



EMEA Conferences

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

26 JANUARY 2017 - BUCHAREST

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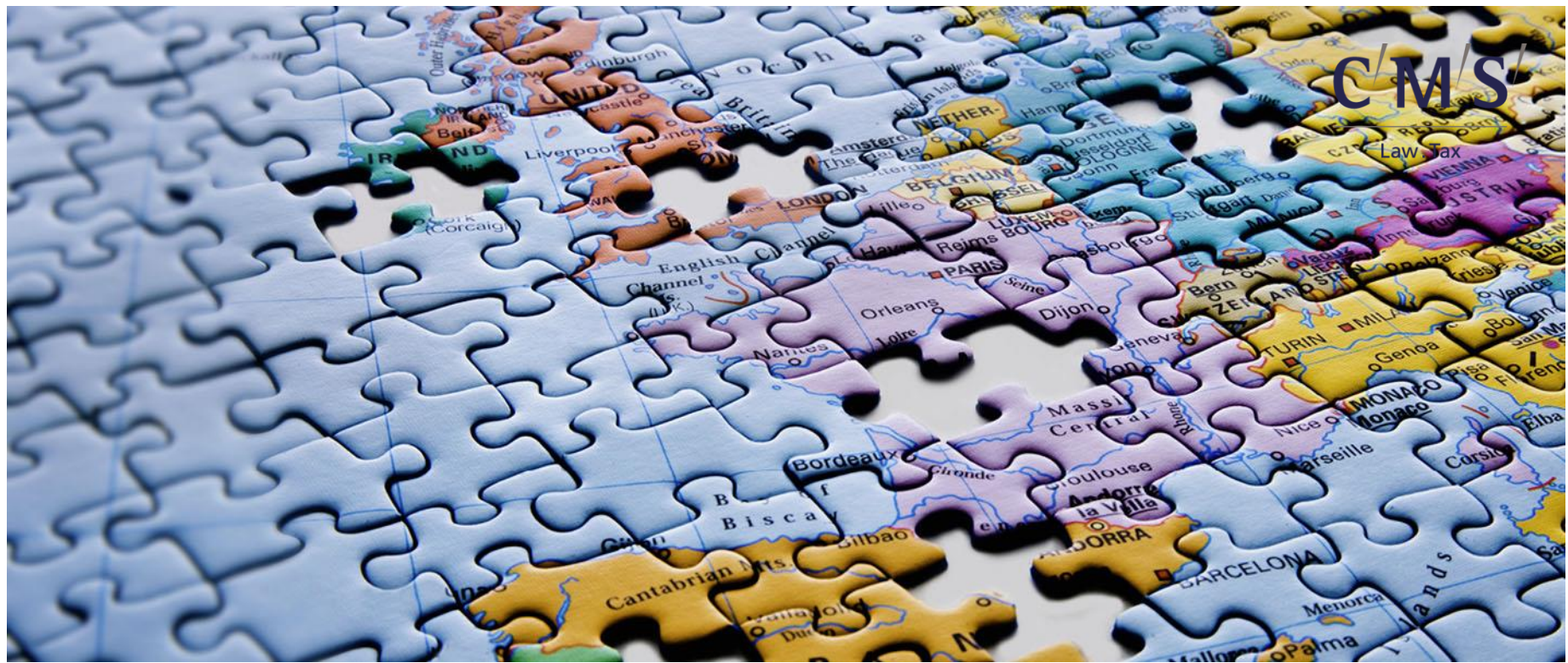
C/M/S/
Law . Tax

Subcontracting and consortia within the framework of public procurement contracts

Bucharest, 26/01/2017

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1. Introduction



Overview

- I. Introduction
- II. Possibility to rely on the capacity of third entities
 - 1. Principle
 - 2. Restriction
- III. Subcontracting according to the directives and the case-law
 - 1. Aim: facilitate the involvement of SMEs in the public procurement market
 - 2. Possibility to exclude or limit subcontracting?
 - 3. Listing of the subcontractors
- IV. Changes within a Consortium or change of subcontractor between the selection and the award fase

