

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

*Answers to the questionnaire by the Supreme Court of Estonia*

## **1. National legal system**

**1.1.1.** Disputes in procurement matters shall be settled as first instance by a review committee set up for such purpose (the Public Procurement Review Committee), an administrative authority within the Ministry of Finance settling pre-action disputes. Decisions of the Review Committee can be contested at an administrative court (subsection 117 (1) and 127 (4<sup>1</sup>) of the Public Procurement Act (hereinafter referred to as the PPA))<sup>1</sup>. This common procedure applies to all public procurement disputes within the scope of the directives, as well as procurement matters falling outside the scope of the directives (i.e. procurements below the threshold, concessions). The contracting authority is required to harmonise all its decisions made during the procurement procedure with the decision of the Review Committee that has entered into force. A public contract awarded by the contracting authority, which conflicts with the decision of the Review Committee, is ineffective (subsection 127 (5) of the PPA).

**1.1.2.** Upon organisation of public procurement, for compensation of loss caused by the contracting authority with the award or amendment of a public contract, an application may be submitted directly to an administrative court or to the Review Committee (subsection 129 (1) of the PPA). In other events<sup>2</sup> the prior addressing of the Public Procurement Review Committee is compulsory.

**1.1.3.** In procurement matters, like in other administrative matters, the Supreme Court acts as a court of cassation. The Supreme Court opens proceedings on an appeal in cassation only in the case that a circuit court has incorrectly applied a rule of substantive law, or has significantly infringed the rules of court procedure, which has resulted or could have resulted in an incorrect judgment being entered; as well as for ensuring legal certainty or forming the case law of the courts (subsection 219 (3) of the Code of Administrative Court Procedure

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<sup>1</sup> The Public Procurement Act is available in English at <https://www.riigiteataja.ee/en/eli/502042015013/consolide>.

<sup>2</sup> A request for review may be submitted with regard to the following documents or decisions of the contracting authority: contract notice, invitation to tender, concession notice, periodic indicative notice that starts the procurement procedure, qualification system notice that starts the procurement procedure, invitation to design contest, contract documents, exclusion of the candidate or tenderer from the procurement procedure, qualification and disqualification of the candidate and tenderer, declaring the tender admissible, rejection of the tender or rejection of all tenders, declaring the tender successful, another decision of the contracting authority made in the course of the procurement procedure on the basis of the PPA, which could violate the rights or harm the interests of the requester. (subsection 117 (2) of the PPA)

A tenderer or interested person may also submit a request for review with regard to a voluntary notice if the contracting authority has not submitted a contract notice, a public contract if the contracting authority has used a negotiated procedure without prior publication of a contract notice, a public contract if the contracting authority has not submitted a contract notice, a public contract if the contracting authority has not indicated in the contract notice that the estimated value of the public procurement is equal to or exceeds the international threshold or that the contracting authority would like the contract notice to be forwarded to the Publications Office of the European Union, provided that the forwarding of the contract notice was required under the PPA. a public contract if the contracting authority has awarded it under a dynamic purchasing system in violation of the conditions provided for in the PPA, or a public contract if the contracting authority has awarded it in violation of the procedure provided for in the PPA. (subsection 117 (2<sup>1</sup>) of the PPA)

(hereinafter referred to as the CACP)<sup>3</sup>. The Supreme Court is usually bound by the facts material as ascertained by the circuit court, except in the case that the rules of procedure were significantly infringed (subsection 229 (3) of the CACP).

**1.1.4.** Disputes between parties to a public contract, primarily disputes about the fulfilment of the contract, shall be settled in civil procedure, i.e. in the general court, if the contract is a civil law contract. Normally, public procurement contracts are civil law contracts (contracts of sale or authorisation agreements). Concession contracts can be either under civil law or public law, depending on the details. Disputes about the fulfilment of a concession contract under public law are settled in the administrative court.

