



**EMEA Conferences**

## NEW EU DIRECTIVES CONCERNING PUBLIC PROCUREMENT TRANSPOSED INTO ROMANIAN LAW STARTING MAY 2016

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# New case law of the ECJ on contract award procedures under the directives

Professor Sue Arrowsmith

Achilles Professor of Public Procurement Law and  
Policy, University of Nottingham

# Outline

1. Transparency in the tender documents
2. Evidence of economic and financial standing, and technical and professional ability
3. Exclusion for non-payment of tax/social security
4. Award criteria
5. Changes to consortium membership

To avoid overlap will not cover cases on use of third parties (sub-contracting etc)

# 1. Transparency in the tender documents

- Case C-27/15 *Pippo Pizzo v CRGT*

(2 June 2016) – contract for managing waste and cargo residues on board ships under Directive 2004/18



Exclusion for non-payment of fee to Supervisory Authority on Public Procurement



# 1. Transparency in the tender documents

- Procurement documents did not state the obligation to pay a fee
- This was contained in national legislation, and it was claimed that:
  - National legislation itself was not clear
  - Fee arose from “broad” judicial interpretation
  - Exclusion arose from judicial rule that the obligation was “automatically” included in the procurement documents

# 1. Transparency in the tender documents

- In these circumstances exclusion for non-payment was not permitted
  - ECJ pointed out that disadvantages tenderers from other Member States



# 1. Transparency in the tender documents

- Must all applicable legal obligations and other legal rules affecting participation in the contract, or performance, therefore be stated in the tender documents?
- No (ECJ)

# 1. Transparency in the tender documents

- So what must be included?
- General test: do not need to include “generally applicable legislative provisions of which a reasonably informed tenderer exercising ordinary care cannot be unaware”
  - Advocate General Campos Sánchez-Bordona; but recognised uncertainty



# 1. Transparency in the tender documents

- Need not specify e.g. obligations affecting performance that relate to taxes, environmental protection, employment protection provisions and working conditions: *Pippo Pizzo*
  - Art.27(1) said *may* specify

# 1. Transparency in the tender documents

- Specification more likely to be required when is a procedural requirement that could lead to exclusion  
*Pippo Pizzo*
- Clarity in the legislation is a relevant factor: *Pippo Pizzo*
  - So clarity of procurement legislation could be important?



# 1. Transparency in the tender documents

- AG in *Pippo Pizzo*: need not specify “basic conditions which, in the context of civil and commercial law, affect the legal capacity of individuals and companies”
- Rules specific to procurement are more likely to require specification in the documents than general legal rules?



# 1. Transparency in the tender documents

- But see Case C-423/07, *Commission v Spain*: tenderers cannot be expected to know national legislation relevant to interpreting the subject matter of the contract in the contract notice

# 1. Transparency in the tender documents

- If in doubt, spell it out – especially requirements for participation
  - Can be done by cross reference e.g. to legislation itself, *if* that legislation is clear?



# 1. Transparency in the tender documents

- Consequence of not including applicable legal obligations in the documents when required
  - Tenderer can be given time to correct the omission
  - Exception to usual rule that if tender documents provide for exclusion for non-compliance, there is no discretion not to exclude as stated in e.g. C-171/15, *Connexxion Taxi Services*
  - What if correction normally forbidden? Need to revisit procedure?
    - E.g. legal obligation to attach “case studies” of experience that might affect who receives invitation to tender



# 1. Transparency in the tender documents

- This will apply to obligations imposed by law
  - But what about other requirements (intended by the contracting authority) that are not sufficiently clear?
    - Can allow correction if this allowed under “usual” rules on correction?
    - If correction not allowed under usual rules e.g. missing case studies, must revisit the award procedure?

## 2. Evidence of technical and professional ability

- Case C-46/15, *Ambisig v AICP*

(7 July 2016) – IT systems contract under Directive 2004/18



- Considered a requirement for notarised declarations from previous clients certifying implementation of systems



## 2. Evidence of technical and professional ability

2004/18 Art.48(2)(a)(ii): evidence of technical ability may be furnished by, inter alia, a list of the principal deliveries effected or the main services provided in the past three years; evidence of delivery shall be given “where the recipient was a private purchaser, by the purchaser's certification or, failing this, simply by a declaration by the economic operator”

- When authority requires a certificate, a declaration can be supplied instead only when objective evidence shows “serious difficulty” prevents obtaining a certificate
  - ECJ suggested authorities cannot *permit* economic operators merely to use self-declarations – but this is wrong?
- Notarisation cannot be required



## 2. Evidence of technical and professional ability

- How relevant is this case under Directive 2014/24?

“May” require “references” to show experience (Art.58(4)); may require list of deliveries (Annex XII point 2(a)(ii))?

- Art.59 *requires* purchasers to accept self-declarations - *but* subject to exceptions, when *Ambisig* remains relevant
- No reference to “failing that” – but proportionality might *sometimes* require acceptance of other evidence when references cannot be obtained, including self-declaration when is no other evidence?

## 2. Evidence of technical and professional ability

- How relevant is this case under Directive 2014/24?

“May” require “references” to show experience (Art.58(4)); may require list of deliveries (Annex XII point 2(a)(ii))?