Introduction

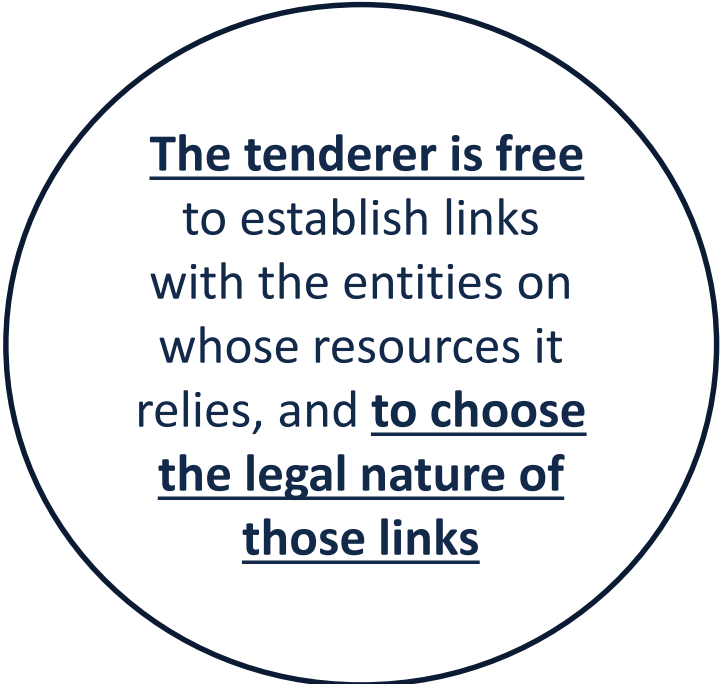
Subcontracting

- The Supplier will remain solely liable vis-a-vis the contracting authority (unless national law provides otherwise)
 - Two different contractual relationships
- Back-to-back or an independent agreement?

Consortium

- Joint and several liability
- There will only be 1 contract between the contracting authority and the Consortium

Introduction



The tenderer is free
to establish links
with the entities on
whose resources it
relies, and **to choose**
the legal nature of
those links

Article 63, 1, last alinea of Directive 2014/24:

“Where an economic operator relies on the capacities of other entities with regard to criteria relating to economic and financial standing, the contracting authority may require that the economic operator and those entities be jointly liable for the execution of the contract.”

Introduction - subcontracting

- The relativity of the subcontracting agreement
 - **Creation** of the contracts
 - **Applicable law?** Make public procurement law applicable in the subcontracting agreement if back-to-back contract - otherwise, common law is applicable
 - **Implementation problems** (back-to-back clause will often not suffice to govern the way in which parties have to deal with problems of implementation)
 - **Price and payment of the price** (paid-if-paid clause?)
 - **Termination of the contract**

Introduction - subcontracting

- Back-to-back clause:
Specify to what extent
the principle should be
applied:
 - Only for the technical
provisions (prescribed
by the specifications)?
 - Only for the
administrative
formalities?
 - Or both?
- The provision of a back-to-back
clause will often not suffice to apply
all the rights and obligations of the
main contract to the subcontracting
agreement



Introduction consortium agreement

- An authority cannot preclude consortium bids, and must be open to them.
- The purpose of a Consortium Agreement is to specify in respect of the Project the relationship between the Parties, in particular concerning:
 - the organisation of the work between the Parties,
 - the management of the Project and
 - the rights and obligations of the Parties concerning inter alia liability, Access Rights and dispute resolution.
- Parties are jointly liable as the consortium is the contractor

Restrictions under competition law...

- The commission views consortium agreements as restrictive agreements, as they inevitably set prices and other commercial requirements for performing specific transactions.

- Could any of the parties to the agreement have independently submitted a bid in the public procurement procedure in question?
 - YES, such a bidder can in principle not be party to an agreement to submit a joint bid
 - NO, the consortium is valid
 - a favourable individual exemption decision only if they can prove that they fulfil all tender criteria jointly and demonstrate that the joint-bid submission results in some benefits to consumers.



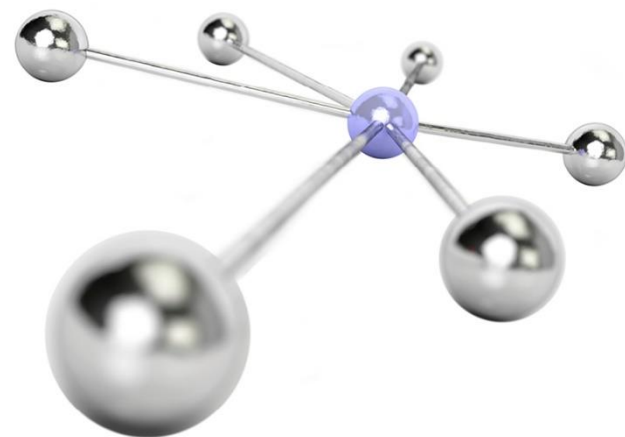
II. The ability to rely on the capacity of other entities

