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?

- In England, Wales and Northern Ireland, any legal challenge to a procurement decision must be started in the High Court. In addition, the High Court is the forum for commencing claims that: (a) fall outside the regulations; or (b) are brought in parallel with claims for breaches under the regulations.

- In Scotland, an action must be started in the Sherriff Court (which is the lower civil court in Scotland) or the Court of Session.

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

- A party may, in some circumstances, be able to bring an action for judicial review of a public procurement decision in the High Court (Administrative Division). Judicial review is the process by which the court reviews the lawfulness of a decision or action taken by a public body. In order to bring an application for judicial review, a party must have a "sufficient interest" in the matter to which the application relates.

- Judicial review will not normally be available to a claimant with another remedy. "Economic operators" should therefore bring their challenges under the UK regulations which implement the directives. By contrast, third parties which are not "economic operators" but are affected by a procurement decision made by a body in exercise of a "public law function" may be able to challenge the decision via judicial review. This may include local residents, pressure groups or other stakeholders. The remedies which may be awarded for a successful claim of judicial review include

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injunctive relief, a quashing order in respect of the decision, or an order for the payment of damages.

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

- In the case of public procurement proceedings commenced under the UK regulations, all functions (e.g. declarations of ineffectiveness, injunctive relief, or damages) are exercised by the High Court (in the cases of England and Wales, and Northern Ireland), or the Sheriff Court or Court of Session (in the case of Scotland).

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 the ACA member for the United Kingdom, the Supreme Court is the final court of appeal from decisions of the Court of Appeal in England and Wales, the Court of Appeal in Northern Ireland, and the Court of Session in Scotland. In certain cases, an appeal will lie directly to the Supreme Court from a decision of a lower court. Permission to appeal to the Supreme Court will be granted only where the appeal raises an arguable point of law of general public importance.

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.)?

- There are no specific measures under the UK regulations to ensure that court proceedings are determined within a specific timeframe. The courts will, however, be responsive to requests for expedited proceedings where possible (see below).

[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.

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 such data is readily available.

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?

- The Supreme Court typically deals with procurement proceedings expeditiously. Where permission to appeal is granted and an expedited hearing is requested, the court may be able to hear the case and give judgment within 2-3 months. For example, in the case of *Edenred (UK Group) Limited and another v Her Majesty's Treasury and others* [2015] UKSC 45, the application for permission to appeal to the Supreme Court was filed on 13 April 2015. As a prompt determination was required, the court heard the application for permission and the substantive appeal at the same time (on 13 and 14 May 2015). The substantive judgment was given on 1 July 2015.

- The history of proceedings in *Edenred* shows that the case was also dealt with promptly in the Court of Appeal (which gave judgment on 31 March 2015 following a two-day hearing on 11-12 March 2015) and at first instance in the High Court (which gave judgment on 23 January 2015 following a 5-day hearing between 25 and 30 November 2014).

- Earlier procurement cases in the Supreme Court show that typically judgments will be given shortly after the case is heard. In *Healthcare at Home Ltd v. The Common Services Agency* [2014] UKSC 49 (30 July 2014), in an appeal from the Scottish Court of Session (Inner House), the Supreme Court heard the appeal on 23 June 2014 and gave its substantive judgment on 30 July 2014. In *Brent London Borough Council and others v. Risk Management Partners Ltd* [2011] UKSC 7, substantive judgment was given on 9 February 2011 following a three-day hearing on 8, 9 and 13 December 2010.

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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	-	-	-	-
2014	-	-	-	-

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	-	-	-	-
2014	-	-	-	-

[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 may request an expedited hearing at any stage of court proceedings (including on appeal to the Supreme Court). Whether an expedited hearing is granted will depend (amongst other things) upon: (a) the importance of the case being determined expeditiously; (b) the availability of the parties' counsel; and (c) there being sufficient space in the court lists.

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?

