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

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?

The Supreme Court as the only administrative court in the country, has exclusive jurisdiction to adjudicate on any recourse filed against a decision, act or omission of any organ, authority or person exercising any executive or administrative authority on the ground that it violates the provisions of the Constitution or any law or it is in excess or in abuse of any power vested in such organ, authority or person. The award of a tender can also be challenged before the Supreme Court. First instance cases are tried by one judge.

In its appellate jurisdiction the Supreme Court sits in a panel of at least five judges. If the case involves a point of law which is of a great importance, then the appeal can be heard by the Full Bench of the Supreme Court, except the judge who gave the decision under appeal.

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

The Tenders Review Authority has been established with power to examine Hierarchical Recourses against acts or decisions of the Contracting Authorities that violate any provision of the law before or after signing a contract of supplies, services or projects.

The Tenders Review Authority may decide:

(a) to approve the act or decision of Contracting Authority,

(b) to annul the act or decision of Contracting Authority if it violates any provision of the law, or

(c) to cancel or order the amendment of any term contained in the tender documents or any other document relating to public procurement procedure in respect to technical, economic or financial requirements before submitting applications or tenders for breach of any provision of applicable law,

(2) to decide on whether to grant interim measures to remedy the alleged violation of the law or to prevent further damage to the interests concerned, including measures to suspend the award procedure or the signature of the contract or to prevent the Contracting Authority executing any decision;

(3) to declare a signed public contract ineffective,

(4) to impose sanctions on Contracting Authorities if a contract was signed illegally,

(5) to enforce payment of the costs of the proceedings.

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

As stated above the Supreme Court is the only administrative court. Recourses can be filed against the decisions of the Tender Review Authority in the Supreme Court. Appeals against those decision will be decided by the Supreme Court in its appellate jurisdiction. Following annulment of a decision by the Supreme Court, the District Courts have jurisdiction to award damages, not the Supreme Court.

1.1.3. What exactly is the role of the Supreme Administrative Court[1] in disputes pertaining to procurement contracts (judge for full remedy proceedings, court of cassation, judge for abuse of power?)

In the exercise of its administrative jurisdiction, the Supreme Court may confirm an administrative act or decision or declare it as null and void. In the case of omissions, it may declare that such omissions ought not to have taken place and that whatever has been omitted should have been performed. Any decision given is binding on all courts, organs or authority and must be acted upon by those concerned.

It must be noted that the jurisdiction of the Supreme Court is limited to the review of the legality of the act and cannot go into the merits of the decision under review and substitute the decision of the administrative organ with its own decision. Such an act would violate the strict separation of powers safeguarded by the Constitution. Decision making in the field of administration rests entirely within the province of the executive branch of the government. It only decides whether in the circumstances such decision of the organ under recourse was proper and correct or not. The review and the inquiry it entails is limited to the validity of the act impeached. Such validity is tested by reference to the powers vested by law in the

[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.

administration, the manner of their exercise and the factual substratum, particularly its correctness.

In its appellate jurisdiction the Supreme Court may uphold, vary, set aside or order the retrial of a case as it may think fit.

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

See answer to question 1.1.1 above.

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.)?

For the procedure before the Tenders Review Authority the following deadlines exist:

Within 15 calendar days from the decision of the Contracting Authority (CA) recourse must be submitted (if the decision was sent by fax)
Within 2 working days the TRA informs the CA
Within another 2 working days from informing the CA, hearing for Interim Measures
Within 5 working days from informing the CA, issue of decision for Interim Measures

Within 45 calendar days from the recourse hearing, a decision is given on the merits of the case
On average the whole procedure lasts 3,5-4 months

Average time period for the resolved proceedings every year, calculated in working days:

- Interim Measures
  2013 – 2 days
  2014 – 3 days

- Recourses
  2013 – 90 days
  2014 – 85 days

As concerns the procedure before the Supreme Court, there are no specific proceedings, however, in practice, applications for interim measures are examined promptly.

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.

No, since we do not, yet, have an electronic filing system, we do not have data specifically on public procurement cases.

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?

Although no statistics are available an appeal against an administrative case, including public procurement, takes 2 year to be finally dealt by the Supreme 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	Not available			
2014	Not available			

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	Not available			

[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.
[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.

2014	Not available			

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?

Very rarely. However if an application is filed, the court decided accordingly. It must be noted that vary sparingly such applications are approved.

3. Dialogue between the Supreme Administrative Court and the CJEU

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

There was only one preliminary ruling in a first instance case, made to the CJEU regarding public procurements cases. The preliminary ruling concerned the right of the contracting authority to file an appeal against the decision of the Tender Review Authority.