Introduction - capacity of third parties [other entities]

- Third parties **are not** members of the Consortium
- Third parties could be subcontractors but not always
- Third parties have no contractual relationship with the contracting authority

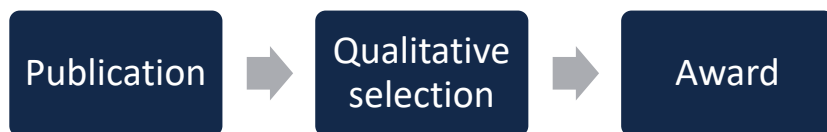
Introduction:

Capacity of other entities and qualitative selection



The ability to rely on the capacity of other entities

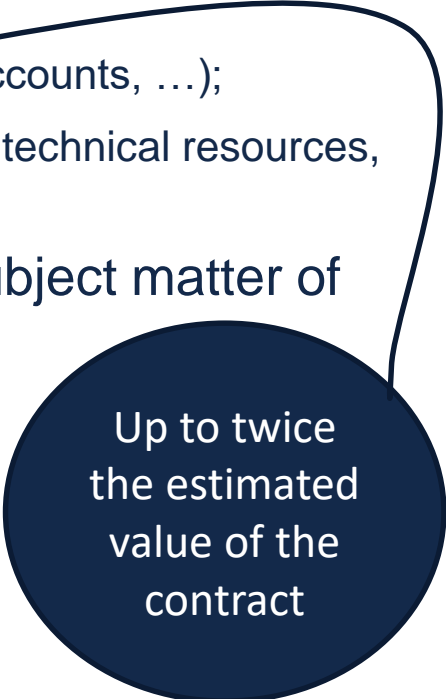
- Qualitative selection - situation:



- Purpose? Verification of the suitability of the candidates/tenderers (financial and economic standing and technical or professional qualifications)
- = Check on the "curriculum vitae" of the Tenderer

The ability to rely on the capacity of other entities

- The contracting authority asks for the evidence he/she wants:
- Selection criteria might relate to:
 - (a) suitability to pursue the professional activity;
 - (b) economic and financial capacity (e.g. turnover, annual accounts, ...);
 - (c) the technical and professional qualifications (human and technical resources, ...) .
- All conditions relate to and are in relation to the subject matter of the contract.



Up to twice
the estimated
value of the
contract

The ability to rely on the capacity of other entities

Legal basis, origin and case-law



The ability to rely on the capacity of other entities

- Ability to rely on the capacity of other entities, as provided for in Article 47 of Directive 2004/18 and Article 63.1 of Directive 2014/24
- Article 63.1 of Directive 2014/24:
*“With regard to criteria relating to economic and financial standing as set out pursuant to Article 58(3), and to **criteria relating to technical and professional ability** as set out pursuant to Article 58(4), an economic operator may, where appropriate and for a particular contract, **rely on the capacities of other entities**, regardless of the legal nature of the links which it has with them.”*

The ability to rely on the capacity of other entities

- Article 63.1 of Directive 2014/24:

*With regard to criteria relating to the **educational and professional qualifications as set out in point (f) of Annex XII Part II, or to the relevant professional experience**, economic operators may however only rely **on the***

capacities of other entities where the latter will perform the works or services for which these capacities are required.

Where an economic operator wants to rely on the capacities of other entities, it shall prove to the contracting authority that it will have at its disposal the resources necessary, for example, by producing a commitment by those entities to that effect.

The ability to rely on the capacity of other entities: origin

- Origin?
- Ballast Nedam - case law:
 - Judgement pending for the Belgian Council of State
 - BN referred in their tender to the works that were carried out by their subsidiaries (separate legal persons)
 - Did not have the required legitimisation
 - Minister's decision = BN could not be regarded as the contractor
 - Council of State asked a preliminary question



The ability to rely on the capacity of other entities



Court of Justice

Ballast Nedam Judgement

14.04.1994

Doc. C-389/92

*“in the assessment of the criteria with which a contractor must comply when examining an application for legitimisation by the dominant legal person of a group, account may be taken of the **companies which are part of this group**, insofar as the legal person concerned can demonstrate that it **will have at its disposal the resources** of those companies which are necessary for performing the contracts.”*

→ BN should have been selected, even though it did not have the necessary legitimisation

The ability to rely on the capacity of other entities

- Reasoning of the Court of Justice?
 - Free market + competition
 - According to the directive, a part of the contract could be subcontracted out.
 - According to the directive, combinations and consortia could put in tenders without assuming a specific legal form.
 - Does not affect the suitability of the tenderer

