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The Court of Justice of the European Union (CJEU) in 2018

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The public procurement year of 2018 will be remembered in Sweden as the year when the CJEU[1], for the first time, held oral proceedings in a Swedish procurement case.[2] However, the past year has also given us several interesting judgements from the court. In this article, we highlight three judgments from the CJEU in 2018 that we believe are of great interest for future procurements. With all certainty, they will also be the subject of much debate and have influence on the national courts in the Member States.

WHEN IS A CONTRACT NOT A CONTRACT

C- 9/17, Tirkkonen

The CJEU specifies the concept of a procurement contract.

Under EU law, the mere fact that a service is exposed to competition does not automatically mean that it is a contract. This quandary was clarified in Case *C-9/17 Tirkkonen*, where the CJEU specified the concept of a "procurement contract."

According to the Court, a public contract is not covered by the procurement regulations if a contracting authority accepts all the suppliers who meet the suitability requirements set out in the invitation to bid, and leaves the choice of supplier to the individual user. In short, it can be stated that what distinguishes a procurement contract from other purchases is the use of award criteria.

Similar to the previous case *C-410/14 Falk Pharma, the Tirkkonen* case concerned an authorization system for farm advisory services. The big difference between *Falk Pharma* and *Tirkkonen* was that the latter system was not open for continuous application. In other words, this arrangement more closely resembled a traditional framework agreement. What is particularly interesting is the fact that there are tangible similarities between such a closed system and a framework agreement where the individual's choice determines which supplier is assigned to each call-off agreement. The closest analogy that can be found to US Government Contracts Law is that an indefinite delivery indefinite quantity (IDIQ) contract in which the government prequalifies bidders or offerors for later delivery orders would not be considered a contract under EU law, whereas a later competed task or delivery order would be a "contract". U.S. Procurement law is different in this way, in that an IDIQ procurement vehicle is considered a "contract", albeit with limited liability to the government.

It remains to be seen what impact the case of *Tirkkonen* will have on public purchases. However, our assessment is that there are reasons to believe that the existence of similar arrangements will increase in the future.

SOLE SOURCE PROCUREMENTS

C-14/17, VAR and ATM

Evidence that offered products are equivalent to the original products and must be presented when the bid is submitted.

It has been clear in the EU and Sweden for a long time that a procuring agency which defines a procurement item by referring to a trademark, patent, type, origin or manufacturer, according to Ch. 9 § 6 Section 2 in LOU/LUF[1] (in other words a "sole source" procurement under US Government Procurement parlance), is obliged to use the words "or equivalent". This is required to not benefit a particular supplier. As in the U.S., EU public procurement law generally frowns upon sole source solicitations and awards.

In the *case C-14/17 VAR and ATM*, the CJEU addressed the question of when a supplier needs to prove that the product is an equivalent in situations when they offer an equivalent product.

The CJEU answered this question, finding that where the technical specifications refer to a trade mark, origin or manufacturer, the contracting authority or entity shall require the supplier to prove in his bid that the products proposed are equivalent to the products defined in the technical specifications. Thus, this places requirements on how the procurement documents and bids are designed when the provision in Ch. 9 § 6 Section 2 in LOU/LUF is applicable.

COMPETITION LAW INFRINGEMENTS

C-124/17 Vossloh Laeis

The European Court of Justice provides guidance on so-called self-cleaning in relation to infringements of competition law.

In the judgment in *C-124/17 Vossloh Laeis*, the European Court of Justice answered two important questions concerning the possibility of voluntary exclusion in the event of infringements of the competition rules. This discusses actual or constructive debarment (using U.S. terminology) for violations of competition laws. Under the EU's procurement rules, a supplier who is covered by an exclusion ground for anti-competitive conduct, may seek to avoid exclusion by so-called self-cleaning, *e.g.*, by participating in a Competition Authority's Leniency program.

In this case, a German contracting authority had requested that a supplier should submit a decision by the federal competition authority concerning fines for participation in a cartel. However, the supplier refused to submit the finding, claiming that its mere cooperation with the competition authority in itself was sufficient to be considered as self-cleaning and allowing the business to proceed forward in the competition.

However, the CJEU found that a contracting authority may request evidence to support a showing that the measures taken by a supplier were sufficient to allow it to participate in the contract. Such evidence may include, by way of example, decisions within the framework of the competition authority's leniency program.

In the same judgment, the CJEU also clarified the start date for the applicability period of the exclusion grounds.

The relevant date is the day of the decision by the competition authority, and not, as the supplier had argued, the day following the end of the infringement in question. This means that a company can risk exclusion long after when the infringement was terminated because this usually takes place earlier than the competition authority's decision.

The ruling of the CJEU proves that companies that, for example, participate in a Competition Authority's leniency program, need to reflect upon how these issues should be dealt with within the framework of their participation in public procurements as well as under which time frame.

Footnotes

[1] The Court of Justice of the European Union (CJEU) interprets EU law to make sure it is applied in the same way in all EU countries, and settles legal disputes between national governments and EU institutions. It can also, in certain circumstances, be used by individuals, companies or organizations to take action against an EU institution, if they assess that their rights have been infringed.
[2] This case concerned two cleaning contracts that SJ, which is owned by the Swedish state, entered into without competitive bidding under the procurement legislation. According to the Swedish Competition Authority, SJ is a contracting entity that must comply with the procurement rules. SJ, on the other hand, believes that its procurement activities do not constitute transport activities as referred to in Directive 2004/17/EG - and that it therefore does not have to follow the procurement regulations. The ruling of the CJEU is likely to have great significance for publicly-owned European passenger transport operators such as, for example, the French SNCF and Deutsche Bahn.