particular if it is guilty of ‘serious misrepresentation’ for making false declarations when submitting the information requested by the contracting authority may be applied where the operator concerned is guilty of a certain degree of negligence: negligence of a nature which may have a decisive effect on decisions concerning exclusion, selection or award of a public contract, irrespective of whether there was wilful misconduct on the part of that operator.



C-131/16 “Archus”

- Polish contracting entity published in the OJEU a notice of a restricted invitation to tender for the award of a contract for the digitalisation of documents
- TD stated that tenderers had to attach two documents to their tender:
 - a scanned copy of a document prepared by the contracting authority, recorded on a durable medium and edited in accordance with a detailed description of the specification
 - a sample of 35mm microfilm containing the exposed result of the work submitted for quality assessment; the quality of the first document was to be assessed under the tender evaluation criteria, while the quality of the microfilm sample was to be assessed according to the ‘satisfies/does not satisfy’ rule, it being stipulated that if the sample was not satisfactory the offer was to be rejected
- Tenders were also required to secure their tender by means of a deposit in the amount of PLN 20 000



C-131/16 “Archus” (2)

- **Only two tenders submitted, one jointly by Archus and Gama, the other by Digital-Center**
- After the deadline for receipts of tenders, Archus and Gama, sent to the contracting entity a request for correction of their tender by replacing microfilm sample which did not conform to the tender specifications. They stated that there had been an inadvertent mistake in their submission
- The contracting entity replied that it considered that the new microfilm sample supplemented the documents sent. However, it also informed them that they had not provided information on the method for microfilming the sample and the technical parameters required by the tender specification and, therefore, invited them to supplement that information
- After examination of the two microfilm samples provided by Archus and Gama, the contracting entity finally rejected their tender as not being in accordance with the tender specification. It took the view that the samples of microfilm submitted by those companies were not readable at a minimum resolution required. In addition, it considered that the tender submitted by Digital-Center was the most favourable



C-131/16 “Archus” (3)

Archus and Gama appealed to the Polish review body against the decision of the contracting authority:

- rejecting their tender
- and accepting Digital-Center’s tender as a winning tender

Archus and Gamma claimed the other offer did not satisfy the requirements of the contracting authority and should be rejected too; in such a case, if both tenders are not compliant, the contracting entity, not having other tenders to consider, should cancel the whole procedure.

C-131/16 “Archus” (4)

- **The PRB had three problems:**
- whether, the requirement imposed on the contracting authority to invite a tenderer to supplement a document required by the tender specification or to submit a new sample is compliant with the law as it may lead that tenderer to alter the content of his tender
- lawfulness of the retention of the guarantee paid by the tenderer where the tenderer does not take up the contracting authority’s invitation to supplement such a document and
- legal interest of Archus and Gama in the rejection of Digital-Center’s tender

C-131/16 “Archus” (5)

- Question about **lawfulness** of the retention of the guarantee paid by the tenderer where the tenderer does not take up the contracting authority’s invitation to supplement such a document:
- not answered by the Court: it was found not relevant
- The Court may refuse to rule on a question referred by a national court only where it is quite obvious that 1. the interpretation of EU law that is sought is unrelated to the actual facts of the main action or its purpose, 2. where the problem is hypothetical, or 3. where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it



C-131/16 “Archus” (6)

- A request for clarification cannot make up for the lack of a document or information whose production was required by the contract documents – the contracting authority is required to comply strictly with the criteria which it has itself laid down
- Tenderers themselves sent the contracting authority a request for their tender to be corrected, in order to replace the sample which they had annexed to their bid, which did not comply with the specifications in the tender specification, with a new microfilm sample

C-131/16 “Archus” (7)

Conclusion:

- A request sent by the contracting authority to a tenderer to supply the declarations and documents required cannot, in principle, have any other aim than the clarification of the tender or the correction of an obvious error vitiating the tender
- A request cannot permit a tenderer to supply declarations and documents which were required to be sent in accordance with the tender specification and which were not sent within the time limit for tenders to be submitted. Nor can it, result in the presentation by a tenderer of documents containing corrections where in reality they constitute a new tender
- The obligation which a contracting authority may have under national law, to invite tenderers to submit the declarations and documents required which they have not sent within the time limit given for the submission of offers, or to correct those declarations and documents in the event of errors, cannot be permitted except in so far as the additions or corrections made to the initial tender do not result in a substantial amendment of that tender



C-131/16 “Archus” (8)