In the case that an amendment to the contract is contested by a competitor, the dispute shall always be settled in an administrative court. The amendment to the contract may be interpreted as *de facto* a new procurement, according to the case law of the Supreme Court based on the case law of the ECJ. For instance, the Supreme Court has found that in a case where the local authority raised the price of organised waste transport without meeting the conditions set out in the contract documents, another tenderer had the right to dispute the amendment of the contract and the action was granted (Judgment of the Administrative Law Chamber of the Supreme Court, 12<sup>th</sup> of October 2011, in case 3-3-1-31-11).

## **2. Length of court proceedings**

**2.1.** Both the Public Procurement Act and the Code of Administrative Court Procedure provide precise time limits for conducting proceedings, as well as the options for suspending or continuing a procurement matter during review proceedings.

Pursuant to subsection 268 (1) of the CACP, the tenderer, applicant or a person interested in participating in public tender proceedings may seek protection of its rights by bringing an action against the actions of the contracting authority, provided it has completed proceedings before the Public Procurement Review Committee, except in procurement matters related to a state secret or to foreign intelligence classified as secret. Thus, prior to recourse to an administrative court a person must generally have concluded pre-action review proceedings.

The review proceedings regulation provided for in the **Public Procurement Act** provide precise time limits for conducting proceedings. The time-limits are generally short, in turn guaranteeing the quick dealing of requests for review.

For instance, a request for review must be received by the Review Committee within ten days as of the date when the requester learned or had to learn of the violation of its rights or harming of its interests, but not after the award of the public contract (subsection 121 (1) of the PPA). Thus, if a public contract has already been validly awarded, a request for review can no longer be submitted. To prevent irreversible consequences and guarantee access to justice, there is a standstill period of 14 days after the submission of a notice of the decision to declare a tender successful, before the contracting authority may grant consent to the award of a public contract (subsection 69 (1) of the PPA). If a person wishes to contest the underlying contract documents, the request for review must be received not later than three working days

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<sup>3</sup> The Code of Administrative Court Procedure is available in English at <https://www.riigiteataja.ee/en/eli/530032015001/consolide>.

before the closing date of submission of requests to participate in the procurement procedure, tenders, conceptual designs or concession applications (subsection 121 (1) of the PPA). This deadline limits the possibility of the tenderer and the candidate to contest the underlying contract documents on the last minute as all tenderers and candidates have had the opportunity to examine the content of said documents during the procurement procedure. If the procurement source documents have not been disputed on time, they are considered legally binding administrative decisions. Their legality cannot be contested later in the procedure.

Pursuant to the PPA, it can be said the time limit of submitting requests for review in a pre-action review proceedings is short.

The PPA also provides short time limits for reviewing requests by the Review Committee. For instance, the Review Committee will evaluate the compliance of a request for review with the requirements provided for in the act within one working day from the receipt of the request (subsection 122 (1) of the PPA) and grants a time limit of two working days to the requester for the elimination of the deficiencies (subsection 122 (2) of the PPA). If the Review Committee reviews a request in a written procedure, a decision by which the request is decided substantively will be announced within ten working days from the receipt of the request without deficiencies by the Review Committee (subsection 127 (2) of the PPA). If the Review Committee reviews a request at an oral hearing that must be organised within seven working days from the receipt by the Review Committee of the request free of deficiencies (subsection 125 (2) of the PPA), a decision of the Review Committee by which a request is decided substantively will be made public in the office of the Review Committee within ten working days from the termination of the reviewing of the request at the hearing (subsection 127 (1) of the PPA). If the Review Committee has involved an expert in reviewing a request or addressed the Court of Justice of the European Union for obtaining a preliminary ruling in the case and thus a decision cannot be made within the time limit previously specified, the decision of the Review Committee by which the request is decided substantively will be disclosed within ten working days from the receipt of the expert opinion or preliminary ruling (subsection 127 (3) of the PPA).

