



Procurement Pulse - June 2017

PROCUREMENT PULSE SERIES

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Procurement legislation provides certain guidance on how to run an impartial procurement process - including minimum time limits for submitting expressions of interest or bid documentation, prescribed criteria for selecting bidders, restricting negotiation to clarification of incomplete or erroneous bids, award criteria and more focussed direction for complex procedures such as competitive dialogue. Otherwise a contracting authority has the discretion to set out its own procedural rules in the procurement documentation. Even with bespoke rules in place, it is impossible to foresee every scenario which might occur, and when that is the case, a contracting authority must ensure that its interaction with bidders complies with the general principles of non-discrimination, equal treatment and proportionality set out in the Treaty on the Functioning of the European Union (TFEU). Case law guidance is invaluable when faced with that judgement call. Can a bidder submit proof of previous experience where that experience derived from work it carried out in consortium with others? Can erroneous samples included in bid documents be resubmitted? Can an authority introduce weightings for published sub-criteria, when bids have already been submitted? Our selected case law this month presents Advocate General and European Court analysis of how TFEU general principles have been applied in practice.

Changing capacity of third party relied on by consortia to carry out works

After bid submission but before contract award, a third party on whom a bidding consortium relied to carry out works, lost a required certification. The procuring authority excluded the consortium from its procurement. The consortium argued that Italian law allowing automatic exclusion of a tenderer without giving it the opportunity to replace the third party, was contrary to the principle of proportionality and breached Directive 2004/18. Advocate General Wahl disagreed. He reasoned that the principles of equal treatment and non-discrimination and the obligation of transparency preclude any negotiation between the contracting authority and a tenderer during a public procurement procedure. Therefore, subject to clarifications and correction of clerical errors, a tender cannot be amended after it has been submitted, whether at the request of the contracting authority or at the request of the tenderer concerned. Following *Wall (C-91/08)*, *Idrodinamica Spurgo Velox (C-161/13)* and *Esaprojekt (C-387/14)*, he considered that introducing a new third party alters the identity of the entities originally proposed to carry out the works, and constitutes a material change to a bid. Capabilities of a third party which allow a tenderer to participate in a tender procedure cannot be regarded as "a non-essential element of a bid. However, exclusion from the procurement process would not be appropriate if *"the tenderer had itself the required capabilities or if it had relied for the same requirement, on more than one entity having those capabilities."*

Advocate General Opinion on Case C-223/16 Casertana Costruzioni srl v Ministero delle Infrastrutture e dei Trasporti

Re-submitting samples after bid submission

Pursuant to Directive 2004/17/EC the Polish oil extraction and gas industry company (P) procured a contract for the digitalisation of documents in its geological archives. Bidders were required to submit a sample of 35mm microfilm containing the exposed result of work submitted for quality assessment. Archus asked to re-submit new microfilm because the sample attached to their original tender did not conform to the tender specification, but even having done so, its bid was rejected. Archus challenged the decision to reject. The Court held that it was up to the Polish courts to decide whether this breached the principle of equal treatment of bidders, on the basis that re-submission went beyond the right to allow clarification or the correction of obvious clerical errors, and in reality constituted submission of a new tender. The referring court also raised the question of Archus' right as a rejected bidder to start proceedings against P. Clarifying the decision in *Bietergemeinschaft Technische Gebäudebetreuung und Caverion Österreich, C 355/15* (that a bidder definitively excluded during the selection phase, did not have standing to challenge a procuring authority), the court held that where a procuring authority is faced with only two bidders and simultaneously makes the decisions to reject one bidder (because of failure to comply with the procurement specification) and award the contract to the other bidder, the rejected bidder has the right to apply to court to challenge those decisions, if it considers them to be in breach of the procurement rules.

