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THE SUPREME ADMINISTRATIVE COURT

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"

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LATVIA

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?

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

Firstly, a complaints examination commission established by the Procurement Monitoring Bureau and consisting of three members examines complaints regarding violations of the procurement procedure. Members of the commission are officials of the Procurement Monitoring Bureau. In order to examine complaints, the Procurement Monitoring Bureau may invite a procurement specialist or expert. The commission takes decisions by voting.

Secondly, the decision of the commission may be appealed in the Administrative District Court in accordance with the procedures prescribed by the Administrative Procedure Law. The matter is reviewed by the court in the composition of three judges. Further, a decision of the Administrative District Court may be appealed in accordance with cassation procedures in the Department of Administrative Cases of the Supreme Court.

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

Administrative District Court adjudicates matters on the merits. Thus it holds the right to set aside the relevant administrative act in full or in part or declare it invalid, instruct the institution to issue an appropriate administrative act and grand compensation. However, the Department of Administrative Cases of the Supreme Court operates in accordance with cassation procedure and reviews the judgements of the Administrative District Court (breach the norms of substantive law or of procedural law).

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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?).

As mentioned before, Department of Administrative Cases of the Supreme Court operates in accordance with cassation procedure and review the judgments of the Administrative District Court (breach the norms of substantive law or of procedural law).

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

Generally, measures introduced after concluding the contract are subject of adjudication in accordance with the procedures specified in the Civil Procedure Law by the courts of general jurisdiction (Civil Courts).

However, applications regarding recognition of a procurement contract or framework agreement as invalid, amending or repealing of the provisions thereof or reduction of the term of operation of a contract or framework agreement are subject of adjudication in accordance with Administrative Procedure Law performed by Administrative District Court.

The administrative court may recognise a procurement contract or framework agreement as invalid, amend or repeal the provisions thereof or reduce the term of operation of a contract or framework agreement in any of the following cases:

1) the procurement contract or framework agreement has been entered into without applying the procurement procedures;

2) the procurement contract or framework agreement has been entered into, unjustifiably awarding the right to enter a procurement contract or framework agreement without publishing a notice regarding the contract on the Internet home page of the Procurement Monitoring Bureau or in the Official Journal of the European Union, if the procurement contract price is equal to the contract price margins specified by the Cabinet or higher;

3) the procurement contract or framework agreement has been entered into without complying with the deadline specified in Section 67, Paragraph four of the Public Procurement Law;

[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.

Section 67, paragraph four: a procurement contract or a framework agreement must be entered into no sooner than on the next working day following the end of the waiting period, if a complaint regarding violations of the procurement procedure has not been submitted to the Procurement Monitoring Bureau

4) the procurement contract or framework agreement has been entered into, violating the prohibition specified in Section 83, Paragraph five of the Public Procurement Law to enter into a procurement contract or framework agreement;

Section 83, paragraph five: The Procurement Monitoring Bureau must, within one working day after the complaint regarding violations of the procurement procedure has been received, insert information about it on the Internet home page thereof, indicating the submitter of the complaint, the commissioning party and the procurement procedure, the lawfulness of which is contested by the submitter of the complaint, as well as inform the commissioning party regarding initiation of an administrative case, by sending a notice regarding the received complaint and a copy of the complaint to the fax number or electronic mail address indicated by the commissioning party, and the commissioning party shall not enter into a procurement contract or framework agreement until a decision of the commission on the results of examination of the complaint or termination of the administrative case is received.

