



Additional works

ECJ 2013 judgments

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Legislative framework

Directive 2004/18/EC of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts

Directive 2004/17/EC of 31 March 2004 coordinating the procurement procedures of entities in the water, energy, transport and postal services sectors

EU Treaty

ECJ case law

National laws on public procurement

Additional works legal framework

Article 31.4(a) of the Directive 2004/18/EC

Article 40.3(f) of the Directive 2004/17/EC
(sectors of water, energy, transport and
postal services)

Maintain principles already established in
previous Directives (92/50,93/37,93/38)

Legislative framework

GOLDEN RULE

The procedure to be used are the open and the restricted procedures

The negotiated procedure without publicity can only be used in a very exceptional cases

Please bear in mind this golden rule when you start to prepare the tendering procedures. Any deviation of this rule will need many justifications and may trigger financial corrections

Why additional works are important?

*Considering all the irregularities detected by DG REGIO since 2005 on both programming periods (2000-2006 and 2007-2013) the weight of the Public Procurement is about **40%** in each period.*

The use of negotiated procedure to award additional works represents aprox. 25% of the Public Procurement irregularities.

If we avoid this practice, the error rate will be reduced

ECA audits have arrived to similar conclusions. In DAS 2009, the 75% of quantified errors were due to non-compliance with Public Procurement rules



DG REGIO approach

-Directives and ECJ case law are rather clear but national legislations should be compatible with the EC legal framework. Many problems in the past were due to wrong transpositions. In this respect, the lead services in the Commission is DG MARKT

-Negotiated procedure without publicity is an exceptional procedure and needs justifications case by case. Very important: The burden of proving the actual existence of exceptional circumstances justifying a derogation lies on the one seeking to rely on those circumstances

-They cannot be accepted as unforeseen circumstances those events that a diligent contracting authority acting in the normal course of business should have foreseen



DG REGIO approach

- The justifications to use a negotiated procedure should be well-kept in the tendering file since the beginning and cannot be added afterwards
- In case of lack of proper evidence, DG REGIO will always apply a financial correction following the COCOF guidelines
- For info: DG REGIO has already applied financial corrections to many Member States (from south to north, east to west) due to lack of justifications/ evidences of the use of negotiated procedure to award additional works.



Main DG REGIO findings – Additional works

Implementation of contracts / Modifications

- a) Additional works or services directly awarded to the economic operator in place, when
 - amount exceeds 50% of the amount of original contract,
 - the circumstances invoked are not unforeseen
 - even if circumstances are unforeseen, when works/services are economically or technically separable

- b) Automatic extension of supervision contracts because of delays in the execution of works contracts



Main DG REGIO findings – Additional works

- a) Additional works not included in the project initially considered or in the original contract
- I. Tender documents should be the result of **careful planning** and include all necessary elements for a genuine competition
 - II. « **Unforeseen** » **events** should be interpreted in an objective manner as referred to what the **authorities should have foreseen** and not to what they actually did
 - III. Consider the means available to the contracting authority, the characteristics of the project and the good practices in the field



European Court of Justice – Previous Case Law

- Strict interpretation of the exceptions to use negotiated procedure

- C-199/85 Commission/Italy paragraph 14
- C-57/94 Commission/Italy paragraph 23
- C-318/94 Commission/Italy paragraph 14
- C-187/04 Commission/Italy paragraph 24
- C-84/03 Commission/Spain paragraphs 46/48/50



European Court of Justice – Previous Case Law

■ Modifications of contracts / Substantial character

- C-496/99 Succhi di Frutta paragraphs 117/118
- C-454/06 Presstext paragraphs 34/36

All mentioned judgements are available following the link:

- http://curia.europa.eu/jcms/jcms/j_6/

European Court of Justice – New Cases 2013

On 31/01/2013, the General Court rendered two judgments in cases [T-540/10](#) and [T-235/11](#) both Commission/Spain.

These 2 judgments are only available in French (procedure language) and Spanish (Member State language). No guarantee that they will be translated to all languages

The cases related to direct award of a number of additional contracts for the construction of the High Speed Railway (AVE) in Catalonia and Castilla-La Mancha co-financed by the Cohesion Fund. Spain attacked the Commission's decisions to impose a financial correction for using, without a legal basis, negotiated procedures without prior publication of tender notices instead of correctly procuring the contracts



European Court of Justice – New Cases 2013

ECJ stressed that the exceptions to use the negotiated procedure have to be interpreted in a strict manner, taking into account that the contracting entity must prove that it acted in a diligent way