Legal interest

- Tenderers have a legitimate interest in the exclusion of the bids submitted by the other tenderers, whatever the number of participants in the procedure and the number of participants who have instigated review procedures
- The exclusion of one tenderer may lead to the other tenderer being awarded the contract in the same procedure or
- If all tenderers are excluded and a new public procurement procedure is launched, each of those tenderers may participate in the new procedure and thus obtain the contract indirectly



C-131/16 “Archus” (9)

Legal interest (2)

- In a procedure in which two tenders have been submitted and the contracting authority has adopted two simultaneous decisions rejecting the tender of one of the tenderers and awarding the contract to the other, an action has been brought before the referring court by the unsuccessful tenderer concerning those two decisions. In that action, the unsuccessful tenderer seeks the exclusion of the tender of the successful tenderer on the ground that it does not comply with the tender specifications
- In such a situation, the tenderer who has brought the action must be regarded as having a legitimate interest in the exclusion of the bid submitted by the successful tenderer
- Article 2a(1) and (2) of Directive 92/13 expressly provides a right of review for tenderers who are not definitively excluded against, inter alia, award decisions taken by contracting authorities



C-42/13“M.A.N.T.I”

The problem

- Italian PPL transposed Article 51 of Directive 2004/18 enabling tenderers to remedy any irregularities in their tenders but at the same time imposed on them a financial penalty proportional to the value of the contract
- The Italian court asked CJ, in essence, whether the power to impose a penalty and the rules for fixing the amount of the fine are compatible with the provisions of EU law
- According to the provisions of the PPL the amount of penalty could not be less than 0.1% or more than 1% of the value of the contract and must not exceed EUR 50 000 (in 2016 it was reduced to EUR 5000



C-42/13“M.A.N.T.I” (2)

- The contracting authority may, in a procedure for the award of a public contract, invite economic operators to supplement or clarify the certificates and documents submitted pursuant to Articles 45 to 50 of the directive
- That provision nor any other provision of Directive 2004/18 does not contains details on how such a rectification may take place or on the conditions to which it may be subject
- MS are not only free to include such a possibility of rectifying tenders in their national law but also to regulate it
- MS may therefore decide to subject that possibility of rectification to the payment of a financial penalty



C-42/13“M.A.N.T.I” (3)

- When MS implement Article 51 of Directive 2004/18, they must ensure that they do not jeopardise the attainment of the objectives of that directive or undermine the principles of equal treatment and non-discrimination, transparency and proportionality
- Article 51 does not allow the contracting authority to accept any rectification of omissions which, as expressly provided for in the contract documentation, had to lead to the exclusion of the tenderer
- A request for clarification cannot make up for the lack of a document or information whose production was required by the contract documents
- The contracting authority is required to comply strictly with the criteria which it has itself laid down
- Such a request may not lead to the submission by a tenderer of what would appear in reality to be a new tender
- In accordance with the principle of proportionality, the measures adopted by the MS must not go beyond what is necessary in order to achieve that objective



C-42/13“M.A.N.T.I” (4)

- Setting in advance the amount of the penalty in the contract notice fulfils, the requirements of equal treatment of tenderers, transparency and legal certainty but:
- the automatic application of the penalty, irrespective of the nature of the rectifications made by the errant tenderer and therefore also in the absence of any specific reasons, does not appear to be compatible with the requirements deriving from the principle of proportionality
- It is an appropriate means of achieving the legitimate objectives related to the need to place responsibility on the tenderers in submitting their tenders and to offset the financial burden that any regularisation represents for the contracting authority but
- the amounts of penalties such as those set out in the contract notices by the contracting authorities in the two cases in the main proceedings appear manifestly disproportionate



Conclusions

- **no obligation** to enable bidders (candidates) to correct or supplement their tenders (application) but the right to do so
- contracting authorities not allowed to accept any rectification of omissions which, as expressly provided for in the contract documentation, had to lead to the exclusion of the tenderer
- a request for clarification cannot make up for the lack of a document or information whose production was required by the contract documents, the contracting authority being required to comply strictly with the criteria which it has itself laid down
- economic operator is not allowed, in order to prove that it satisfies the conditions for participating in a public tender procedure, to submit documents which were not included in its initial bid, such as a contract performed by another entity
- a request may not lead to the submission by a tenderer of what would appear in reality to be a new tender
- the measures adopted by the Member States must not go beyond what is necessary in order to achieve that objective (proportionality)



Thank you very much for attention
QUESTIONS?



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