

PUBLIC PROCUREMENT LAW

NO AWARD IS SAFE! AND: LIMITATION OF THIRD PARTY CAPACITIES!

The ECJ has recently passed two far-reaching decisions on the following topics:

All tenderers, even if they are to be excluded from the tender procedure, are eligible to challenge an award decision: a tenderer's challenge is admissible if it claims that there is an alleged breach of procurement law; its challenge may not be rendered inadmissible without examining its claim. The challenge is admissible regardless of the number of the remaining bidders and the nature of the (alleged) grounds of exclusion.

"Reference-shopping" is illegal: an undertaking providing necessary capacities for a tenderer (e.g. reference projects) has to render the pertinent service upon performance of the contract directly and personally if the subject matter of the contract demands it – a mere "borrowing" or "sale" of references from third parties is therefore not allowed.

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EVERY TENDERER MAY CHALLENGE AN AWARD DECISION – ECJ BROADENS THE LEGITIMACY TO SEEK REVIEW PROCEEDINGS SUBSTANTIALLY

The ECJ has recently extended its previous jurisprudence on the legitimacy to file an application for review substantially (ECJ 5.4.2016, C-689/13 PFE/*Airgest*). According to the ECJ's latest decision, any tenderer can file an application for review of an award decision arguing that the successful tenderer is to be excluded. Even if the claimant itself is to be excluded, its claim may not be rendered inadmissible. This applies regardless of the number of tenderers (still) involved in the tender and also irrespective of the grounds of exclusion.

Until now, the contracting authority and the successful tenderer had the possibility to prevent challenges of award decisions by "presenting" the court grounds of exclusion vis-à-vis the claimant. If those grounds of exclusion were legitimate, the challenge was deemed inadmissible (originally, this was true regardless of the existence of grounds of exclusions vis-à-vis the successful tenderer; as of 2013 and the ECJ's "*Fastweb*" decision, this was true as long as the claimant and the successful tenderer were not both to be excluded on similar grounds). This new understanding of the legitimacy to challenge an award decision is likely to lead to an increased number of appeals, considerable delays of tenders and a higher number of revocations of tenders. Although this decision may have a positive impact on the fairness of procedures, it will also reduce legal certainty and increase the probability that economically interesting offers have to be excluded

due to minor (formal) errors.

Contracting authorities will therefore be compelled to examine offers of tenderers even more diligently in order to avoid losing "their" successful tenderers and reimbursing the claimant for procedural fees. Tenderers, on the other hand, will now have to check the tender documents even more carefully in order not to lose a clear-cut award (which could happen even if the offer of the claimant itself is to be excluded from the procedure).

THE END OF REFERENCE-SHOPPING – CONTRACTORS PROVIDING NECESSARY CAPACITIES ALSO HAVE TO PERFORM THE PARTICULAR SERVICE

According to another new ECJ decision (ECJ 7.4.2016, C-324/14 Rs *Partner*), an undertaking, which provides references as proof for technical or other capacity to a bidder, must also render the particular service upon contract performance. The aim is to curb the practice of reference-shopping, where subcontractors provide references for necessary capacities without actually providing any service.

This decision does not bar bidders from relying on the means and references of third parties in order to prove their technical and professional capacities and suitability. However, bidders will no longer be able to resort to references provided by third parties without involving the particular undertakings in the fulfilment of the awarded contract. Although this has not yet been fully clarified by the ECJ (or Austrian Courts for that matter), it can be assumed that the particular undertaking providing such necessary capacity must at least perform a significant part of the pertinent service (in the authors' view the more difficult the particular service and the more extensive the required experience is, the greater the required involvement will have to be).

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