



*Seminar organized by the Supreme Administrative Court of Finland
and ACA-Europe*

***“Recent case-law of the Court of Justice of the European Union and of the
(Supreme) Administrative Courts in public procurement litigation”***

Helsinki 22 – 23 October 2015

NORWAY

1. National legal system

1.1. Which court is responsible for the implementation of the appeal proceedings with respect to public procurement falling within the scope of the directives?

In Norway we have a general court system. This means that the public procurement cases brought before the court are tried before the general court of first instance and can be appealed to the Court of Appeal. The case can also finally be appealed to the Supreme Court, but before the Supreme Court will try the case the Appeals Selection Committee has to admit the case. This happens only if the case raises questions of principal interest and questions of importance beyond the specific case.

1.1.1. Is there an administrative, civil or special court, or an authority of a different kind?

There is an administrative complaint board called The Norwegian Complaints Board for Public Procurement. The Complaint Board does only give advisory opinions not enforceable by law. However, the procuring authority normally respects the opinion given by the Board. The procedure is normally initiated after the contract is signed; hence the procedure is mostly used to establish a basis for liability for the tenderer against the procuring authority or just establish that the procuring authority did break the regulations.

1.1.2. Is there a distribution of functions between these courts (disputes for a substantiated decision? Compensation? Declaration of ineffectiveness? Any others?)

All the functions enforceable by law lie with the general courts.

1.1.3. What exactly is the role of the Supreme Administrative Court¹ in disputes pertaining to procurement contracts (judge for full remedy proceedings, court of cassation, judge for abuse of power?)

¹ The Supreme Administrative Court refers to a court that is a member court of the ACA and that acts as a court of last instance.





The Supreme Court can receive an appeal in a case regarding public procurement as an appeal of a judgment or as an appeal of a decision. The first category will apply to judgment for compensation, proceedings for ineffectiveness, imposition of fines or shortening of the duration of the contract. These cases will as already mentioned only be admitted by the Appeals Selection Committee of the Supreme Court if the case raises questions of principal interest.

If the public procurement case is an interim measure which is used for prevent signing of the contract, the appeal will be an appeal of a decision. A decision will be reviewed by the Appeals Selection Committee of the Supreme Court. However, the Appeals Selection Committee has only competence to review the form of procedure by the Court of Appeal and the interpretation of the law – not the application of the law – of a decision given by the court of first instance. An interim measure in a public procurement case will in all normal cases be given by the court of first instance. The decision will be reviewed in full by the Court of Appeal and hence the Supreme Court has a limited competence.

1.1.4. Does the distribution between the courts change in relation to the proceedings for the measures introduced after concluding the contract?

No, the general courts have the same competence before and after the signing of the contract. However, naturally will the type of cases change since interim measures will no longer be an adequate measure and proceedings for compensation first will be of interest when the contract is signed.

2. Length of court proceedings

2.1. Are there any specific proceedings or methods to verify whether the national proceeding applied is quick and efficient (for example: definite deadlines to rule on interim measures, etc.)?

There are no specific regulations for public procurement cases. However the Civil Procedure Act states that a judgment or a decision shall be given within four weeks after the hearing and two weeks if there has only been one judge (which is the most common in the court of first instance). The Civil Procedure Act also states that the hearing shall not be scheduled for later than six months after the proceedings was initiated.

An interim measure will be tried substantially faster than the normal proceedings as stated above. There are different proceedings for interim measures according to how quickly the applicant needs the decision. The interim measure shall be decided at once, however, normally there shall be held a hearing in the first instance. There will not be





held a hearing if the case is of such a nature that the claim can be lost if the case is not decided before the hearing can be held.

2.2. Is the average processing time determined for public procurement cases? Do you have specific data by type of proceedings and juridical level (level of the court)? If yes, specify.

Unfortunately there are no statistics for this.

If no statistics are available regarding the average time duration of these types of proceedings, would it be possible to have an average for the cases dealt with by the Supreme Administrative Court?

Procedure for “interim measures” (including suspension)

| Year of case resolution | Number of public procurement proceedings resolved in the Supreme Administrative Court in the reference year | Average time period for the resolved proceedings every year, calculated in working days ² | | |
|-------------------------|---|---|------------------------------------|--|
| | | First instance court ³ | Second instance court ³ | Supreme Administrative court/Court of last resort ³ |
| 2013 | No cases. | | | |
| 2014 | 1 | One day to the first decision, however a hearing was held afterwards and the total time period was 1,5 month. | 3,5 month. | 1,5 month. |

² The day on which the appeal was lodged, as well as the day on which the decision was made, must be included in the calculation.

³ If applicable.





