



PUBLIC PRACTICE

The lawful interest of an excluded at a prior stage tenderer to request the exclusion of the successful tenderer.

By Constantinos Kavadelas, Aggelos Kosteletos | December 9, 2019

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The lawful interest of a tenderer who was excluded at one stage prior to the award of the contract to request the exclusion of other tenderers at this stage - A legal review of the questions for a preliminary ruling to the ECJ.

BY CONSTANTINOS KAVADELLAS, AGGELOS KOSTELETOS | DECEMBER 9, 2019

This Newsletter aims to provide a summary of ruling no. 235/2019, held by the Committee of Suspension of the Plenary Assembly of the Council of State for a preliminary ruling from the of interpretation of Articles 1 (par. 3) 2 (par. 1, points a and b) and 2a (par. 2) of the Directive 92/13 / EEC regarding the interest in bringing proceedings instigated by an excluded tenderer at a stage prior to the award of the contract requesting the exclusion of the other tenderers at this stage. The Committee ruled that the infringement of the Principle of equal treatment of tenderers is so far the only reason, in accordance with rulings of the Council of State, that may lead to the annulment of the award of a contract to another tenderer and for that reason is seeking for a preliminary ruling by the ECJ regarding the possibility for a non-definitively excluded tenderer to seek the exclusion of other tenderers on the basis of reasons other than that.

The majority of the Committee accepted also the opinion that a definitively

excluded tenderer should be considered to be (i) only the participant who didn't bring actions against the deed of its exclusion or (ii) the participant who filed a petition of annulment against its exclusion, but it was rejected via a final judgment. However, a tenderer must not be considered as definitively excluded, when its recourse before the Authority for the Examination of Preliminary Appeals (AEPP as per its Greek Acronym) was rejected, but the deadline to file a petition of annulment or a petition of suspension in accordance with art. 372 of Law 4412/2016 has not lapsed. The Committee clarified the above, since the existence of a lawful interest in bringing actions against the award of a contract to another tenderer would be not recognized to a definitively excluded tenderer, since the excluded tenderer would be treated as a third party without having direct legal interest in the tender process. The Committee came into that conclusion by interpreting and combining the provisions of Articles 346 (1) and (2)

and 360 (1) of Law 4412/2016, whose interpretation corresponds with Directives 89/665 / EEC and 92/13 / EEC (Articles 1 (3) and 2a (2)), in the light of judgments rendered by the European Court of Justice i.e. *Fastweb (C-100/12)*, *PFE (C-689/13)*, *Archus and Gama (C-131 / 16)* and *Lombardi (C-333/18)*.

Additionally, in order to be recognized as a non-definitively excluded tenderer the legal interest in bringing an action against the contracting Authority's decision accepting the bids of the other tenderers and awarding to one of those the contract of public procurement, it is necessary it's action to be upheld in such a way that it does not lead to a definitive cancellation of the tender process i.e. a re-tender, but, on the contrary, to leave open the possibility of initiating a new procedure for the award of the contract, in which the unsuccessful tenderer will have actual possibilities to be awarded with the contract. A Judge participating in the Committee, expressed a narrower opinion by setting as a prerequisite for a non-definitively excluded tenderer to bring actions against the other tenderers, the rejection of its bid to derive from formal deficiencies or procedural omissions and faults such as the failure to properly submit supporting documents. On the other hand, if it is a necessary condition for being able to participate in the new procedure either to alter the substantive content of its bid or the terms of the notice of contract to be modified, the interest of the unsuccessful tenderer to cause the cancellation of the tender and being re-announced, is neither legal nor worthwhile of judicial protection.

Due to the minority's decision to adopt the contradictory judgment no. 180/2019

of the Committee of Suspension, which requested the Plenary Assembly of the Committee of Suspension to undertake the dispute in question, the Committee considered necessary to seek a preliminary ruling by the ECJ, since contradictory jurisprudence on a such critical issue is not acceptable. In the light of the foregoing, the Committee postponed issuing a final ruling as regards the part of the petition of suspension concerning grounds other than the breach of the Principle of equal treatment of tenderers and the following questions are referred for a preliminary ruling:

1. a) Should articles 1 (par.3), 2 (par. 1, elements a and b) and 2a (par 2) of E.U. Directive 92/131 be interpreted as being contrary to national jurisprudence stemming from case law according to which at a stage previous to the final one of actual awarding of a contract (e.g. at the stage of technical compliance check-up) the entity responsible for assigning the contract bars from the procedure a tenderer and accepts a competitor, the unsuccessful party, in case his application of suspension before the Court regarding the specific part that refers to the act of being excluded has been rejected, may retain lawful interest in presenting, via the same process of suspension against the successful tenderer only in the case that his success occurred in contravention of the Equal Treatment of Tenderers?

b) If the answer on the above question was affirmative, would be able the unsuccessful tenderer to raise objections unrelated to the grounds led him being excluded and the tender process would be deferred until a final judgment regarding his petition for annulment was issued, since if his petition for annulment

was successful, the competitor would be excluded and the process would be deferred and more chances for a new tender process being initiated would exist?

2. It is relevant to the answer to the preceding question that the requirement for provisional (but also definitive) judicial protection is the prior unsuccessful recourse before the AEPP, in the light of the judgment on *Bietergemeinschaft Cuban und Schäferbauer C-355/15*)?

3. It is relevant to the answer to the first question that the finding that, in the event of acceptance of the objections raised by the excluded tenderer against competitor's participation in the tender process (a) it is impossible the public procurement process being re-announced that (b) the reason that led him being excluded from the process, renders his participation impossible in the new tender process after the cancelation of the previous one?

In the context of the aforementioned preliminary questions, the ECJ, which, in view of the effective application of EU rules in procurement procedures, is called upon to determine the extent of judicial protection to which the excluded tenderer is entitled prior to the final stage of award. The judgment of the Court is expected to be of particular interest, as it may introduce new perspectives to the legal view of the public procurement system.

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