- No. The Supreme Court Justices keep up-to-date on developments in the jurisprudence of the CJEU and will consider any relevant jurisprudence in a particular appeal.

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?

- Yes. The Supreme Court will make references to and quote from relevant decisions of the CJEU in its 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?

- The court may grant the remedies of a declaration of ineffectiveness or an alternative award (e.g. damages, a financial penalty or contractual shortening) on the application of a party. The court cannot do so *ex proprio motu*.

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 the UK regulations, an economic operator can bring an application for a declaration of ineffectiveness. The CJEU judgment in *Commission v FRG, C-503/04* has not as yet been considered in detail by the UK courts.

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

- The balance of interests procedure is not currently applied in England, Wales and Northern Ireland in relation to interim measures, and the guidance at Article 2(5) of Directive 2007/66/EC has not been translated into the UK regulations. In order to obtain an interim injunction before a procurement contract has been entered into with a successful bidder but before the authority has made an award decision, a challenging party must satisfy the standard test for prohibitory injunctions established in the English case of *American Cyanamid Co. v. Ethicon Ltd (No.1)* [1975] A.C. 396, namely that (a) there is a serious issue to be tried, (b) the balance of convenience favours an injunction being granted, and (c) that damages would not be an adequate remedy. For examples of cases applying *American Cyanamid* in a procurement context, see *Excel Europe v. University Hospitals Coventry & Warwickshire NHS Trust* [2010] EWHC 332 (TCC) (in which it was queried whether *Cyanamid* was the correct test) and *DWF LLP v Secretary of State for Business Innovation and Skillls* [2014] EWCA Civ 900). If the claim is issued in respect of a contracting authority's decision to award a contract, however, a challenging party can instead rely on the automatic suspension provisions under the regulations.

- In Scotland, the balance of interests test under Article 2(5) of Directive 2007/66/EC was implemented under r.47A(2) of the Public Contracts and Utilities Contracts (Scotland) Amendment Regulations 2009 (now under r.48(2) Public Contracts (Scotland) Regulations 2012/88).

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?

- A court including an appeal court can terminate a suspension by way of an interim order, or lift the suspension on determination of a challenge. See r.96(1)(a) of the Public Contracts Regulations 2015 (applicable in England, Wales and Northern Ireland) and r.47(9) of the Public Contracts (Scotland) Regulations 2012/88 (applicable in Scotland).

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?
5.2. Does the jurisprudence or legislation allow the use of sub-criteria that is not explicitly stated, and if so, under what conditions? Does the jurisprudence or legislation determine the sub-criteria? Does the jurisprudence or legislation differentiate between the sub-criteria and the assessment criteria?
5.3. What are the consequences of the jurisprudence using sub-criteria that are not explicitly stated? Does the same question apply to the assessment criteria?
5.4. Does the national legislation or jurisprudence require any prior communication as regards the assessment method for the offers?

Application in England and Wales, and Northern Ireland

- The rules established by the CJEU's decisions in *ATI EAC C331/04* and *Lianikis C-532/06* were first applied by the High Court in England and Wales in *Letting International Ltd v. Newham London Borough Council* [2008] EWHC 1583 (QB). The court held that any matter that any sub-criteria and weightings used for making an award must be disclosed by a contracting authority under the regulations.

- *Letting International* has been considered and applied in several subsequent decisions in England and Wales. In particular, in *Mears Ltd v Leeds City Council* [2011] EWHC 1031 (TCC), the High Court summarised the principles to be derived from *ATI EAC* and *Lianakis*, and the English and Northern Irish authorities applying those decisions: (a) contracting authorities had to disclose to tenderers the award criteria

they intended to apply; (b) the authorities were also obligated to disclose any rules for the relative weighting of the intended selection criteria; (c) specific undisclosed weight could, in certain circumstances be attached to sub-criteria by dividing among those sub-criteria the points awarded to a particular criterion; (d) there was a distinction to be drawn between award criteria aimed at identifying the most economically advantageous tender and those aimed at evaluating the tenderer's ability to perform the contract; and (e) there was a level of assessment below the criteria, sub-criteria and weightings which contracting authorities did not have to disclose for a number of reasons (see paragraph 122 of the judgment).