Case C131/16 Archus sp. Zoo v Polskie Gornictwo Naftowe

Introducing weightings to published sub-criteria post bid submission

The European Union Intellectual Property Office (EUIPO) has appealed the General Court's decision in October 2015 upholding European Dynamics' claim that EUIPO breached the general principle of transparency and equal treatment, by using weightings in the evaluation process which had not been provided for in the procurement documents. The Advocate General's opinion is that the Appeal on this point of the original judgement should be upheld on the basis that the General Court erred in law, as the weighting factors applied to sub-criteria within one of the award criteria. Previous case law recognises that a contracting authority enjoys more latitude with sub-criteria. The ECJ established in *ATI EAC e Viaggi di Maio and Others* and reiterated in *Lianakis and Others* and *TNS Dimarso* that weighting factors for sub-criteria can be introduced after expiry of the time limit for submitting tenders provided three conditions are met.

(1) that ex post determination must not alter the criteria for the award of the contract set out in the contract documents or the contract notice.

(2) It must not contain elements which, if they had been known at the time the tenders were prepared, could have affected that preparation.

(3) It must not have been adopted on the basis of matters likely to give rise to discrimination against one of the tenderers.

The Advocate General opined that the General Court should therefore have determined whether the arguments put forward by European Dynamics established that EUIPO had failed to meet those conditions.

Advocate General Opinion in Case C-677/15 European Union Intellectual Property Office v European Dynamics Luxembourg SA

Scoping evidence of experience on previous contracts

In an open procedure procurement for hospital IT systems, a Polish contracting authority (CA) required bidders to submit evidence that, during the last three years, they had performed at least two contracts for the supply and installation of integrated hospital systems in "white and grey" departments of a hospital. One bidder, Konsultant Komputer (KK) provided evidence of work it had carried out at Slupsk Hospital - not making it clear that the work had been the subject of two contracts - one for "white" departments, and one for "grey" departments of that hospital. A competing bidder challenged on the basis that the CA had accepted incorrect selection information. The court held that the procurement documents did not specifically exclude reliance on two or more contracts, rather than a single contract, and that two or more contracts can be treated as a single contract, unless a contracting authority specifically excludes that possibility because of requirements which are related and proportionate to the subject matter and purpose of the contract. As a result of the challenge, CA asked KK to submit further information. KK submitted evidence based on the experience of another entity, to whom it had not referred in its original tender response. CA accepted that evidence and awarded the contract to KK. Esaprojekt challenged. The court held that:

- By analogy with the rules against amending tenders after they have been submitted (save for mere clarification, and correction of obvious errors), and as a result of the rule that where third party expertise is relied upon, that third party must actually be available to carry out the work on the procured contract which requires that expertise, introducing evidence of third party expertise at this stage was "*in reality a substantive and significant amendment of the initial bid ... more akin to the submission of a new tender*" which "*directly affects... the very identity of the economic operator who may be awarded the public contract...*" This breached the TFEU principles of equal treatment and transparency
- It was only possible to combine the knowledge and expertise of two entities (which separately do not have the capacities required to perform a particular contract) if a contracting authority takes the view that the contract can be divided. If it is of a view (related and proportionate to the subject matter of the contract) that the contract can only be carried out by a single operator, then it is not obliged to accept dual technical capacity
- An economic operator cannot provide evidence of its expertise by reference to a previous contract which it worked on as part of a consortium, unless its actual contribution to the performance of that contract included the expertise required for selection purposes for the current contract
- The original information submitted by KK was a "*serious misrepresentation*" which provided CA with discretionary grounds to exclude KK from the procurement, pursuant to Directive 2004/18/EC. The court held that the "*serious misrepresentation*" ground for exclusion did not require an intention by KK to misrepresent relevant expertise, only "*some degree of negligence which may have a decisive effect on the decisions to exclude candidates from being selected or awarded a public contract*". Negligent provision is now a separate ground for discretionary exclusion pursuant to article 57 of Directive 2014/24/EU which allows exclusion where an economic operator has "*negligently provided misleading information that may have a material influence on decisions concerning exclusion, selection or award.*"

Case C 387/14 *Esaprojekt sp. z o.o. v Województwo Łódzkie*

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