European Court of Justice – New Cases 2013

Different circumstances invoked by the contracting authority and not accepted by DG REGIO (confirmed by ECJ):

1.- Circumstances concerning urban planning

As a general rule, the contracting entity must, in cases in which other public entities are competent to define, according to national legislation, this urban planning, seek an agreement with these public entities before launching the tendering procedure in order to avoid modifications of the initial project in the phase of works execution



European Court of Justice – New Cases 2013

2.- Circumstances concerning late requests from public or private entities

The same principle applies to the environmental evaluation of the project. The contracting entity must prove that it had consulted these entities before launching the tendering procedure. If this consultation has not taken place, requests made by public or private entities after the publication of the tender notice in the OJEU are not to be considered, per se, as an unforeseen circumstance



European Court of Justice – New Cases 2013

3.- Geological reasons

The contracting entity must conduct sufficient geological surveys in order to obtain an in-depth knowledge of the geological conditions of the area affected by the infrastructure. These surveys have to be conducted before launching the tendering procedure.

Concerning the level of diligence required, the General Court indicated that the contracting authority must take into account the available technical data before launching the tendering procedure and the foreseeable evolution of these data (geological, demographical, socio-economical...) according to the duration of the execution of works in order to prepare the initial project

European Court of Justice – New Cases 2013

- Some interesting points of the judgments:
- Case T-235/11 (paragraph 101): The contracting authority has to ensure a level of quality of the initial project and adopt measures during the planning phase of the contract in order to minimise the risk
- Case T-235/11 (paragraphs 88 to 94): requirements of other administrations (at higher or different level) cannot be assessed as unforeseen circumstances as the contracting authority should act in a diligent way during the planning phase
- Case T-235/11 (paragraph 105): the simple extension of a work contract is not enough justification to extend the services contract through direct award

European Court of Justice – New Cases 2013

- Case T-540/10 (paragraph 83): a diligent contracting authority should take into account reasonably the potential social-economic and demographic evolution of the affected areas
- Case T-540/10 (paragraph 90): it was obligation of the contracting authority acting in a diligent way to ensure prior agreements with the different municipalities affected by the works. These agreements have to be done before the publication of the contract notice (paragraph 85 of case T-235/11)

Questions from CZ authorities (1)

„doměrky“ – u některých položek (např. zemní práce) není reálně možné předem přesně stanovit objemy prací. Je nutné stanovit postup pro posuzování oprávněnosti těchto víceprací, příp. omezit procentuálně, a dále stanovit, zda se tyto vícepráce započítávají do limitu 20%.

“Additional measured quantities” – for some items (e.g. earthworks), it is not possible in reality to specify the exact volume of works in advance. It is necessary to set up a procedure for assessing the legitimacy of these extra works, or limit these by a percentage of the total, and also specify whether these extra works fall into the 20% limit.

Questions from CZ authorities (2)

- vícepráce, jejichž potřeba se zjistila až po ukončení výběrového řízení či podpisu smlouvy s vybraným zhotovitelem, jsou pro nezbytné pro úspěšné dokončení díla, ale jedná se zejména o opomenutí investora/projektanta při přípravě zadávací dokumentace. Vzhledem k tomu, že projektant je ve většině případů externí společnost, bylo by možné považovat tyto vícepráce za nepředvídatelné při současném uplatnění záruky za vady díla na příslušném projektantovi? Dovolují si podotknout, že případné vyhlášení samostatného otevřeného výběrového řízení by naráželo na princip řádného hospodáře, protože stavba samotná by musela být zastavena a zakonzervována, což by přineslo značné dodatečné náklady, jejichž zadání by rovněž bylo problematické...
- *Extra works that were identified only after completion of the tender or signature of the contract with the selected contractor and that are necessary for a successful completion of the work, but are caused mostly by negligence/omission on the side of the investor/designer when preparing the terms of reference for the tender. As detailed design is usually performed by an external company, would it be possible to consider these extra works as unpredictable while claiming at the same time warranty for defects of work from the designer in question? It must be noted that a possible launching of a new tender would be contrary to the principle of due diligence and care as the construction itself would have to be stopped and preservation measures applied to construction site. This would lead to substantial additional costs while the tendering of these works would also be problematic.*



Questions from CZ authorities (3)

- vícepráce, které vzniknou z důvodu rozdílu mezi výkresovou částí projektové dokumentace a výkazem výměr (součást zadávacích podmínek pro výběrové řízení)?
- *Extra works caused by difference between the detailed design drawings from project documentation and the bill of quantities (part of terms of reference for the tender)?*

Questions from CZ authorities (4)

odpovědnostní závazky – jedná se o závazky, které vzniknou „pochybením“ na straně zadavatele, např. pozdní předání staveniště. Smlouvy o dílo s tímto počítají a obsahují i ustanovení pro výpočet takto vzniklých nákladů. Může toto být zahrnuto mezi způsobilé výdaje?

