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How to challenge an award of a contract according to the EU Directives in ten different European countries.

Association Française pour le Droit de la Construction

INTRODUCTION

Dear Mr President, distinguished guests, ladies and gentlemen, dear friends

First of all, the President of the French Association of Construction Law, Professor Périnet-Marquet, who couldn't come, apologizes for not being with us today.
This was the easiest part of the message.
The hardest part is that he asked me to answer the four cases our friend has submitted to us…

It is already not that easy to do it in French, so as you know my very bad English, you will understand that it took me quite some courage if not, a whole unconsciousness to do it in Shakespeare's language.

No doubt, following the example of the British burning Joan of Arc for a reason that has not historically been revealed yet (she couldn't speak her executioners' language well enough), you will have the right to reserve the same fate to me.

Also, already laid on the pyre of the "Directive on Services in the internal Market", I rather light myself the fire of our French Public Procurement Contracts Code, which is supposed to enlighten this Directive since its transposition, and I rather deliver you, floored by the flames, the answers you have pulled out from me.

The Directive n° 2004/18/EC entered into force on April 30, 2004 and had to be transposed by the member States into their national law at the latest on January 31, 2006.

In France, the transposition of the Directive mainly takes place through two texts which implementation depends on the nature of the contracting authorities.

I / The French Public Procurement Contracts Code created and modified by several successive decrees.

This Code applies to contracts awarded by :

1° The State and its public establishments other than those having an industrial and commercial character ;

2° The regional or local authorities and the local public establishments.

in order to answer to their needs with regard to works, supplies or services.

With regard to public contracts, the Directive has been successively and completely transposed in France by :

- Decree n° 2005-601 of May 27, 2005 modifying Decree n° 2004-15 of January 7, 2004 relating to the Public Procurement Contracts Code.
- Decree n° 2006-975 of August 1, 2006 relating to the Public Procurement Contracts Code.

II / The Order n° 2005-649 of June 6, 2005 relating to contracts awarded by public or private bodies not governed by the Public Procurement Contracts Code.

This text sets out the rules applicable to contracts awarded by contracting authorities other than those governed by the Public Procurement Contracts Code, namely bodies governed by private or public law having legal personality and established for the specific purpose of meeting general interest needs, not having an industrial or commercial character, and that comply with one of the following requirements :

a/ either the activity is financed, for the most part, by a contracting authority governed by the Public Procurement Contracts Code
b/ or management is supervised by a contracting authority governed by the Public Procurement Contracts Code
c/ or, more than half of the members of the administrative, managerial or supervisory board are appointed by a contracting authority governed by the Public Procurement Contracts Code.

The Order also applies to the Bank of France, the Institute of France, the French Academy etc.

These two documents, the Public Procurement Contracts Code and the Order of 2005, transpose the principles of the Directive in a more or less restrictive way, including the principle of competition.

The Order of 2005 gives broader discretion to contracting authorities than the Public Procurement Contracts Code.

As the exact character of the contracting authority has not been specified in each of the cases, we assumed it concerned in each case entities governed by the French Public Procurement Contracts Code, and not by the Order of 2005.

Case 1 – The floors

1. **Did the Contracting Authority act in accordance with the Public Procurement Contracts Code?**

Several hypotheses have to be considered in this case to determine whether the contracting authority did comply with the Public Procurement Contracts Code, and more precisely, whether it did follow the rules of competition it had itself laid down for this consultation.

Hypothesis 1: it clearly transpires from the consultation documents that tenderers had to provide a price for product A **AND** product B. As tenderer n° 1 only provided a price on product A, his bid was incomplete and as such did not comply with the consultation requirements. Therefore, the bid had to be rejected by the contracting authority.

On the other hand, tenderer n° 2 had provided a price for each of the products so his bid was compliant. According to article 17 of the Public Procurement Contracts Code, "The prices of the provisions to which the contract relates are either unit prices applied to the quantities actually delivered or performed, or contract prices applied to all or part of the contract regardless of the quantities". Therefore, the formula used by the contracting authority for the calculation of the price of the contract is correct.

In this hypothesis, the procedure took place in accordance with the Public Procurement Contracts Code.

However, a reservation may be expressed relating to the fact that the public entity did not specify the total floor area that had to be provided. Indeed, the floor area was eventually liable to change the price of each covering per square meter. Moreover, if the unsuccessful candidate manages to prove that the fact he could not know the public entity's precise needs on this point, seriously affected the context of his bid, he may eventually put forward a breach of the principle of transparency as well as a breach of equality between tenderers, and this would make the procedure illegal.

Hypothesis 2 : it clearly transpires from the consultation documents that tenderers had the choice to make a bid for product "A" **OR** product "B or a similar product", as evidenced by the only one blank space in the pricing form. Accordingly, the bid of tenderer 1 was valid whereas the one of tenderer 2 was not, and had to be eliminated according to article 53 of the Public Procurement Contracts Code.

Therefore, the contracting authority could not in any case take into account in this hypothesis the two answers given by tenderer 2 to choose the cheapest. Acting that way, he has breached the equality between the tenderers ; hence the procedure violates one of the principles set out by article 1 of the Public Procurement Contracts Code. Therefore, the procedure is deemed illegal.