The review proceedings can be considered substantially efficient as the Review Committee may make a decision on the suspension of the procurement procedure, design contest or award of a public works concession at any stage of the review proceedings on the basis of a founded request by reviewing the concession within three working days from its receipt (subsection 123 (3) of the PPA) that protects the rights of the contracting authority against the outcomes of a wrongful decision made as a result of a possible violation of the rules of procedure provided for by the law. In addition, on the basis of a reasoned request of the contracting authority the Review Committee may, if the contracting authority's decision to declare a tender successful is being contested, make a decision to permit the approval to award the public contract at any stage of the review proceedings if the overriding public interest that could be harmed in the event of failure to award the public contract overrides the possible harming of the requester's rights (subsection 123 (3<sup>2</sup>) of the PPA). Said rules enable the Review Committee to consider the necessity of protecting the interests of parties and on the basis of this make a decision to permit the approval to suspend the procurement matter or award a contract.

In conclusion it can be said that the review proceedings' time limits provided for in the Public Procurement Act are short and the proceedings can be considered quick and effective. There

are no statistics on the processing time in the Review Committee, but the Committee assures they have no problems following the deadlines.

The **Code of Administrative Court Procedure** provides a specific regulation for the proceeding in procurement matters in court (chapter 28, sections 266–280 of the CACP). As with review proceedings, specific time limits have been set for settling procurement disputes in an administrative court. In addition, many special provisions that simplify the procedure, but also limit the participants' rights, aid the court in following the short time-limits.

The time-limit for bringing an action in a procurement matter is generally 10 days starting from the public pronouncement of the decision of the Public Procurement Review Committee (subsection 270 (1) of the CACP; in comparison, the general time-limit for bringing an action in an administrative case is 30 days). Special rules apply to procurement matters related to a state secret or to foreign intelligence classified as secret where the time-limits for bringing an action arise from other circumstances as the right to initiate proceedings does not depend on whether the person who brings the action has completed review proceedings (subsection 268 (1<sup>1</sup>) and clauses 270 (1<sup>1</sup>) 1–5) of the CACP). In addition, specific time limits apply to bringing a reparation action in a procurement matter (clauses 270 (2) 2–3) of the CACP). If the person who brings the action wishes to submit a declaration which contains new facts or new applications, it must be submitted at least two working days before the court session or, if the matter is not heard in a court session, before the end of the time-limit for submission of procedural documents (subsection 271 (3) of the CACP) and the defects of the declaration must be cured within two working days starting from receipt of the ruling by which the court refused to open proceedings on the declaration (subsection 271 (4) of the CACP). Thus, specific time limits have been set by the Code of Administrative Court Procedure for bringing an action and for its amendment or correction. The complaint proceedings is effective and quick also as a declaration of a participant of the proceedings in a procurement matter is must be submitted to the court electronically if the declaration exists in an electronic format and if there is no valid reason to submit it in other format (subsection 271 (1) of the CACP). This is a special regulation of the Code of Administrative Court Procedure as an similar provision (subsection 53 (1) of the CACP) is only applied to an advocate and an administrative authority, yet subsection 271 (1) of the CACP applies in general to all the participants of the proceedings.

The grounds for stay of proceedings by operation of law and for court-ordered stay of proceedings during the hearing of the procurement matter provided for in the Code of Administrative Court Procedure are substantially restricted. Proceedings in a procurement matter are not stayed by operation of law and are subject to court-ordered stay of proceedings (subsection 273 (1) of the CACP) practically only in the case where a judgment depends on another case (subsection 95 (1) of the CACP). Even in said cases the court is not obliged to order a stay of proceedings, but must consider its necessity.