The CJEU ruled that Article 2(8) of Directive 89/665/EEC as amended by Directive 92/50/EEC, must be interpreted as not requiring the Member States to provide, also for contracting authorities, a right to seek judicial review of the decisions of non-judicial bodies responsible for review procedures concerning the award of public contracts. However, that provision does not prevent the Member States from providing, in their legal systems, such a review procedure in favour of contracting authorities**.(C-570/08 Simvoulio Apokhetefseon Lefkosias** v **Anatheoritiki Arkhi Prosforon,21.10.2010)**

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?

We do not have such a department, but the judges of the Supreme Court are constantly being notified of the Judgments of 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 |Administrative Court regularly refers to the jurisprudence of the CJEU and they interpret and apply domestic laws in conformity with the Decisions of the CJEU.

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?

As stated above the Supreme Court in its appellate jurisdiction in administrative law matters cannot reach a decision as to how the decision of the administrative organ ought to have been. It only decides whether in the circumstances such decision of the organ under recourse was proper and correct or not. The review and the inquiry it entails is limited to the validity of the act impeached.

The revisional jurisdiction of the Supreme Court is primarily of a corrective character. It is aimed to ensure, in the interest of legality

and public good that the administration functions within the sphere of its authority and always subject to the principles of good administration. The court will not assume administrative responsibilities, a course impermissible under a system of separation of State powers, constitutionally entrenched in Cyprus.

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?

Under Article 146.2 of the Constitution a recourse may be made by "*a person whose any existing legitimate interest, which he has either as a person, or by virtue of being a member of a community, is adversely and directly affected by such decision or act or omission".*

Article 186 provides that the term «person» includes any company, partnership, association, society, institution or body of persons, corporate or unincorporate.

The legitimate interest of a person must be prejudicially affected directly by the act or omission. The concept of "interest" is not similar to the concept as applied in civil law. It must be concrete of a financial or moral nature. In this respect a person's interest must be

distinguished from the interests of the general public. No *actio populari* is allowed. The interest must exist at the time of the filing and the hearing of the recourse. Whether the interest is directly affected is a question of fact to be decided on the circumstances of each case.

The contracting authorities must comply with annulling decisions of the court.

We could not spot any case where the above decision of the CJEU has been referred to.

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

The grant of a provisional order in an application to the Supreme Court under Article 146 of the Constitution is regulated by Rule 13 of the Supreme Constitutional Court Rules, 1962. It is a cardinal principle of administrative law that a provisional order is granted only if the applicant shows manifest illegality or the likelihood of irreparable damage

We not have any data on the number of cases where the balance of interest procedure has been implemented

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

See above

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?

Filing of a recourse or an appeal against a judgment given by a court in its revisional jurisdiction does not have an automatic suspensive effect. An application must be filed for granting an order suspending the conclusion of the contract.

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 courts accept the validity of award and sub award criterias and the valuation of the tenders according to these criteria and the weight attached to them. (Case no CGA Facilities Services Inc v. Tender Review Authority, 30.3.2012, case no 174/08 Epistele Communication and Media Ltd v. CTO, 13.1.0.2009. revisional Appeal Angelos Nicolaides Holdings Ltd v. DDLS (2012)3 CLR 394)

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 Coordination of Procedures for the Award of Public Works Contracts, Public Supply Contracts, Public Service Contracts Law of 2006 (Law 12(I)/06) is the basic legislation governs the tender procedure regarding public contracts. Article 59 of the law provides that:

59.-(1) Without prejudice to the legislative, regulatory or administrative provisions applicable in the Republic concerning the remuneration of certain services, the criteria on which the contracting authorities shall base the award of public contracts

shall be the following:

(2) Without prejudice to subsection (3), in the case provided for in paragraph (a) of subsection (1), the contracting authority shall specify in the contract notice or, in the tender documents or, in the case of a competitive dialogue, in the descriptive document, the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender. Those weightings can be expressed by providing for a range with an appropriate maximum spread.

(3) Where, in the opinion of the contracting authority, weighting is not possible for demonstrable reasons, the contracting authority shall indicate in the contract notice or contract documents or, in the case of a competitive dialogue, in the descriptive document, the criteria in descending order of importance.

The courts have accepted the use of subcriteria as mentioned above, however we did not yet have a case on the use of criteria not explicitly stated.

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?

See answer above.

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

See answer above.

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**?

We did not have a case on pubic contract where the issues of in house horizontal cooperation or cooperation between public entities has arisen.

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

See above.

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**?

There are only a few cases where the issue of confidentiality in recourse concerning public procurement has been raised.

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**?

Article 5 of Law 101/2006 stipulates that the contracting authority shall not disclose information forwarded to it by economic operators which they have designated as confidential. Such information includes, in particular, technical or trade secrets and the confidential aspects of tenders.

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?

See above

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**?

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