- Is still prohibited to require notarisation
- Wording “may” require references indicates clearly that authority can choose to accept self-declarations if it wishes



## 2. Evidence of economic and financial standing

Case C-225/15, *Domenico Politanò*

(8 Sept 2016) - tendering procedure for authorisation for bookmaking activity



- Suggested justified under TFEU to require certificates from TWO banks
  - Though for national court to decide



## 2. Evidence of economic and financial standing

- Can this be required under the directives?
  - 2014 Public Contracts Directive Art.60(3) and Utilities Directive Art.80: where economic operator valid reason not to provide, must be permitted to provide other documents that authority considers appropriate
  - Less discretion than in *Domenico Politanò*?
    - Emphasised lack of harmonisation, and wide discretion in relation to gambling
- Can this be required in procurement cases under TFEU?
  - Not clear
    - No harmonisation; but case may turn on gambling context

### 3. Exclusion for non-payment of tax/social security

- Case C-199/15, *Ciclat v Consip*  
(10 November 2016)



Contract for cleaning and other building services under Directive 2004/18

- Tenderer excluded as consortium member had failed to pay tax at time of participation – although had corrected by time of award
- - Concerned same Italian legislation as *Libor*, requiring exclusion for default above certain tiny amounts



### 3. Exclusion for non-payment of tax/social security

- Key points:
  - Wide discretion in applying discretionary exclusions
  - Does not violate the directive to require exclusion for such small amounts
    - Confirms what indicated in *Libor* (which directly only concerned the TFEU but referred to the directive in its reasoning)
    - Same will apply under 2014 directive as based on same proportionality principle?



### 3. Exclusion for non-payment of tax/social security

- Key points:
  - May exclude for non-payment at start of award procedure – and can refuse to reinstate where corrected by the end. Indeed *cannot* reinstate where this is contrary to the tender documents)
  - Same applies under 2014 directive as does not affect discretion to set time for applying the exclusion – Art.57(4) final para only means that cannot exclude *if not in default at that time?*

### 3. Exclusion for non-payment of tax/social security

- Key points
  - May exclude based on a certificate of non-payment from the national social security authorities which the contracting has sought on its own initiative from those authorities.
    - Irrelevant has not been warned that certificate being sought (so can check current status)
    - However, this may not apply where the economic operator does not have an opportunity to check its payment status at any time with the relevant national authorities



## 4. Award criteria

Case C-6/15 *TMS Dimarso*  
(14 July 2016)



Contract for housing survey under Directive 2004/18

Disclosed: PRICE 50%  
QUALITY 50%



## 4. Award criteria

Application not disclosed:

PRICE 50%

QUALITY 50%

High

Satisfactory

Low

# Award criteria

- The established principles:
  - Must *formulate and disclose* the award criteria and (usually) weightings
  - Must *disclose* any sub-criteria if used
    - No condition that could have affected preparation of tenders?
  - Must *disclose* any weightings for the sub-criteria when they could have affected preparation of tenders
  - Sub-criteria and their weightings cannot be set after opening tenders



# Award criteria

- Rules disclosed to tenderers cannot generally be changed
  - But can this be done if the authority gives sufficient time to adapt tenders before submission deadline, and the change is not material?
    - ECJ case law is not conclusive (and UK case law allows)



# Award criteria

- Must *method* for applying the award criteria, weightings etc be disclosed?
  - *Dimarso*

## 4. Award criteria

- *Dimarso*: it is not necessary to disclose: “the method of evaluation applied by the contracting authority in order to effectively evaluate and assess the tenders in the light of the award criteria of the contract and of their relative weighting” (para.27)



## 4. Award criteria

- However, is this true in all cases? Or must such material be disclosed *when it could have affected tenders* i.e. is treated the same as weightings of sub-criteria?
  - Latter was view of AG Mengozzi para.47 of the Opinion
  - Also view of Commission in letter to Danish Government March 2016
    - Must disclose e.g. conversion of price into points
  - Is the better view

## 4. Award criteria

- *Dimarso*: Applying the method chosen for quality without disclosing it possibly unlawful as could have effect of changing the disclosed weighting, by reducing the importance of quality against price
  - See paras 33-35 of judgment and paras 55-56 of Opinion of AG Mengozzi
  - Was for national court to decide whether did in fact have the effect of changing weightings



## 4. Award criteria

- Is use of a “scale” permitted in principle
  - *Dimarso*: yes, provided that it does not alter the disclosed rules (para.36)
- If the scale in the present case had been disclosed, would it be acceptable on the basis that the way in which the 50% is to be applied is clear and so not “altered” by the method of application?
  - Yes (my view)
  - Or can it be argued that the 50% weighting and stated method are inconsistent with each other?

## 4. Award criteria

- Belgian court in *Dimarso* assumed in its reference that disclosure of sub-criteria, method etc must be in call for competition or initial tender documents
- Is this true – or is it sufficient if disclosure occurs in sufficient time for preparing tenders?



## 4. Award criteria

- *Dimarso: method* cannot be established after opening of tenders
  - i.e. applies the same rule already established regarding setting sub-criteria and their weightings
- *Dimarso*: however, there is an exception where it is not possible to establish method before tenders for “demonstrable reasons”

## 5. Changes to consortium membership

Case C-396/14, *MT Højgaard v Banedanmark*  
(May 24 2016)



Contract for construction of a railway line by negotiated procedure with call for competition

Bidding consortium reduced from two to one because of insolvency between selection (all 5 qualified selected) and initial tenders



## 5. Changes to consortium membership

- Allowing changed consortium to continue does not involve breach of equal treatment where:
  - The remaining economic operator by itself meets the stated conditions for participation; *and*
  - Continued participation does not mean that other tenderers are placed at a disadvantage
    - AG Mengozzi: this could be the case if the decision to participate alone was made when – as in this case – the tenderer already knew the number of tenderers and how its tender compared with others

**Thank you!**  
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*Raluca Sochimis - Law Office*