In general, an administrative court must hear the matter within reasonable time (subsection 126 (2) of the CACP). Yet, a procurement matter must be heard within 45 days from the date it was brought (subsection 275 (2) of the CACP). This is a maximum limit provided for by the law to guarantee that procurement matters are settled as a priority and as soon as possible after identifying the positions of the participants of the proceedings and the facts material. The purpose of the time-limit is to guarantee the compliance with recitals 1 and 3 of Directive 89/665 and the principle based on the case law of the Court of Justice of the European Union according to which Member States must establish quick and effective proceedings for

requests for review in the field of public procurement. Still, a procurement matter is heard within 45 days only by the court of first instance. A circuit court and the Supreme Court may hear a procurement matter pursuant to standard deadlines, i.e. within reasonable time. Yet this does not indicate that procurement matters are being heard slowly in these instances. Both a circuit court and the Supreme Court may hear a procurement matter in simplified proceedings that in other fields are only allowed in the case that the right for which the action seeks protection is a minor one (subsections 279 (1) and 133 (1) of the CACP). In simplified proceedings, the court may not follow certain rules of procedure to guarantee quicker proceedings and has regard solely to essential principles of administrative court procedure, and must guarantee that the fundamental rights and freedoms of participants of the proceedings are observed (section 134 of the CACP).

In practice, the Supreme Court has a case-by-case approach. In cases where the contract has already been awarded and there is no hurry, the procedure is not different from other administrative cases. Fulfilling the Supreme Court's role of giving fundamental guidelines may take more time than simply settling disputes. The proceedings are quicker if the procurement procedure is suspended. Often, if such cases have no fundamental importance and the courts have not made significant errors in law, the Supreme Court decides on refusing to open proceedings within a week from receiving the appeal in cassation.

**2.2.** The statistics of the Ministry of Justice include substantive proceedings as well as applying interim measures across court instances. Given the technical capability, separate statistics cannot be collected regarding interim measures, including suspending a procedure. Thus, no statistical data can be presented for these.

**Substantive proceedings (annulment, declaration of ineffectiveness, compensation, etc.) and procedure for “interim measures”<sup>4</sup>**

Year of case resolution	Number of public procurement proceedings resolved in the Supreme Administrative Court in the reference year <sup>5</sup>	Average time period for the resolved proceedings every year, calculated in working days		
		First instance court	Second instance court	Supreme Administrative court/Court of last resort
2013	4	26	41	31
2014	4	39	46	22

**2.3.** An application to expedite proceedings may be made in case the proceedings in the procurement matter have been pending before the court at least for 15 days and the court, without having a valid reason, does not perform a needful procedural act, including not ordering, in due time, a court session to be held or adjourns the hearing of the procurement matter for more than 15 days (subsection 273 (2) of the CACP). An application to expedite

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<sup>4</sup> The statistics of the Ministry of Justice includes substantive proceedings as well as applying interim measures across court instances.

<sup>5</sup> In addition, the Criminal Chamber of the Supreme Court resolved 3 cases in 2013–2014 regarding the violation of requirements provided for in the Public Procurement Act.

proceedings is determined by the court without delay (subsection 273 (3) of the CACP). Said rule applies in all three court instances.

Applications to expedite proceedings have not been determined in the case law of the Administrative Law Chamber of the Supreme Court. Given the current technical capability, no statistics can be collected for lower instance courts, thus there is no overview of expediting proceedings in the Estonian judiciary system.

### **3. Dialogue between the Supreme Administrative Court and the CJEU**

**3.1.** The Supreme Court has only once sought a preliminary ruling from the Court of Justice of the European Union in procurement matters (case C-561/12 *Nordecon*). The case concerned the question whether it is possible for the contracting authority to negotiate on tenders which do not comply with the mandatory requirements of the technical specifications relating to the contract. The answer of the CJEU was negative.

There have been some cases where the Supreme Court has decided not to seek a preliminary ruling, despite having received an application from one of the participants. In one of the cases settled in the Supreme Court, the circuit court had previously sought a preliminary ruling (case C-292/12 *Tahkuranna*).

**3.2.** The Department of Legal Information of the Supreme Court does not regularly analyse the case law of the CJEU. Yet, the Ministry of Foreign Affairs provides monthly overviews of the case law of the Court of Justice of the European Union, forwards the summaries of these as newsletters and publishes them on their web site<sup>6</sup>. If needed, the Department of Legal Information of the Supreme Court compiles analyses of the case law both for specific cases and as more general overviews.