The ability to rely on the capacity of other entities



Hof van Justitie

Holst Italia Spa Judgement

02.12.1999

Doc. C-176/98

Is the BN jurisprudence limited to references to other companies belonging to the same group ? **NO, but subject to conditions**

“... A service provider (...) may rely on the capacities of other entities, **regardless of the legal nature of the relations existing between them**, so long as **he can in fact have the resources of those entities at his disposal**, which are necessary for the performance of the contract. *It is up to the national court to assess whether that proof has been furnished in the principal proceedings.*”

The ability to rely on the capacity of other entities



Hof van Justitie

Holst Italia Spa Judgement

02.12.1999

Doc. C-176/98

Regarding the condition:

*“It is for the national court to assess the relevance of the evidence submitted for this purpose. Directive 92/50 does not allow in that assessment **that certain evidence be excluded in advance or be based on an assumption** that the service provider has the resources of another entity at his disposal solely on the grounds that he belongs to the same group of companies.”*

The ability to rely on the capacity of other entities



Court of Justice

Swm Construzioni 2 Spa Judgement
10.10.2013
Doc. C-94/12

*“ It follows from the foregoing that, on the basis of Directive 2004/18, the **capacity of several economic operators may be combined** to meet the minimum capacity requirements specified by the contracting authority, provided that it is demonstrated to that department that the bidder or tenderer who invokes the capacity of other entities will indeed have the resources of those entities at his disposal which are necessary for the performance of the contract.”*

The ability to rely on the capacity of other entities

- **SO**, if the Contracting authority asks for 5 references, it is sufficient that, for example:
 - The tenderer, for example, has 2 references
 - The first entity has 2 references
 - The second entity has 1 reference

So long as a commitment is added
- **SO**, even if a tender is submitted as a consortium, not all members of the consortium have to meet all the minimum conditions (qualitative selection)
 - ↔ Grounds for exclusion

The ability to rely on the capacity of other entities

- Then, completing the European Single Procurement Document (ESPD):
 - The ESPD must also contain the details of the entities on whose capacities a candidate or tenderer relies.
 - In this case, the candidate or tenderer will have to make sure that the adjudicating department or contracting entity receives its **own ESPD together with a separate ESPD** with the relevant information for each of the entities on which he relies.

The ability to rely on the capacity of other entities

The capacity of third parties can be relied on, regardless of the legal relations with them.

If [a candidate/tenderer] wishes to rely on the capacity of other entities:

For the tenderer	For the contracting authority
Add proof that you really can have [the resources of other entities] at your disposal, and clearly indicate this in your candidacy/tender. Add separate ESPD	Do not select any candidate or tenderer that does not submit the commitment.



Limitations on the ability to rely on the capacity of other entities

Case-law of the Court of Justice



Limitations on the ability to rely on the capacity of other entities



Court of Justice

Swm Construzioni 2 Spa Judgement
10.10.2013
Doc. C-94/12

- Work might show particularities that require a certain capacity that cannot be obtained by putting together the smaller capacity of several companies
- The contracting authority may require one economic operator (or a limited number of economic operators) to have the minimum level of the capacity concerned.
- EXCEPTIONAL situation

Limitations on the ability to rely on the capacity of other entities

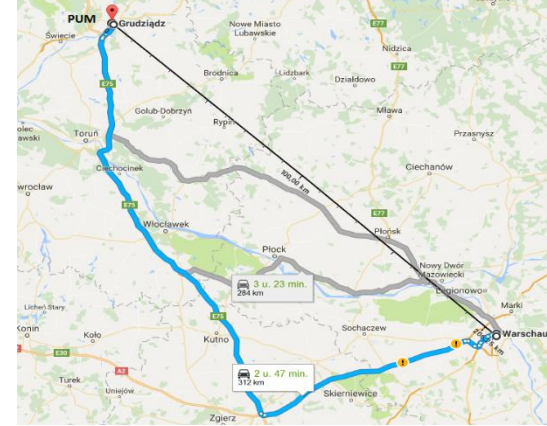


Court of Justice

Partner of Apelski Dariusz Judgement
07.04.2016
Doc. C-324/14

- Contract for the entire mechanical cleaning of the streets in Warsaw (removal of ice, sweeping and cleaning the streets)
- Partner submits a tender (and adds references from Y)
- Involvement of Y: advisory services, training employees and solving problems.
- Contracting authority requests clarification and thinks that the knowledge and the experience of Y could not be made available because that company would not personally and actually take part in the implementation of the contract concerned.