Hypothesis 3 : the real expectations of the contracting authority did not clearly transpire from the consultation documents which were drafted in a contradictory manner. This hypothesis is plausible since the request of price was obviously formulated for product A AND product B or similar ; however, the writing of the bid schedule seemed to point out that only one of the two prices had to be mentioned.

Hence, the lack of transparency due to this inconsistency in the consultation documents has created a breach of equality and has played against the unsuccessful tenderer.

2. **Which measures would be appropriate if the rules in the directive were not complied with?**

In France, tenderers who consider they have been unfairly evicted at the conclusion of the competition procedure governed by the rules of the Public Procurement Contracts Code, have various avenues available to appeal the decision and eventually to claim compensation for the damage suffered by being evicted.

- If the contract between the contracting authority and the tenderer to whom the contract has been awarded has not been signed yet, the unsuccessful tenderer may bring a pre-contractual emergency proceeding. The purpose of this emergency proceeding is to sanction non-compliance by the contracting authority with the requirements of advertising and competition within the procedure for the award of the public contract. At the conclusion of such a procedure, if it appears that the contracting authority has effectively infringed its duties relating to the advertising and the competition and that besides, this is likely to have caused the tenderer a loss, the judge may :
    - Request the contracting authority to comply with its duties; he may in particular order a new examination of the applications
    - Suspend the award procedure or the performance of the contract
    - Cancel all decisions relating to the procedure for the award of the contract.

- If the contract between the contracting authority and the tenderer to whom the contract has been awarded has already been signed, the tenderer may, within two months from notification or publication of the decision contested, request from the administrative judge the cancellation of a decision or an administrative act relating to the contract, by introducing a claim for abuse of power. This is the usual administrative action claim for cancellation. However, the tenderer may also bring a contractual claim before the judge, and request from him the cancellation of the contract itself.

- Irregularities that have affected the award of a contract may also be the subject of a compensation request from one or several tenderers feeling unfairly evicted. In this way, the tenderer/petitioner who considers that the rejection of his application or his bid by the contracting authority is not justified may claim for compensation if he demonstrates that the procedure for the award of the contract is illegal and that he had very significant chances to be declared winner.

3. **Would the contractor be awarded any kind of compensation? In the affirmative, please state the legal "frame of the compensation" and "the amount awarded".**

In this case, insofar as, as demonstrated above, the contracting authority has not followed the rules of the Public Procurement Contracts Code, the procedure that has led to the eviction of tenderer 1 is deemed illegal.

Besides, being the only other tenderer and having very likely made a bid in compliance with the consultation requirements, he had significant chances to be awarded the contract.

Thus, he is entitled to request compensation for the damage he suffered.

If the tenderer had significant chances to obtain the contract, he may receive compensation, not only for the cost of preparing his bid, but also for his entire loss-of-income.

The fact that a company has managed to maintain its turnover or even increase it later, due to the award of other contracts, does not prevent full compensation for the tenderer's loss-of-income.

A tenderer seeking to obtain compensation for his loss-of-income must provide all accurate and pertinent elements justifying the amount claimed. Thus, the judge will not accede to a request unless the petitioner produces accounting documents, showing the net margin that the performance of the contract would have generated. Generally speaking, the calculation of the loss-of-income is assessed according to documents provided by the company evicted, but also taking account of the benefits that one can usually expect from such contracts.

In this case, the percentage retained by the judge for the calculation of the loss-of-income suffered by the tenderer following his eviction will probably be around 13 %. Indeed, transpiring from documents relating specifically to the activity of the petitioning company and not of a similar company, this rate gives a more precise idea of the loss effectively suffered due to the rejection, assuming that its previous margins were effectively related to contracts with the same nature for equivalent services provided.

The fact that the company did not obtain any further contract within the respecting period could also constitute a damage that to be compensated if the company manages to prove the existence of a direct causality link between his rejection and a possible loss of credibility on the market, explaining this absence of order.

However, it seems that the absence of order is due to the fact that the company has not undertaken any step to obtain one. So, the company can not request any compensation for a damage resulting from its own inaction. The company's confidence in obtaining the litigious contract does not justify its inaction. Its contribution to the competition procedure does not guarantee the award of the contract and does not constitute any certainty nor any assured right to be awarded the contract. The fact that the company has not undertaken any display to obtain other orders constitutes an imprudent behaviour for which the company can not request any compensation to the public entity.

It should be noted that in France the petitioner does not have any duty to undertake any action to minimize his loss.

Case 2 – The waterfront

1. Did the Contracting Authority act in accordance with the Public Procurement Contracts Code?

One of the obligations made to the contracting authority was to comply with the consultation requirements that it has set out itself. In this case, the contracting authority has itself specified that no bid containing major reservations would be considered.

Hence, insofar as the bid of the tenderer who was awarded the contract contained a reservation in respect of winter measures necessary for the dredging works, and as these works took an important place in the contract, we can consider that it was a major reservation, even though the contracting authority was in a position to evaluate the economic effect of this reservation.

