

“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

SLOVENIA

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 judicial proceedings, the District (first instance) Court in Ljubljana has exclusive jurisdiction over matters arising in public procurement. Consequently, the Higher (appeals) Court in Ljubljana decides on appeals (which are ordinary remedies) in such cases. The Supreme Court decides on extraordinary remedies.

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

National Review Commission for Reviewing Public Procurement Award Procedures is a specific, independent, professional and expert state institution providing legal protection to tenderers at all procedural levels of the award of public contracts.

Judicial protection (in commercial proceedings before the civil court) is only available for limited number of reasons. The claimant can only ask the court to annul the public procurement contract and award compensation.

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

No.

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

The Supreme Court decides on extraordinary remedies in judicial proceedings.

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

No.

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.)?

The courts decide on public procurement disputes as a matter of priority (Article 47 of the Legal Protection in Public Procurement Procedures Act).

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?

No statistics are available. Average time for (any type of) priority cases before the Supreme Court is approximately 1 year.

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?

Yes. Special remedies are available under the Protection of Right to Trial without Undue Delay Act. It applies to all the courts. No statistics are available as to its application in public procurement proceedings.

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?

None.

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?

Yes, a registry department of the Supreme Court.

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?

So far, there have not been any public procurement cases before the Supreme Court where CJEU jurisprudence would be relevant.

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

Directives 89/665/EEC, 92/13/EEC and 2009/81/EC (all with subsequent amendments) are implemented in the Legal Protection in Public Procurement Procedures Act (shortened: LPPPPA).

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?

According to the LPPPPA, the first instance court can annul the public contract on the request of a person having legitimate interest in annulment or on the request of the „public interest advocate“.

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?

See answer to 4.1.

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

No statistics are available.

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

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?

In judicial proceedings concerning public procurement, the court can only be asked to annul the public procurement contract and award compensation. The courts do not deal with public procurement matters in the stage before 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?

So far, there have not been any public procurement cases before the Supreme Court where this particular CJEU jurisprudence would be relevant.

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 courts do not deal with public procurement matters in the stage before the conclusion of the contract. So far, there have not been any public procurement cases before the Supreme Court concerning the annulment of the contract where the issue of assessment (sub)criteria would arise.

Article 48 of the Public Procurement Acts provides:

(1) *The contracting authority may award a contract either:*

a) to the most economically advantageous tender by using various criteria linked to the subject matter of the public contract in question, for example, quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost effectiveness, after-sales service and technical assistance, delivery date and delivery period or completion date, or

b) on the basis of the lowest price.

[...]

(3) *Should the criteria be specified in both the contract notice and contract documents, they should be the same.*

(4) *In the event of awarding a public contract by using the most economically advantageous tender criteria, the contracting authority shall describe and weight each award criterion in the contract notice or in the contract documents or, in the case of competitive dialogue, in the descriptive document. The criteria shall be non-discriminatory and shall be logically related to the subject matter of the public contract. The criteria may be weighted by determining a maximum range. Where, in the opinion of the contracting authority, weighting is not possible on objective grounds, the contracting authority shall indicate in the contract notice or contract documents or, in the case of competitive dialogue, in the descriptive document, the criteria in descending order of importance.*

(5) *In the evaluation of tenders, the contracting authority shall apply only the criteria indicated in the contract notice or contract documents, as they were described and weighted.*

(6) *In the case of two or more most economically advantageous tenders, the contracting authority shall select the most*

advantageous one by also applying predetermined social elements aimed at promoting professional in-service training, creating jobs for the difficult-to-employ and combating unemployment, and shall lay them down in the contract documents.

[...]

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 to 5.2.

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

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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?

So far, there have not been any such cases before the Supreme Court.

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

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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?

So far, there have not been any public procurement cases before the Supreme Court where the confidentiality of the documents would be invoked.

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?

Due to unclear formulation of the question, we cannot provide an answer.

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?

General rules for civil and commercial judicial proceedings apply. Certain special rules for public procurement documents apply in public procurement proceedings before the contracting authority and before the National Review Commission, which could exceptionally - in case of a lack of a specific rule in the Civil Procedure Act - also apply *mutatis mutandis* in judicial proceedings.

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 Constitutional Court has recently found that the Civil Procedure Act is unconstitutional insofar it regulates insufficiently the question of access of the parties to the proceedings to classified documents (i. e. documents, marked as classified by state officials for reasons of state security). Until the deficiency is fixed by the Parliament, the Constitutional Court has set up a transitional regime, according to which the judge deciding the case decides if and how the parties to the proceedings can become acquainted with the classified information submitted in the case. In doing so, he or she must give particular consideration to the opposing constitutional values and find a balance between the right to fair trial and protection of classified information, taking into account the sensitivity of such information and the importance of the rights in question.

There is no difference in the accelerated proceedings.

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

See answer to 7.4.