**3.3.** The Supreme Court mostly references the text of the European Court rulings, but also presents quotes. *Inter alia*, the Supreme Court has applied the directives and the respective case law of the CJEU in cases outside the scope of the directives, for instance in a case below the international threshold (Judgment of the Administrative Law Chamber of the Supreme Court, 16<sup>th</sup> of November 2011, in case 3-3-1-65-11).

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

**4.1.** The prerequisite of identifying the ineffectiveness of the public contract is a respective application of the requester. The court is bound by the scope of the action and, as a rule, cannot impose alternative remedies *ex officio*. Instead of identifying the ineffectiveness of the public contract, the Review Committee or a court may leave the public contract in force, cutting the term of validity of the contract, by taking into account the overriding public interest that may be harmed in the event of the ineffectiveness of the public contract (clause 126 (1<sup>2</sup>) 2) of the PPA).

**4.2.** Identifying the ineffectiveness of the public contract can be applied for by a tenderer (a person who has submitted a tender in a procurement procedure or an indicative tender in

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<sup>6</sup> <http://vm.ee/et/euroopa-liidu-kohus>

the event of a dynamic purchasing system), a candidate (a person who has submitted a request to participate in a procurement procedure in the event of a restricted procedure, negotiated procedure with prior publication of a contract notice or competitive dialogue) or a person interested in participating in a procurement procedure (subsection 117 (1) of the PPA; definitions from subsections 12 (1) and (2) of the PPA). A person cannot be identified as a person interested in participating in the procurement procedure, if the person's tender has been rejected with a valid decision (Ruling of the Administrative Law Chamber of the Supreme Court, 7<sup>th</sup> of October 2013, in case 3-3-1-44-13).

The Ministry of Finance as the institution exercising state and administrative supervision over organisation of public procurement also has the right to issue compulsory precepts aimed at terminating violations of the Public Procurement Act and legislation adopted on the basis thereof (subsection 108 (7) of the PPA). The Ministry of Finance may also exercise supervision at their own initiative and may do so before and after the procurement procedure (subsection 107 (1) of the PPA). There is no Supreme Court case law concerning the CJEU judgment in case C-503/04, yet the above-mentioned provisions may be interpreted in compliance with the obligations deriving from the aforementioned judgment, allowing the Ministry of Finance to order the contracting authority to terminate the contract.

**4.3., 4.4.** In the case of **supervision proceedings**, subsection 108 (6) of the PPA provides that if a decision to declare a procurement procedure invalid or a precept is made, any and all decisions and steps relating to the procurement procedure will be ineffective, regardless of whether they were made before or after the decision declaring the invalidity. Also, a public contract awarded after the making of a decision to declare a procurement procedure invalid or after making a precept will be ineffective. Thus, interests are not considered in these cases. On the other hand, the Ministry of Finance has discretionary power when making above-mentioned decisions and issuing precepts.

During **review proceedings**, the Review Committee may make a decision on the suspension of the procurement procedure, design contest or award of a public works concession at any stage of the proceedings on the basis of a founded request by the requester, taking into account the potential consequences arising from the suspension to all interests that might be harmed (subsection 123 (3) of the PPA). On the basis of a request of a party to the procedure or of its own motion, the Review Committee may declare a decision made on the suspension invalid at any stage of the review proceedings (subsection 123 (3<sup>1</sup>) of the PPA). On the basis of a reasoned request of the contracting authority the Review Committee may, if the contracting authority's decision to declare a tender successful is being contested, make a decision to permit the approval to award the public contract at any stage of the review proceedings if the overriding public interest that could be harmed in the event of failure to award the public contract overrides the possible harming of the requester's rights (subsection 123 (3<sup>2</sup>) of the PPA). An application to suspend procurement proceedings or concerning an application to allow a decision to grant acceptance to an offer for the making of a public contract may be contested at an administrative court (subsection 280 (2) of the CACP). A public contract awarded after the receipt of the notice regarding the request for review, but before 14 days have passed from the announcement of a decision of the Review Committee, is ineffective (subsection 123 (4) of the PPA).