5) the procurement contract has been entered into without complying with the requirements specified in Section 65, Paragraph seven of the Public Procurement Law, if the contract price of the relevant contract is equal to the contract price margins specified by the Cabinet or higher;

Section 65, paragraph seven: if the framework agreement is entered into with several suppliers, the specific contracts within the scope of the framework agreement must be entered into, applying the provisions of the framework agreement and without re-evaluating the tenders. If all the necessary conditions are not provided for in the provisions of the framework agreement and the tenders have to be re-evaluated, these provisions must be supplemented on the basis of the same provisions (if necessary, more precisely regulated) or also other provisions in accordance with the specifications of the framework agreement in accordance with the following procedure:

1) in order to enter into the specific contract, the commissioning party must consult in writing with the suppliers, which are capable of implementing this contract;

2) the commissioning party must determine a period of time, which is sufficient for the submission of the relevant tender, taking into account such factors as the complexity of the subject-matter of the contract and the time required for the preparation of tenders;

3) a tenderer must submit a tender in writing and the content thereof must remain confidential until the end of the deadline specified for the submission; and

4) the commissioning party must enter into the specific contract with the tenderer, which has submitted the most conforming tender on the basis of the selection criterion of a tender, which is specified in the specifications of the framework agreement.

6) the procurement contract has been entered into without complying with the requirements specified in Section 66, Paragraph four or five of the Public Procurement Law, if the contract price of the relevant contract is equal to the contract price margins specified by the Cabinet or higher.

Section 66, paragraph four and five
(4) The commissioning party must invite the submission of tenders for each specific contract within the scope of the dynamic procurement system. Prior to sending an invitation the commissioning party must publish a simplified notice regarding the contract, inviting all interested suppliers to submit indicative tenders. The deadline for the submission of indicative tenders must be determined as not less than 15 days from sending of the simplified notice regarding the contract to the Official Journal of the European Union or publication thereof on the Internet home page of the Procurement Monitoring Bureau. The commissioning party shall not commence the evaluation of tenders until the evaluation of the indicative tenders, which are received within the deadline specified, has been completed.
(5) The commissioning party must invite all suppliers included in the dynamic procurement system to submit tenders, indicating the deadline for the submission of tenders, for the entering into each specific contract within the scope of the dynamic procurement system. The commissioning party must enter into a contract with the supplier, which has submitted the most appropriate tender in accordance with the selection criterion of a tender and the evaluation criteria, which are specified in the notice regarding the establishment of the dynamic procurement system. If necessary, the commissioning party may clarify these criteria in the invitation.

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.)?

According to Article 197 of Administrative Procedure Law an application for interim measures must be adjudicated within a reasonable time, taking into account the urgency of the case, however the application must be adjudicated not later than one month from the date of the initiation of the case. However, there are no particular methods of verification of the quickness and efficiency of the public procurement proceedings.

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.

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?

There is no specific data. However, below there are the statistics calculated manually.

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	2	~31 days	x	~35 days
2014	9	~28 days	x	~35 days

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	17	~340 days	x	~90 days
2014	33	~240 days	x	~120 days

[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.

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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?

Parties are allowed to request acceleration of proceedings. However such request must be reasoned, i.e., reasons for acceleration must be stated. The request is decided by the judge who reviews the case. There is no date how often has this been applied and how often the acceleration of proceedings is granted.

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?

Three requests for preliminary rulings related to public procurement issues had been referred to the CJEU.
C-542/14 VM Remonts and Others
C-234/14 Ostas celtnieks
C-348/10 - Norma-A and Dekom

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?

There is an employee who is responsible for analyses of the jurisprudence of the CJEU, inter alia, judgments relating to Latvia. This employee is responsible for informing and counselling judges of the Department of the Administrative Cases as well.

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?

Quoting jurisprudence of the CJEU is an essential element of reasoning national judgments.

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?

In accordance with the Administrative Procedure Law the court will initiate an administrative case pursuant to an application of an applicant. The Public Procurement Act provides persons` right to submit an application regarding recognition of a procurement contract or framework agreement as invalid, amending or repealing of the provisions thereof or reduction of the term of operation of a contract or framework agreement. If the court establishes that a procurement contract or framework agreement has been entered into, violating the norms of this law, and concludes that the application should be satisfied, it shall, in compliance with the norms of this law, pass one of the following types of judgment:

1) recognise the procurement contract or framework agreement as invalid from the moment of entering into;

2) amend or repeal the provisions of the procurement contract or framework agreement. By this judgment a court can also reduce the term of operation of the procurement contract or framework agreement;

3) reduce the term of operation of the procurement contract or framework agreement.