Limitations on the ability to rely on the capacity of other entities



Court of Justice

Partner of Apelski Dariusz Judgement
07.04.2016
Doc. C-324/14

- A contract for the mechanical cleaning of the streets of the city of Warsaw
- It is not possible to rely on the capacity of other entities merely in order to meet the requirements (you must actually have it at your disposal).
- *“Furthermore, it might be that in special circumstances the **skills** possessed by another entity required for the implementation of a certain contract **might not be possible to transfer to the tenderer**, given the nature and the objectives of a particular assignment. In such circumstances the successful tenderer may therefore rely on those skills only if the other entity directly and personally participates in the performance of the contract in question.”*

Limitations on the ability to rely on the capacity of other entities



- When it comes to an exceptional project for which a certain capacity is necessary
- Possibility to require that 1 company reaches a minimum level (or a limited number of companies possess the required capacity) or to require that the other entity also carries out the assignment.
 - Safer to give reasons for this (especially in view of the judgement of the Court of Justice of 14 July 2016)!





III. Subcontracting according to the directives and the case-law

Making access to public contracts easier for economic operators

Access by SME's and direct payments



The access to public procurement for SME's

Division into lots (recital 78, directive 2014/24/EU):

- *“Member States should remain free to go further in their efforts to facilitate the involvement of SMEs in the public procurement market, by extending the scope of the obligation to consider the appropriateness of dividing contracts into lots to smaller contracts, by requiring contracting authorities to provide **a justification for a decision not to divide contracts into lots** or by rendering a division into lots obligatory under certain conditions. With the same purpose, Member States should also be free to provide mechanisms for direct payments to subcontractors.”*

The direct payments

- Article 71.3 of Directive 2014/24 specifies:

*“Member States may provide that at the request of the subcontractor and where the nature of the contract so allows, the contracting authority **shall transfer due payments directly to the subcontractor** for services, supplies or works provided to the economic operator to whom the public contract has been awarded (the main contractor). Such measures may include appropriate mechanisms permitting the main contractor to object to undue payments. The arrangements concerning that mode of payment shall be set out in the procurement documents.”*

Possibility to exclude or limit subcontracting?

Jurisprudence of the Court of Justice



Possibility to exclude or limit subcontracting?

- Based on the case law regarding the possibility to rely on the capacities of third entities, **subcontracting can in principle not be excluded.**
- **BUT**, an exemption can be made for
 - the “critical tasks” and
 - The substantial works

The requirement that the contractor should perform a certain part of the contract himself

- Can a contracting authority demand in the specifications of a public contract that the contractor to whom the contract is awarded should carry out a certain percentage of the work covered by the contract with his own resources?

“The economic operator must carry out at least 25% of the work covered by the contract with his own resources.”

The requirement that the contractor should perform a certain part of the contract himself



Court of Justice

Wroclaw Judgement

14.07.2016

Doc. C-406/14

– Reply of the Court:

*“A contracting authority **may not stipulate** in the specifications of a public contract that the contractor to whom the contract is awarded should carry out a certain percentage of the work covered by the contract with his own resources.”*

Note: OK to prohibit recourse to subcontractors for essential parts of a contract (describe those essential elements !) and if the contracting authority was not in a position to check the situation of the subcontractor

The requirement that the contractor should perform a certain part of the contract himself

- Note: new Article 63, 2° of the Directive 2014/24 :

“In the case of works contracts, service contracts and siting or installation operations in the context of a supply contract, contracting authorities may require that certain critical tasks be performed directly by the tenderer itself or, where the tender is submitted by a group of economic operators as referred to in Article 19(2), by a participant in that group.”

The requirement that the contractor should perform a certain part of the contract himself

- Article 63, 2° of Directive 2014/24 speaks only of contracts for services but on the basis of the case law of the ECJ, this also seems possible for contracts for works and supplies
- Jurisprudence will have to interpret the notions of “*critical tasks*” and “*essential parts*”

The requirement that the contractor should perform a certain part of the contract himself

Conclusion:

- In principle, never insert a clause requiring the contractor to undertake X% of the work himself.
- It is possible to require the tenderer to carry out critical tasks himself - but then the tasks must be specified.