In an **administrative court procedure**, the court may, at any stage of the proceedings, on the basis of an application of the applicant which states its reasons, or of its own motion, enter a ruling ordering a measure of interim relief to give provisional protection to the applicant's

rights if, otherwise, the protection of the applicant's rights by the judgment may be rendered significantly more difficult or impossible (subsection 249 (1) of the CACP). When entering a ruling ordering interim relief, the court has regard to the public interest and the rights of the persons affected and conducts an assessment of the prospects of the action and the foreseeable consequences of the ruling for interim relief (subsection 249 (3) of the CACP). A ruling ordering interim relief may suspend the validity or enforcement of the administrative act contested, prohibit the issue of the contested administrative act or the taking of the contested measure, order the administrative authority to issue the administrative act, take the administrative measure applied for or to discontinue a measure which is in progress, attach any property, prohibit the addressee of the administrative act from engaging in the activity regulated in the administrative act or order such activity to be performed, or establish conditions for such activity (subsection 251 (1) of the CACP).

There is no Supreme Court case law regarding these issues in procurement matters. As explained in the answer to question 2.2, there is no technical capability to collect statistics on the use of interim measures. The above-mentioned regulation shows that both the Review Committee and the courts must always consider different interests when deciding on interim measures.

**4.5.** As written in the answer to questions 4.3 and 4.4, a public contract awarded after the receipt of the notice regarding the request for review, but before 14 days have passed from the announcement of a decision of the Review Committee, is ineffective (subsection 123 (4) of the PPA). After that deadline, concluding the contract is only prohibited if the court applies respective interim measures. The prohibition of awarding a contract cannot automatically become invalid prior to the conclusion of appeal proceedings or court proceedings. As written above, the Review Committee may, on the basis of a reasoned request of the contracting authority, permit the approval to award the public contract at any stage of the review proceedings (subsection 123 (3<sup>2</sup>) of the PPA). The court may, on the basis of an application of a participant of the proceedings, or of its own motion, at any stage of the proceedings, revoke or vary the ruling for interim relief (subsection 253 (1) of the CACP). In that case, the same facts material as when applying interim relief must be considered (see answer to questions 4.3 and 4.4).

## **5. Division of the award criteria into award subcriteria, balancing the award subcriteria, criteria for assessment and a scoring method for the offers**

**5.1.** The Administrative Law Chamber of the Supreme Court has not had to rely on the mentioned European Court judgments in their case law. However, section 36 of the PPA regulates the amendment of the contract notice and the contract documents.

**5.2.** In general, the issue is not clearly regulated nor does the case law of the Supreme Court give a clear answer.

Within Estonian law, the use of the subcriteria during a procurement procedure may be understood as an amendment of the contract notice and the contract documents. Pursuant to the first sentence of subsection 36 (1) of the PPA, the contracting authority may amend a contract notice or contract documents before the closing date of submission of tenders or requests to participate in the procurement procedure specified in the contract notice. The law does not permit the amendment of a contract notice or contract documents after tenders have been submitted. This has not been allowed by the Supreme Court case-law either. However,

the Administrative Law Chamber of the Supreme Court has analysed the issue of whether a contracting authority was amending contract documents or explaining the contract documents (Judgment of the Administrative Law Chamber of the Supreme Court, 14<sup>th</sup> of April 2010, in case 3-3-1-99-09).

**5.3.** The Administrative Law Chamber of the Supreme Court has not directly analysed the issue of what would be the legal consequence of a contracting authority using subcriteria in a procurement procedure. If the contracting authority uses subcriteria and these are covered by the award criterion, in that situation the use may be legal.