A court, upon selecting one of the above-mentioned types of judgment, is not bound by the subject-matter indicated by the tenderer and the limits of the claim.

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?

A declaration of ineffectiveness of a public contract can be sought by a *person who is or has been interested in acquiring the right to enter into a procurement contract* or a framework agreement or who is qualifying for winning and who, in relation to the specific procurement procedure, regards that his or her rights have been infringed or that an infringement of these rights is possible, which is caused by a potential violation of the EU's or other legal norms.

If the procurement contract has been concluded unlawfully (without applying procurement procedures) then the "person who is or has been interested in acquiring the right to enter into a procurement contract" can be a person who [for example] ordinary provides the same services or delivers the same goods, who *prima facie* has a proper resource base for carrying out the contractual obligations or who has been participating in the procurement procedures that have been organized to procure the same goods or services.

If the court recognizes unlawfulness of the contract due to a violation of the public procurement rules by the contracting authority, it can declare the contract ineffective.

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

Up to date, there are no such cases in the jurisprudence of Latvian courts.

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

See the answer to the question 4.3.

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?

There are differences between suspension during the proceedings in the court and in the independent authority examining complaints before the court proceedings (The Procurement Monitoring Bureau).

In accordance with Public Procurement Act a procurement contract or a framework agreement shall not be concluded if a complaint has been submitted to The Procurement Monitoring Bureau. At this level of the review the suspension has to be lifted automatically. There are no other conditions for the suspension at this level.

If the Bureau, while examining a complaint, finds that the complaint is not justified, it may, by a decision, allow to conclude a contract or a framework agreement. Such a decision may be appealed in the Administrative District Court. The appeal does not suspend the operation of the decision, but the applicant can require the suspension or other interim measures.

To sum up, it is possible to have the suspension lifted automatically at the first level of the review of the contracting authority`s decision, but it is not possible at the next level (which means court).

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?

There has been only one case at the Supreme Court dealing with the issue. In that case the Court made a reference to the CJEU case law and noted that the assessment criteria (and subcriteria) have to be explicitly stated.

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?

In accordance with Public Procurement Act there are two criteria for selection of tenders: the economic advantage or the lowest price. If the selection criteria is the economic advantage, such factors as the deadlines for the implementation of supplies or a contract, operational costs and other costs, the effectiveness thereof, the quality of works, goods or services, the aesthetic and functional description, observation of the environmental requirements, technical advantages, accessibility of spare parts, safety of supplies, the price as well as other factors associated with the subject-matter of a contract can be taken into account.

These factors have to be specifically stated and objectively comparable or assessable.

It is also stated in the Act that the commissioning party shall indicate, in the notice regarding the contract or in the documents of the procurement procedure, all the evaluation criteria in the order of their significance, the proportion and numerical value of the criteria. It shall also indicate, in the documents of the procurement procedure, the selection algorithm of the tender in accordance with these criteria and a description of how each evaluation criteria will be evaluated. The numerical value granted to criteria may be indicated in a specific range.

It is recognized in the Supreme Court`s jurisprudence that the clarity and exactness of the subcriteria is even more important if the evaluation of the disputable criteria can have a substantial influence on the award of the contract. In other words: the more points it is possible to get for particular criteria the more explicit the criteria must be.

The jurisprudence or legislation does not determine subcriteria, but the contracting authority determining them is obliged to observe the general principles of public procurement law.

Assuming that the term "assessment criteria" in context of the particular question corresponds to the term "award criteria" (in context of ECJEU judgement in case C-532/06) the answer to the third question is that the law is not separately considering the terms *subcriteria* and *award/assessment 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?

If some criteria have been determined explicitly only during the assessment of tenders, it can result in to prohibition to continue the procedure (if the complaint about the criteria has been submitted to The Procurement Monitoring Bureau) or it can be a ground for award decision annulment.