Liabilities resulting from duties and responsibilities – these would be liabilities caused by “fault” on the side on the contracting authority, for example delay in handing over of the construction site. Can this be included in eligible expenditure?

Questions from CZ authorities (5)

- návrhy úsporných opatření – ustanovení FIDIC (Red Book) počítají s tím, že zhotovitel může podat návrh na změnu, která má přinést úsporu nákladů, a dokonce mu za to přísluší část takto uspořených prostředků. Je vůbec možné při současném striktním výkladu zadávání veřejných zakázek tento institut využít
- *Proposed saving measures – according to FIDIC rules (Red Book), the contractor may propose a variation that would lead to cost reduction and should be rewarded by a part of the resources thus saved. Is it even possible to apply this mechanism at all taking into account the current strict interpretation of public procurement?*

Questions from CZ authorities (6)

- nové technologické postupy či materiály – dojde-li od doby schválení projektové dokumentace ke kvalitativní změně v oblasti technologických postupů či stavebních materiálů (případně jsou tyto technologie ještě levnější než původní řešení), je možné tyto využít a zadat např. přes JŘBU nebo je nutno striktně realizovat vysoutěžené řešení. Připomínám, že úprava projektové dokumentace je časově náročná záležitost a aktualizace každé z nich před vyhlášením výběrového řízení by tyto stavby zpozdila
- *New technological procedures or materials – if a qualitative change in the area of technological procedures or construction materials occurs after the approval of project design documentation (or if these technologies are even cheaper than the original solution), is it possible to use these and procure them using for example the negotiated procedure without publication, or is it necessary to implement strictly the tendered solution? It must be noted that modification of a project design documentation is a rather time consuming activity and updating of each one prior to announcing of tender would delay the constructions in question*

Questions from CZ authorities (7)

- sektorový zadavatel – byla-li stavba vysoutěžena zadavatelem v pozici veřejného zadavatele a v průběhu realizace stavby došlo ke změně statutu na sektorového zadavatele, je přípustné překročení limitu 20% dodatečných stavebních prací?
- *Sector contracting entity – in case the construction was tendered by a contracting entity in the position of a public contracting entity and throughout the construction phase, its status changed to sector contracting entity , is it acceptable to exceed the limit of 20% of additional construction works?*



Questions from CZ authorities (8)

Požadavky nadřízených organizací (např. MD ČR) na úpravu projektu – mohou být za nějakých podmínek vyhodnoceny jako nepředvídatelné?

Requirements of superior organisations (such as the Ministry of Transport of the Czech Republic) to modify the project – can these be under some conditions assessed as unpredictable?

Questions from CZ authorities (9)

- U projektů s historickými objekty se mnohdy naleznou např. zasypané prostory, které vyvolají změnu řešení konstrukce stavebního díla. Často přistupujeme k těmto odůvodněným vícepracem tak, že není dochována relevantní dokumentace objektu a nebylo možné předpokládat tento stav. Postupujeme správně?
- *With projects involving historic buildings, there are often e.g. filled in spaces found, requiring a change in the approach to building construction. We often approach such justified additional work like this: relevant building documentation has not been preserved and such conditions could not be expected. Is our approach correct?*

Questions from CZ authorities (10)

- Při realizaci projektů týkající se staveb také řešíme případy, kdy geologický průzkum v rámci projektové přípravy neodhalil skutečnosti, které je pan nutné řešit v průběhu provádění stavby. Např. skalní podloží. V souvislosti s touto skutečností vzniknou vícepráce, jejichž rozsah a způsob postupu prací je řešen na kontrolních dnech. Je možné takto vzniklé náklady považovat za způsobilé? (jsou nám známy podmínky ZVZ, nicméně nás zajímá pohled EK)
- *When implementing projects concerning construction, we also deal with cases where the geological survey performed during project preparation did not find facts that must then be handled during construction, such as bedrock. This is associated with additional work, the scope and method of which is discussed at site meetings. Can such incurred expenditures be considered eligible? (We know the conditions of the Public Contracts Act; nevertheless, we would like to know EC's opinion)*



Main Conclusions

Recent ECJ case law confirms DG REGIO approach on the strict interpretation of the exceptions to use negotiated procedure

Borden of proving lies on the Contracting Authority

Be aware of the high risk of financial correction



Děkuji velmi pěkně
Thank you
for your attention!

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