**5.4.** Pursuant to subsection 36 (2) of the PPA, in order to amend the contract notice, the contracting authority will submit a new contract notice to the register and immediately notify all tenderers, candidates and the interested persons who have received the contract documents. Upon amending the contract documents, the contracting authority will send the amended contract documents simultaneously to all tenderers and to the candidates and interested persons who have received the contract documents (subsection 36 (3) of the PPA).

Pursuant to subsection 36 (4) of the PPA, upon amending the contract notice or contract documents, the contracting authority extends the time limit for submission of tenders or requests to participate in the procurement procedure so that as of the publication of the amended contract notice in the register or as of sending the amended contract documents to the tenderers, the time limit of submission of tenders or requests to participate in the procurement procedure would be at least equal to a half of the relevant minimum time limit provided for in the PPA. The contracting authority does not have to extend the specified time limit if the amendments concern only the contact details or in other events where the tender drawn up on the basis of the original notice and contract documents cannot become non-compliant due to the amendments made or if the tenderer or candidate compliant with the award criteria on the basis of the original notice cannot remain unqualified due to the amendments made.

Each person participating in a procurement procedure and each interested person, who at the respective moment has the possibility to participate in the procurement procedure, has the right to receive explanations or additional information regarding the contract notice, contract documents and the invitation to tender. The contracting authority will submit the explanations regarding the contract notice, contract documents, invitation to tender or other additional information the publication of which is considered possible by the contracting authority to the person asking simultaneously for explanations or additional information, to all tenderers and candidates who have received the contract documents or invitation to tender or to the interested persons who have received contract documents, who at the respective moment have the possibility to participate in the procurement procedure and discloses these with the contract documents. The contracting authority will submit the specified information within three working days from receiving the respective request (subsection 56 of the PPA). These explanations could in practice be quite similar to subcriteria.

## **6. In-house horizontal cooperation**

**6.1.** The Administrative Law Chamber of the Supreme Court has had to carry out at least two cases on this topic in their case law. During the first case the issue was raised whether the state was allowed to provide the operating rights of passenger trains to a company owned 100% by the state without a procurement procedure (Judgment of the Administrative

Chamber of the Supreme Court, 5<sup>th</sup> of March 2014, in case 3-3-1-2-14). The second case focused on the issue of whether local governments had the right to set the condition that waste transporters would transport waste to the waste management facility belonging to a company belonging to local governments in the procedure to find a waste transporter (Judgment of the Administrative Chamber of the Supreme Court, 15<sup>th</sup> of January 2015, in case 3-3-1-68-14).

The biggest problem is relating the circumstances of specific cases to the prerequisites of the case law of the Court of Justice.

**6.2.** The Administrative Law Chamber of the Supreme Court has analysed in its case law whether or not the circumstances of the specific case relate to the exemption regarding in-house transactions and cooperation between local governments. The most important issue in the case concerning passenger trains was the fulfilment of the "similar control" criterion. In order to control that, the Supreme Court analyzed the Commercial Code and the articles of association of the company and ascertained that the Minister of Economic Affairs and Communications was able to give the supervisory board and, through them, the management board instructions.

## **7. Confidentiality of the documents upon judicial review**

**7.1.** The Administrative Law Chamber of the Supreme Court has not often in their case law had to deal with disputes based on business secrets in procurement procedures.

**7.2.** Pursuant to subsection 46 (5) of the PPA, upon opening tenders, the contracting authority will not disclose the contents of the tenders to an extent that would violate the business secrets of the tenderers or harm competition between them.

Pursuant to subsection 54 (3) of the PPA, the contracting authority may decide not to send to tenderers or candidates the information regarding a notice on a decision to exclude a tenderer or candidate from the procurement procedure, a decision to qualify a tenderer or candidate, a decision to disqualify the tenderer or candidate, a decision to reject a tender, a decision to reject all tenders, a decision to declare a tender admissible, and a decision to declare a tender successful, if the disclosure of these would violate the business secrets of undertakings or distort their mutual competition.