The consequences are the same if the assessment criteria or subcriteria are not explicitly stated.

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

There is no such a requirement in the national legislation or jurisprudence.

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 are very few cases in the Court`s practice concerning in-house horizontal cooperation. The Court successfully deals with the matter applying the appropriate CJEU jurisprudence.

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

The court examines whether the works or supplies performed or services provided by such institution, which concurrently conforms to the following criteria:

a) it is under complete control of one or several commissioning parties (such control manifests itself as the right to influence essential objectives and operational decisions of the institution under control),

b) at least 80 per cent of its annual financial turnover consists of the implementation of specific tasks in the interests of the controlling commissioning parties or other commissioning parties, which are controlled by the commissioning parties controlling the institution,

c) capital shares or stocks thereof completely belong to the commissioning parties controlling it.

The above-mentioned criteria are established by the Public Procurement Law.

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?

Yes, it is.

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?

According to the Article 145(4) of the Administrative Procedure Law, in order not to disclose commercial secrets, the court, on its own initiative or at the request of a part, may adopt a reasoned decision, laying down restrictions for the applicant or for the defendant to consult the relevant part of the case file.

It implies, for example, that the winning offer in a tender cannot be automatically treated as confidential. The court has to examine each and every case on its own merits, it may not invoke the confidentiality of a document in general terms (see also the judgement of the Court of First Instance of 20 April 1999, in joined cases T-305/94, T 306/94, T-307 / 94, T-313/94, T-314/94, T-315/94, T-316/94, T-318/94, T-325/94, T 328/94, T-329/94 and T-335/94 Limburgse Vinyl Maatschnappij NV & Others v Commision, point 1017, where it states, with relation to the Commission's procedure, that "the Commission cannot use a general reference to confidentiality to justify a total refusal to divulge documents on its file. Moreover, in this case it does not seriously maintain that all the information contained in those documents was confidential. (..)). Thus, the court will not automatically restrict access to the entire document, but will access, in its decision, to what extent the confidentiality is to be granted.

At the same time, the fact that contracting authority`s, reviewing body`s or court`s decision would essentially be based on information classified as confidential would not cancel the duty to properly motivate those decisions. If the contracting authority or the court can not reveal specific information due to its confidential nature, it must explain the grounds of its decision pointing out the fact that there is particular information in the administrative file, but not mentioning any specific confidential details. Even if it is not disclosing specific numbers or other secret details, it must be clear from the reasoning of the decision exactly why the bid, the complaint or the application is rejected.

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?

The access to confidential information during court proceedings is regulated by general rules – Administrative Procedure Law. There are not specific rules regulating the access to confidential documents during the court proceedings related to the public procurement.

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?

The national judge rules on the confidentiality of the documents.
He/she can determine confidentiality of particular documents by a decision on his/her own motion or in response to a request of participant of the administrative proceeding.
The need to protect a business secret is a common foundation to make that decision.
There is no difference depending on whether accelerated proceedings are applied.

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

There is no such presumption in the national law as it is stated in the judgment of the CJEU in case C-450/06: where the defendant fails to lodge the administrative file within the prescribed period, the facts alleged by the applicant shall be deemed to have been proven, unless they are manifestly inaccurate.

The main principle at the national administrative proceedings is *principle of judicial inquiry*. In order to determine the true facts of a matter within the limits of the claim and achieve legal and fair adjudication of the matter, the court shall give instructions and make recommendations to the participants in the administrative proceeding, *as well as collect evidence on its own initiative*. The court finding and examining facts has an active role in proceedings.

Thus, although some of parties can not lodge confidential documents (because they cannot get them from the contracting authority, for example), it does not restrict the party`s right to a fair trial because the court must collect and examine evidence on its own initiative.

When the confidential information (ie. the information that is classified as confidential by its owner during the procurement procedure) is lodged, the judge rules on the confidentiality of particular documents. These documents are not available for particular persons even if they are parties in the case.