Substantive proceedings (annulment, declaration of ineffectiveness, compensation, etc.)

| Year of case resolution | Number of public procurement proceedings resolved in the Supreme Administrative Court in the reference year | Average time period for the resolved proceedings every year, calculated in working days ⁴ | | |
|-------------------------|---|--|------------------------------------|--|
| | | First instance court ⁵ | Second instance court ³ | Supreme Administrative court/Court of last resort ³ |
| 2013 | 2 | 5 months.* | Approx. one year.* | 2 months |
| 2014 | No cases. | | | |

* Info only available for one of the cases.

2.3. Can the parties in litigation request acceleration of proceedings? If yes, does this apply to all the courts or only to the Supreme Administrative Court? If yes, in how often has this been applied?

There is no formal way to request that the case is done faster than normal. However, the parties often can influence the time of proceedings – reply instantly e.g. – and the court normally adjust the time-limit for responses from the parties to the nature of the case.

⁴ The day on which the appeal was lodged, as well as the day on which the decision was made, must be included in the calculation.

⁵ If applicable.





E.g. in the interim measure mentioned above the parties agreed to stop the proceedings before the court of first instance.

3. Dialogue between the Supreme Administrative Court and the CJEU
Since Norway is not part of the EU, but a party to the EEA-agreement, we will answer the question based upon the relationship with the EFTA Court.

- 3.1. How many requests for preliminary rulings has your Supreme Administrative Court made to the CJEU regarding public procurement cases?

The Supreme Court has not asked for any advisory opinion in public procurement cases. There are very few such cases tried for the Supreme Court and the few cases that have been tried before the court has not raised any unclear questions of EU/EEA-law.

- 3.2. Is there a documentation department that systematically analyses the judgements of the CJEU and informs the members of the Supreme Administrative Court about these judgements?

The law clerks go through the cases from the EFTA Court, and read a magazine published by the Department of European law at the University of Oslo which analyses important judgments by the CJEU. The law clerks will inform the judges of the Supreme Court of relevant new case law from the EFTA Court and the CJEU.

- 3.3. Does the Supreme Administrative Court quote the jurisprudence of the CJEU in its decisions or does it make material references to its jurisprudence?

The Supreme Court both quotes and makes material references to the jurisprudence of the CJEU and the EFTA Court.

4. Implementation of the remedies laid down in Directives 89/665/EEC and 92/13/EEC

- 4.1. Is it possible for the Supreme Administrative Court (or a lower-level court) to declare a public contract ineffective and/or impose alternative or other remedies (in accordance with Directives 89/665/EEC or 92/13/EEC) *ex officio* or only if it is required?

The courts can declare a contract ineffective or impose other sanction according to their own assessment. The courts are not bound by the specific claims pressed by the plaintiff, cf. The Public Procurement Act article 15 nr. 2.

- 4.2. Who can seek a declaration of ineffectiveness? Has the jurisprudence of the CJEU judgement dated 18 July 2007, Commission v/FRG, C-503/04 been incorporated into national law?





In Norway everyone which seeks a remedy before the court needs to demonstrate a legal interest in the outcome of the case. The same delimitation applies to public procurement cases and to the person/entity that seeks a declaration of ineffectiveness. The committee which assessed the necessary changes based upon the directive 2007/66/EC, also looked into who should be able to bring a case before the courts. However, the committee and the Ministry of Local Government and Modernisation concluded that there was no need for an enlarged circle of persons/entities that could bring such a case before the courts.

The case from the CJEU was assessed by the committee, but it concluded that the case did not require any changes.

4.3. In how many cases has the balance of interests procedure been implemented for not formulating the interim or suspension measures?

The Supreme Court has not used the balance of interests procedure in any case. How many cases the lower-level courts have used the doctrine are unfortunately not possible for us to find out.

4.4. Is the national jurisprudence subject to the balance of interests under certain conditions?

Yes, the procedure for interim measure involves an assessment of balance of interests, cf. the Civil Procedure Act article 34-1 nr. 2. The balance of interests assessment will in principle be assessed in every case regarding interim measure, but will only be applied if the applicant's interest in the measure is clearly disproportionate to the disadvantage the defendant will suffer if the measure is given.

4.5. Directives 89/665/EEC and 92/13/EEC stipulate that when a first instance court, independent of the contracting authority, is reviewed by an appeal dealing with the contract award decision, the member States shall ensure that the contracting authority cannot conclude the contract before the appeal authority gives its judgement based either on the request for interim measures or the appeal. Is it possible to have this suspension lifted automatically by your court? If yes, under what conditions?

The suspension of the right to sign the contract is lifted automatically when the decision for interim measure is taken. Hence, if the court of first instance denies the request for interim measure the suspension is lifted and the contract can be signed. However, this only applies if the restriction period has expired. If the interim measure is granted the suspension is also lifted, but then the contract cannot be signed since the interim measure denies signing.

