

Judgment of 30 June 2020 in case no. SKA-1069/2020

ECLI: LV: AT: 2020: 0630.A420341617.14.S

The principle of openness in public procurement

In an open tender, a hospital determined the supplier of equipment and aids for the treatment of medical devices by drawing lots. However, the selection of the winner by random draw took place without the presence of the bidders. The decision was appealed to the court.

The Supreme Court recognized in the case that a lottery was traditionally a fair choice, allowing, for example, to decide between identical bids. However, the principle of openness was not respected in the lottery in this case, i.e., the selection of the winner took place in a process that was neither open nor transparent. Respect for this principle is an essential element of the legality of the procurement process. In assessing the legality of a procurement procedure - a lottery - infringements as serious as the failure to respect the principle of openness could only be compensated for by convincing evidence that the lottery had excluded the possibility of unfair practices.

If the principle of openness is not guaranteed at all (neither the bidders nor an independent observer participated in determining the winner of the contract), it is not possible for the court and the bidders to fully verify whether the procedure for selecting the winners was actually conducted legally. The testimonies of the members of the Public Procurement Commission, however credible, cannot totally exclude doubts about the objectivity of the lottery and the full respect of the principle of chance.

The fact that, after hearing the testimony of the members of the Public Procurement Commission, the court has no doubts about the proper conduct of the lottery cannot in itself be sufficient reason to recognize that the failure to respect the principle of openness is justified and that the lottery was carried out legally. Such subsequent evidence of the conduct of the procurement procedure does not remove the shortcomings in the ability to assess the legality of the procurement procedure resulting from the non-application of the principle of openness.