In an administrative court procedure, the court declares a proceeding or a part thereof closed at the initiative of the court or based on a petition of a participant in the proceeding if this is clearly necessary to protect a business secret or other similar secret, unless the interest of public proceeding exceeds the interest of protection of the secret (subsection 77 (1) of the CACP and clause 38 (1) 6) of the Code of Civil Procedure<sup>7</sup>).

In the case of proceedings which have been declared in camera proceedings, a participant of the proceedings may be removed from any procedural act, including a court session or a part of such a session in order to keep a business secret (clause 79 (1) 5) of the CACP).

Removal of a participant of the proceedings is possible only in the case that the interest to maintain the secret clearly overrides the right of a participant of the proceedings to be present

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<sup>7</sup> Available in English at <https://www.riigiteataja.ee/en/eli/516062015009/consolide>.

when the procedural act is performed (subsection 79 (2) of the CACP). Removal of a participant of the proceedings is decided by the court without the participation of the participant to be removed, after hearing the participant in whose interest the other participant is to be removed (subsection 79 (3) of the CACP). A participant of the proceedings is removed from a procedural act to the smallest extent possible. The court discloses the content of the procedural act to the participant to the maximum extent which is possible without prejudicing the purpose of the removal. When the prerequisites of removal are no longer present, the content of the entire procedural act is disclosed to the participant (subsection 79 (4) of the CACP). Removal of a participant of the proceedings is decided in a court ruling. An appeal may be lodged against the ruling, and the ruling entered by the circuit court in respect of the appeal may be further appealed to the Supreme Court. Until the ruling becomes final, the court does not disclose any information to the participant (subsection 79 (5) of the CACP).

In addition, the court may inhibit the participant from perusing the files. A participant of the proceedings may only be refused permission to peruse the file if the interest for maintaining secrecy of the file overrides the right of the participant of the proceedings to peruse the file and to obtain copies of procedural documents which are in the file or which belong to the file (subsection 88 (2) of the CACP). A participant of the proceedings is allowed to peruse any procedural documents in the file and belonging to the file to the maximum extent possible and such a participant is refused permission to peruse to the minimum extent possible without prejudicing the aim of the right to peruse the file (subsection 88 (3) of the CACP). In the case that a party or third party has applied to have permission to peruse refused, refusal of permission to peruse, as well as the grant of such permission is decided by a court ruling, against which an appeal may be lodged (subsection 88 (5) of the CACP).

If the decision contains a business secret, it is left out of the judgment or the court may publicly announce only the operative part of its judgment (subsections 173 (5) and 175 (5) of the CACP).

**7.3.** The Code of Administrative Court Procedure states no specific regulation for business secrets in procurement matters; therefore the general regulation of court procedure applies.

**7.4.** In case of business secrets, the judge shall operate based on the rules presented in clause 7.2 of the current document.

**7.5.** In reaching its decision, the court may only rely on the evidence taken in the matter which the parties and third parties have been able to examine, and on the facts regarding which the parties and third parties have been able to express their opinion. It is true that if the participant of the proceedings is not granted access to specific documents, it infringes the principle of fair trial. Therefore the restriction is only allowed if there is a real danger of damaging the participants of the proceedings. If the participant of the proceeding is not granted access to specific documents as these are not disclosed due to a business secret, a fair trial shall be guaranteed by a three-tiered court system. A higher instance has the ability to verify whether the restriction was justified or not. Every court instance has access and the right to examine the documents which are not disclosed. The principle of investigation compensates for the lack of disclosure. The court must, of its own motion, make sure that facts material to the matter dealt with are ascertained, where necessary by gathering additional evidence, or by imposing the obligation of presenting evidence on participants of the proceedings. The court takes guidance from the law in objectively assessing the evidentiary items of a matter in their fullness and in relation to all of their aspects, and decides, acting in

all conscience, whether or not an assertion made by a participant of proceedings has been proved.