5. Division of the award criteria into award subcriteria, balancing the award subcriteria, criteria for assessment and a scoring method for the offers (case law references: CJEU, C331/04 ATI EAC and others; CJEU, 24 January 2008, Lianakis, C-532/06)





5.1. How does your Court implement this jurisprudence in its everyday practice?

The mentioned jurisprudence from the CJEU has been mentioned in one case before the Supreme Court.⁶ However, the case law from the CJEU do not seem to be decisive for the case.

5.2. Does the jurisprudence or legislation allow the use of subcriteria that is not explicitly stated, and if so, under what conditions? Does the jurisprudence or legislation determine the subcriteria? Does the jurisprudence or legislation differentiate between the subcriteria and the assessment criteria?

The subcriteria for qualification shall mainly be stated in the announcement, cf. the Public Procurement regulation article 17-5. However, the criteria need to be stated in detail in the tender documentation either in a special qualifying documentation or in the general document for the competition.

It is stated in the Public Procurement regulation article 22-2 nr. 2 that all the criteria that will be used in the evaluation shall be stated in the announcement or the tender documentation of the procurement competition. Hence, there are no material difference between the regulations for subcriteria for qualification and the assessment or evaluation criteria.

5.3. What are the consequences of the jurisprudence using subcriteria that are not explicitly stated? Does the same question apply to the assessment criteria?

The consequence of illegal assessment or qualification criteria is normally that the public procurement competition has to be canceled since the tender documentation can only be changed if the changes are not substantively. If the dead line for submission of the offer also has expired, the tender documents cannot be changed and the only available measure to mend the errors is to cancel the competition.

5.4. Does the national legislation or jurisprudence require any prior communication as regards the assessment method for the offers?

The assessment method will normally be stated in the tender documents, but if there is a specific reason why the weighing of the award criteria cannot be given at such an early stage, the authority can give the priority of the criteria instead.

⁶ Rt-2008-1705





6. In-house horizontal cooperation [CJEU cases, C-15/13, Technische Universität Hamburg-Harburg; C-386/11, Piepenbrock Dienstleistungen; C-159/11, Azienda Sanitaria Locale di Lecce and C-480/06, Commission v. Germany (Grand Chamber)].

6.1. Did your Supreme Administrative Court face any difficulties as regards the procurement contracts in the cooperation proceedings?

There has been no case regarding this issue in the Supreme Court.

6.2. In concrete terms, how is the examination of the fulfilment of these carried out?

The cases are part of the sources of law in Norwegian public procurement law and will be taken into account if the question arises. However, there is no evidence in the jurisprudence of Norwegian courts that this has been the case so far.

7. Confidentiality of the documents upon judicial review (case law references: CJEU, 14 February 2008, Varec, C-450/06)

7.1. Is the confidentiality of the documents frequently invoked in litigations concerning public procurement that you deal with?

The party may invoke the right to confidentiality if the documents consist business secrets or other confidentiality by law. However, this is seldom the case when the litigation starts since the confidentiality is most important before the submission of the tender. The confidentiality is not unlimited in the litigation before the court, for further explanation see section 7.2.

7.2. How does the national legislation or jurisprudence obtain the confidentiality and the incentive for the decisions of the contracting authorities and the courts?

The parties to the case before the court have a right to access all the documents. This right applies to all evidence in the case. However there are regulations of which documents (and other evidence) that can be submitted to the court. E.g. documentation or statements regarding information which will breach confidentiality by law obtained by a person in service for the state. This can be the case in a public procurement case, but the Ministry can except the document from confidentiality as can the court after a strict procedure. There is also an exception for evidence which contains business secrets, however, the court can instruct the party to submit the evidence if it finds it necessary for the case.

7.3. Is the question of access to confidential documents during the jurisdictional phase regulated by a specific legislation in your country? Are there general rules and/or specific rules for public procurement documents?





There are no specific regulations for public procurement cases. However, there are some regulations which give the court a right to secure confidentiality during the hearing. To our knowledge these regulations securing confidentiality are seldom used in public procurement cases.

- 7.4. Does the national judge rule on the confidentiality of the documents? Must he/she refer to a specific instance in the matter? What criteria does the jurisprudence use to authorise or deny access to documents that are classified as confidential? Is there a difference depending on whether accelerated proceedings are applied or not?

As stated above the general courts assess whether a document is confidential or not, and if it is confidential the judge can if necessary require that the document is submitted before the court. The only other instance involved would be the Ministry if one of the parties requests the Ministry to except the document from confidentiality.

It is no formal difference between the normal cases and the interim measure, but since the interim measure as the name says is temporary, the court can be more withdrawn with requiring evidence containing business secrets.

- 7.5. When some documents are classified as confidential, how is the right to a fair trial guaranteed?

The right to a fair trial is secured in the regulations mentioned above where the court can require the evidence even if the document is confidential.

