

ECJ guidance on applying exclusions to potential problem bidders

Rebecca McLean reviews the case of Delta Antrepriză de Construcții și Montaj 93 SA v Compania Națională de Administrare a Infrastructurii Rutiere SA, which highlights the European Court of Justice's (ECJ's) recent ruling on the interpretation of Article 57(4) of Directive 2014/24 (the public procurement directive), which provides useful clarification over when contracting authorities can apply exclusions grounds where an economic operator has been in default under a prior public contract.

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Background

This case is in relation to the public procurement directive, Directive 2014/24 ('the Directive'), and its implementation into Romanian law, specifically Articles 167(1) and 171 of Legea nr. 98/2016 privind achizițiile publice (Law No 98/2016 on public procurement) of 19 May 2016.

Article 167(1) provides that a contracting authority shall exclude from procurement any economic operator which has either:

"(g) Committed serious breaches of its principal obligations under a public contract which have led to the early termination of that contract, the payment of damages or other comparable sanctions.

"(h) Been guilty of serious misrepresentation in supplying information required by the contracting authority in establishing whether any grounds exist for exclusion or compliance with the selection or qualifying criteria."

Under Romanian law, Article 167(8) provides clarification that in relation to Article 167(1)(g) referenced above, examples of serious breaches of contractual obligations include, for example, the failure to perform a contract or the delivery/ supply/ performance of the products/works/services that present significant shortcomings, which makes them unusable for the intended purpose provided for in the contract.

A Romanian Court requested a preliminary ruling on the interpretation of article 57(4)(g) of the Directive, which is in relation to a discretionary exclusion ground for significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract, which led to early termination of that contract.

Facts

- The Municipality of Râmnicu Vâlcea in Romania (Municipality) awarded a works contract for the restoration and modernisation of a leisure facility (Contract 1) to a consortium on 3 October 2014, where Delta Antrepriză de Construcții și Montaj 93 SA (Delta) was the lead contractor (Consortium1).
- The Municipality terminated the contract early on 7 June 2017 on the ground that Consortium 1 had used a subcontractor without the Municipality's prior authorisation.

- On 25 July 2017, the Municipality lodged an online report on a platform known as the 'Electronic public procurement system' ("EPPS") stating that the contract had been terminated early by way of misconduct by Consortium 1, and as a result of the early termination, this caused the Municipality losses of EUR 521, 000.
- Delta later tendered for another public procurement process run by CNAIR for the construction project for the widening of a national road, as part of another consortium consisting of two other members (Consortium 2).
- CNAIR searched the EPPS platform, and became aware of the report relating to Delta and Contract 1, and requested clarification from both Delta and the Municipality.
- After making enquiries, CNAIR considered that Delta had failed to show that the Municipality's report had been suspended or annulled.
- CNAIR found that the tender submitted by Consortium 2 fell within the provisions of Article 167 (1) (g) of Romanian law (which implemented the public procurement directive) and excluded it from the tender.
- Delta challenged this exclusion in the domestic courts, arguing that the termination of Contract 1 due to the works being subcontracted was a "minor irregularity" and not a breach of a principal obligation of the contract. Delta further argued that it could only be excluded by CNAIR in "exceptional circumstances".
- The Romanian Court of Appeal referred the case to the ECJ for a preliminary ruling, considering that it had not yet interpreted Article 57(4)(G) of the Directive.

Issue

The question referred to the ECJ for a preliminary ruling was:

"Can Article 57(4)(g) of Directive 2014/24 be interpreted as meaning that the early termination of a public works contract on the ground that part of the works was subcontracted without the contracting authority's authorisation reflects a significant or persistent deficiency in the performance of a substantive requirement under a prior public contract leading to an economic operator being excluded from participation in a public procurement procedure?"

Findings

In response to the question referred, the ECJ found that the answer to the question must be interpreted as meaning that:

- the subcontracting, by an economic operator, of part of the works under a prior public contract, decided upon without the contracting authority's authorisation and which led to the early termination of that contract, constitutes a significant or persistent deficiency shown in the performance of a substantive requirement under that public contract, within the meaning of that provision; and
- this is therefore capable of justifying that economic operator being excluded from participation in a subsequent public procurement procedure if, after conducting its own evaluation of the integrity and reliability of the economic operator concerned by the early termination of the prior public contract, the contracting authority which organises that subsequent procurement procedure considers that such subcontracting entails breaking the relationship of trust with the economic operator in question.
- Before deciding such exclusion, the contracting authority must allow that economic operator the opportunity to set out the corrective measures adopted by it further to the early termination of the prior public contract.

In the present case, due to the early termination of Contract No 1, it would be the responsibility of Consortium 2, in accordance with the requirements of transparency and good faith, to inform the contracting authority of its situation, and provide all relevant information from the outset that prove that the characterisation as subcontracting was mistaken, and that it had not failed to fulfil its obligation in the context of Contract No 1.

Furthermore, the contracting authority should pay particular attention to the principle of proportionality when examining and assessing the facts "diligently and impartially" for itself. The contracting authority, CNAIR, should not automatically infer from another contracting authority's decision that the subcontracting had caused significant or persistent deficiencies in the performance of a substantive requirement under the contract pursuant to Article 57(4)(g), rather it should have assessed the integrity and reliability of the tenderer itself.

Commentary

This case is one of the first examples of how contracting authorities may take into account prior poor performance of economic operators at the selection stage. It is a key reminder that all procurements should be run on their own merits, and contracting authorities should examine and impartially assess the facts of each tenderer for themselves, especially where potential exclusions may exist.

This case is also a reminder that it would be prudent for potential tenderers to ensure that they provide relevant supporting information with their bid, especially where grounds for discretionary exclusions could exist rather than trying to ignore it or brush it under the carpet.

Contact



Mark Hickson

Head of Business Development

onlineteaminbox@brownejacobson.com

+44 (0)370 270 6000

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