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CJEU News: It's Not Enough to Rely on Procurement Documentation — Bidders Must Know Nationa Procurement Legislation Too

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On May 2, the European Court of Justice (CJEU) ruled in Case C-309-18 Lavorgna Srl ./. Comune di Montelanico, Comune di Supino, Comune di Sgurgola, and Comune di Trivigliano. The case clarified how a contracting authority should proceed when tenderers (contract bidding and award procedures) lack information required under national procurement law per Directive 2014/24/EU.

The CJEU ruling concerned the interaction between what is stipulated in the procurement documentation and what is required in national procurement law. The CJEU also discussed the possibility of requesting clarifications and data supplements of solicitation that have not been explicitly requested in the procurement documentation.

The National Court's Main Proceedings

The case involved a coordinated service procurement carried out by several Italian municipalities. The procurement documentation did not contain labor costs in the tender documents to allow the bidders to fully develop their pricing/bids. Instead, bidders were asked to supplement the tenders with the labor costs before the contract award.

The municipalities decided to award the contract to the undertaking (bidder) Gea. The undertaking Lavorgna, ranked second, reviewed the award decision and argued that Gea should have been excluded from the procurement due to its failure to state labor costs.

The CJEU Ruling

The CJEU argued that it appeared that under Italian procurement law, implemented by the directive, tenderers that failed to submit labor costs as part of its bid/tender, were to be excluded from the procurement. In the procurement documentation in this case, however, the tender (1) required that the bidders/tenderers include this pricing; and (2) it also stipulated that the national procurement legislation would apply to issues not addressed explicitly therein.

Against this background, the CJEU considered the fact that all reasonably informed and normally diligent bidders could, in principle, have gained knowledge of the rules and provided labor costs in their tenders. The CJEU held that the principle of equal treatment and transparency (what is termed in the U.S. as "full and open competition" on a "level playing field") did not require the contracting authority to explicitly state that labor costs should be submitted in the tender. Put differently, a contracting authority must not repeat what was stated in the national legislation in the procurement documentation.

However, uncertainties remained regarding the tenderers' ability to "act right" in their tenders. CJEU noted that, in the present case, there was no physical space to provide information on labor costs. In addition, it appeared that the tenderers were not allowed to submit documents that were not specifically

requested. Therefore, the CJEU held that it was for the national court to consider whether it was physically possible for the tenderers to provide the labor costs in accordance with the law. If not, the CJEU said that the municipalities could allow the tenderers to remedy any non-compliance with the national legislation.

Analysis

Article 18 in Directive 2014/24/EU requires member states to take appropriate measures to ensure that bidders comply with applicable environmental, social, and labor law obligations under EU law, national law, collective agreements, or in international environmental, social, and labor law provisions. In addition, Article 56(3) enables contracting authorities to request bidders to supplement and clarify their tenders within an appropriate deadline.

Directive 2014/24 is a so-called minimum directive that allows member states to adapt their own rules when implementing the law, if it complies with the directive's objectives.

The CJEU ruling confirmed that member states with national legislation choosing to adopt more detailed provisions than required by the directive, must uphold them. Provisions stipulated in the statute that are sufficiently clear and may lead to the exclusion of a bidder, will hence apply automatically. Such provisions are given priority over more general writings in the procurement documentation.

The ruling further confirmed that the contracting authority did not need to explicitly state what was stated in the statute's exclusion provision in its procurement documents. A general reference to the grounds of exclusion was, according to the CJEU, sufficient in view of the principles of legal certainty, transparency, and proportionality.

In sum, the CJEU held that an obligation clearly stated in the national procurement legislation need not be explicit in the procurement documentation, as long as it was explicitly referenced. Furthermore, it was possible for the contracting authority to request documents from the bidders, provided that the provision's framework on clarifications and supplements allows it.

Hence, for a bidder, it is not enough to follow what is explicitly stated in the procurement documentation when submitting a tender. In order to avoid exclusion, the bidder must also ensure that it is aware of the national procurement legislation, and that the bid complies with all such requirements as well.