Listing subcontractors



Listing the subcontractors

- Article 71.3 of Directive 2014/24 on Public Procurement Contracts specifies:

*“In the procurement documents, the contracting authority **may** ask or may be required by a Member State to ask the tenderer **to indicate in its tender any share of the contract it may intend to subcontract to third parties and any proposed subcontractors.**”*

- SO: (i) either the contracting authority has discretion or (ii) the candidate or tenderer is obliged to list the subcontractors.

Listing the subcontractors

- Must the proposed subcontractors actually perform the contract as well or can it be changed?

Initial draft of Directive 2004/18	The text of Directive 2004/18
“any <u>designated</u> sub-contractors”	“any <u>proposed</u> subcontractors”

- The European Commission wished to give this amendment a certain degree of flexibility (nominating subcontractors definitively might constitute a barrier to the submission of a tender)

Listing the subcontractors

- **CONCLUSION?** Change of subcontractors is possible
- But frequently, a typical clause in the specifications
 - That no other subcontractors will be used than those that have been proposed
 - That if the tenderer wishes to change the subcontractors, the contracting authority must approve this (in writing)





IV. Changes within a Consortium or change of subcontractor between the selection and the award phase

The possibility for a company to submit a tender, even if not selected

The possibility for a company to submit a tender, even if not selected

Or a selection is made and the capability of the subcontractor is taken into account, but the subcontractor withdraws after the selection and before the submission of a tender...

Can a tender be submitted by a legal person other than the one which was selected? For example: a consortium of companies is selected, but in the end only one of those companies wishes to submit a tender...

The possibility for a company to submit a tender, even if not selected



Court of Justice

MT Højgaard A/S Judgement

24.05.2016

Doc. C-396/14

- Two Consortia submit a request for participation:
 - Combination consisting of MT Højgaard and Züblin (hereinafter referred to as: “Combination 1”) submit a request for participation
 - Combination consisting of Per Aarsleff and E. Phil og Søn A/S (hereinafter referred to as: “Combination 2”)
- One of the firms in Combination 2 (E. Phil og Søn A/S) went bankrupt after the selection, but before the submission of a tender;
- The contracting authority decided that only Aarsleff could submit a tender.
- Combination 1 disputed that decision.

The possibility for a company to submit a tender, even if not selected



Court of Justice

MT Højgaard A/S Judgement

24.05.2016

Doc. C-396/14

Preliminary question: *“Must the principle of equal treatment, as described in Art. 10 of Directive [2004/17], read in conjunction with Article 51 thereof, be interpreted in such a way that in a situation such as this it would prevent a contracting authority from awarding a contract to a tenderer that did not take part in the pre-selection and which consequently was not pre-selected?”*

The possibility for a company to submit a tender, even if not selected



Court of Justice

MT Højgaard A/S Judgement

24.05.2016

Doc. C-396/14

*“Strict application of the principle of equality of treatment of tenderers, as expressly laid down in Article 10 of Directive 2004/17, in conjunction with Article 51 of that Directive, would in essence mean that **only preselected economic operators as such may submit tenders** and the contract may only be awarded to them.”*

The possibility for a company to submit a tender, even if not selected



Court of Justice

MT Højgaard A/S Judgement

24.05.2016

Doc. C-396/14

*“A contracting authority **does not violate that principle** if it allows one of the two economic operators that were part of a consortium of companies, invited as such to submit a tender, to take over from that consortium after its dissolution and participate in the award procedure through negotiations for a public contract, **provided that it can be proved that this economic operator independently meets the conditions described by that authority and the competitive position of the other tenderers does not suffer as a result if that economic operator continues to participate in the procedure.**”*

The possibility for a company to submit a tender, even if not selected

– Note

- Open communication to the contracting authority
- Unclear whether the contracting authority, on the basis of the principle of equality, still has the option to exclude the tender of the tenderer that was not selected.
- This looks like being the case (it seems to be the responsibility of the company to submit a request for participation in good time) <> Principle of Fairness

The possibility for a company to submit a tender, even if not selected

- Case before the Belgian Council of State:
 - **No change of subcontractor in the course of the procedure - all the more so because this was not communicated**

Council of State, 27 February 2015, no. 230.360, CVBA Inno.com

- Procedure in 2 phases
- In the selection phase: appeal to one subcontractor;
- In the tender: change of subcontractor;
- The contracting authority had based itself on the capacity of the subcontractor in order to select the candidate;
- It excluded the tender with another subcontractor → OK

The possibility for a company to submit a tender, even if not selected

Conclusion:

- Contracting authority can still give a company the opportunity to submit a tender, even if it was not selected.
- Open communication to the contracting authority seems in any case to be necessary



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