- *Letting International* has been considered and applied by several decisions of the High Court in Northern Ireland (for example, see *Irish Waste Services Limited v. Northern Ireland Water Ltd* [2013] NIQB 41 and *Allpay Ltd. v. Northern Ireland Housing Executive* [2015] NIQB 54).

Failure to disclose sub-criteria which the contracting authority had a duty to disclose

- Where a contracting authority has failed to disclose sub-criteria in breach of their disclosure obligations, they may not use these sub-criteria in making a decision and the court may grant appropriate relief (see for example *Lettings International* and *Mears*).

Threshold standards

- It is not yet clear in the UK case law the extent to which contract authorities must disclose any "threshold" standards relating to the award criteria which will cause tenders to be rejected if they are not met (e.g. any quality scores that tenderers must exceed to be considered).

Requirement that material could have affected tenders

- It is also not yet clear in the UK case law whether the condition that disclosure *could* have affected tenders is applicable only for disclosure of weightings, or whether it also applies to disclosure of sub-criteria themselves (*ATI EAC*, which refers to this condition, was concerned only with weightings and *Lianakis* does not refer to this condition). In *Lettings International*, the court held that, where there are undisclosed criteria and weightings for those criteria, the EU directives and UK implementing regulations require a strict approach to be taken to the obligation of transparency. It

was emphasised that the disclosure obligation in relation to criteria, weightings and sub-criteria was not dependent on whether non-disclosure *would* have had a material impact on the preparation of tenders. Rather, the obligation was an inevitable consequence of the overarching principle of transparency and equal treatment (see paragraph 87 of the judgment).

- By contrast, in *J Varney & Sons Waste Management Ltd. v. Hertfordshire CC* [2011] EWHC 1404 (QB), the High Court held that the disclosure obligation in relation to sub-criteria and weightings was qualified by the test laid down in *ATI EAC*: the disclosure obligation would not be breached where the matters "*could not have affected the position of any of the tenderers*" (see paragraph 102 of the judgment). The High Court's decision in *J Varney* was upheld by the Court of Appeal in England and Wales ([2011] EWCA Civ 708). In its decision, the Court of Appeal considered how the CJEU decisions in *ATI EAC* and *Lianakis* were to be applied. In particular, the Court of Appeal observed that the definition of criteria applied in *Letting International* was too general and too wide. The decision in *Lianakis* established that the weightings of sub-criteria may not need to be set out in the contract notice, provided that the conditions in *ATI EAC* were met. The Court of Appeal stated that it was necessary to ask two questions (see paragraph 48 of the judgment): first, were the standards applied by the contracting authority "criteria" or "sub-criteria"? Second, if the standards were "sub-criteria", were they defined in advance, and if so, were the requirements in *ATI EAC* satisfied? In approving this approach, the Court of Appeal emphasised that the disclosure obligations under the UK regulations should not be interpreted more widely than required to ensure that the basic principles of equality and transparency were not infringed. To do otherwise would be "*a significant imposition on contracting authorities*" and this was not what the EU rules intended (see paragraphs 50-1 of the judgment). The Court of Appeal's reasoning, however, was not essential for its decision in the case and, although the "could have affected" condition was also approved by the Court of Appeal in Northern Ireland in *McLaughlin and Harvey (No. 2)* ([2011] NICA 60), this was only *obiter dicta*. It is therefore unclear whether the condition will be applied to sub-criteria by the UK courts.

Application in Scotland

- In *Healthcare at Home Limited v. The Common Services Agency* [2012] CSOH 75, the Scottish Court of Session (Outer House) considered the decisions in *ATI EAC* and *Lianakis* in holding that the contracting authority must formulate the award criteria in the contract documents in such a way that potential tenderers are in a position to

be aware when preparing their tenders, of the existence and scope (or relative importance) of the elements which the contracting authority will take into account in identifying the most economically advantageous offer. In this context, Lord Hodge also noted the CJEU's formulation of this consideration in a different manner in the case of *SIAC Construction Ltd v. Mayo CC* (C-19/00)– namely that the award criteria must be formulated in such a way as to allow all reasonably well-informed and normally diligent tenderers to interpret them in the same way. This approach was approved on appeal by the Scottish Court of Session (Inner House) and again on appeal by the Supreme Court (see [2014] UKSC 49).

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

- The Supreme Court has not as yet considered any of CJEU decisions in C-15/13, C-386/11 and C-159/11. However, in *Brent London Borough Council and others v. Risk Management Partners Limited* [2011] UKSC 7, the Supreme Court considered the CJEU decision in C-480/06 in the context of the *Teckal* exemption, in particular whether a local authority was entitled to enter into contracts of insurance with a mutual insurer, established in co-operation with other local authorities without first putting those contracts out to tender in accordance with the UK regulations (at that time, the Public Contracts Regulations 2006). The Supreme Court held: (a) that the *Teckal* exemption did apply to the UK regulations; (b) that it was available in respect of insurance contracts; and (c) that it is sufficient for it to apply that the co-operating public authorities together exercise collective control over the party to whom the contracts are awarded.

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?*

   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?*

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?

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?

Contracting authorities

- As regards contracting authorities, a general duty of confidentiality is set out under the UK regulations (implementing the duty set out under the EU directives). See r.21(1) of the Public Contracts Regulations 2015 (applicable in England, Wales and Northern Ireland) and r.43(1) of the Public Contracts (Scotland) Regulations 2012 (applicable in Scotland). This duty of confidentiality is subject to (amongst other things) the authority's obligations relating to the provision of information to unsuccessful bidders. The contracting authority may, however, impose requirements on economic operators aimed at protecting confidential information (see r.21(3) of the 2015 regulations).

- The UK regulations also set out requirements in relation to the storage and communication of confidential information by contracting authorities.

The Courts

- The importance of protecting confidential information is raised frequently in UK court proceedings. Where a party wishes to withhold inspection of a relevant document or part of a relevant document on grounds of confidentiality, they must make an application to the court. In determining such an application, the court may invite representations from other interested parties. There are no specific rules regulating how the courts approach issues of confidentiality in public procurement proceedings; the courts will apply the general principles governing the protection of confidential information in litigation.

- If the court concludes that a party does owe a duty of confidentiality (under the UK procurement regulations or otherwise) in respect of a relevant document in its possession, it will need to determine whether disclosure and inspection of that document should be ordered. Generally speaking, the fact that a document contains confidential information is not a bar to disclosure or inspection.[6] The court has a power to compel disclosure if it considers that it is necessary for the fair disposal of the case, and the courts will normally order that relevant material is withheld only as a last resort.

- In deciding whether disclosure and inspection of confidential information is necessary, the court will carry out a balancing exercise. The ultimate test is whether disclosure and inspection are necessary for the proceedings to be disposed of fairly. Often it will be possible for irrelevant confidential information in a document which is otherwise relevant (and therefore disclosable) to be protected by way of redaction. In some cases, the court may be prepared to order that certain documents are dealt with in private hearings, or that disclosure is made to a confidentiality "ring" or "club", in which documents are shared only with a party's external advisors. For an example of how the High Court in England and Wales has dealt with confidentiality issues in a procurement case, see *Croft House Care Limited and others v. Durham County Council* [2010] EWHC 909 (TCC).

- There will be no difference in the way that the court approaches an issue of confidentiality if the case is being heard on an expedited basis.

[6] There are certain statutory and common law exceptions to this principle, for example where confidential information is also subject to privilege (e.g. a confidential communication between a party and its legal advisors, or a communication made "without prejudice" between two parties genuinely aimed at settlement of a dispute).