As a consequence, the bid did not comply with the consultation requirements and should have been rejected according to article 53 of the Public Procurement Contracts Code. By examining even though the bid, and by awarding moreover the contract to the tenderer who made this bid, the contracting authority has infringed the rules of the Public Procurement Contracts Code. Hence, the procedure is deemed illegal.

2. **Which measures would be appropriate if the rules in the directive were not complied with?**

The action claims the unsuccessful tenderer may exercise to contest his rejection and the validity of the procedure are the same than those abovementioned. Besides, we would like to specify that the contracting authority can also, according to the rules of administrative law, within two months from notification of its decision to award the contract on the basis of a non-valid bid, carry out the withdrawal of this decision since the contracting authority admits the illegality. Then, it may carry out a new examination of the bids.

3. **Would the contractor be awarded any kind of compensation? In the affirmative, please state the legal "frame of the compensation" and "the amount awarded".**

Here again, if the Administrative Court admits that the unsuccessful tenderer has been rejected at the conclusion of an illegal procedure, this tenderer may receive compensation for the damage suffered by his rejection, all the more since he was obviously likely to be awarded the contract. He will have to demonstrate this damage by proving the elements abovementioned.

In the case in point, the damage characterised by the loss-of-income must be calculated on the basis of the company’s offer amount after deduction of the costs to carry out the contract. On the other hand, the arguments developed by the contracting authority in favour of a downwards revision of this damage must be taken into account. Indeed, if the contracting authority has, according to the documents given concerning the financial results of the company for the previous year, tangible elements that enable to prove that the assessment of such a margin is not realistic, the contracting authority can perfectly put forward these elements.

However, the argument according to which contracts requiring outside work or offshore work always include an unforeseeable risk likely to reduce the benefits expected can not be taken into account to assess the damage suffered. Hence, the existence of such a risk is not clearly proved and its potential consequences on the benefits that the tenderer would have made by performing the contract can not be calculated from tangible data.

Besides, assuming that such a risk could systematically exist and could be measured, it is obvious that the contractor would have taken it into account while presenting his bid. Hence, it would not have been logical to reflect a second time this risk by a downwards assessment of the margin expected.

Case 3 – The carpets

1. **Did the Contracting Authority act in accordance with the Public Procurement Contracts Code ?**

The contracting authority seems here to have committed a double infringement to the Public Procurement Contracts Code.

First of all, if, according to article 45 of the Public Procurement Contracts Code, the contracting authority can ask the economic operators to justify quality certificates with their applications, this possibility is only conceivable within the framework of a contract which object would justify such measure. In the case in point, as the service only concerned a standard service without any particularity in its object, it does not seem justified that the contracting authority requires such a certificate ….

On the other hand, if the documents required did not include a certificate delivered by an independent organization, but merely information or documents that enable to assess the experience of the tenderers, their professional, technical, financial abilities, this requirement remains legal and valid according to the Public Procurement Contracts Code.

However, if the contracting authority decides to set out minimum levels of ability, it can only be required from the tenderers minimum levels of ability in link with and proportionate to the object of the contract. The documents, information and the levels of ability required have to be specified in the tendering procedure or if not, in the consultation documents.

Moreover, insofar as the selection criterion of the most economically advantageous tender was not only the price, the contracting authority could not be content with indicating that the decision of award would be made on the basis of an “overall estimate of the tender”.

It had, according to article 53 of the Public Procurement Contracts Code, to base its choice on various criteria which vary in accordance with the object of the contract, including the operating costs, the bid's technical merit, its innovative nature, its environmental friendliness, its performance in terms of occupational integration of populations in difficulty, the time for completion, its aesthetic and functional features, after-sales service and technical support, the delivery time and date, and the price of the provisions and other criteria may be taken into account if they are related to the object of the contract.

The contracting authority has to specify in the consultation documents the weighting of these criteria. Hence, by not acting this way, the contracting authority has not complied with the principle of transparency.

Furthermore, concerning the technical specifications used by the contracting authority for the material to provide, it transpires from the consultation documents that the material suggested by the tenderer chosen does not comply with the technical specifications initially required, the contracting authority could not in theory choose this bid. Acting this way, the contracting authority has not followed the rules it has set out itself. Hence, the procedure is deemed illegal.

2. **Which measures would be appropriate if the rules in the directive were not complied with?**

Same answer than for the 2 previous cases.

3. **Would the contractor be awarded any kind of compensation? In the affirmative, please state the legal "frame of the compensation" and "the amount awarded".**

In this case too, the unsuccessful tenderer may claim compensation for the damage suffered by his rejection at the conclusion of an illegal procedure. In this case, the procedure was indeed illegal.

The tenderer claims compensation here for his loss-of-income on the basis of a valid calculation, documents provided in support. So, the judge shall in theory be enable to give right to his request, provided that the tenderer proves he had significant chances to be awarded the contract. Yet, it is this point that the contracting authority contests. The argument of the public entity is likely to challenge the grant of any compensation by the tenderer. Two hypotheses shall be distinguished :

- if the requirements of the contracting authority according to the applications documentation did not comply with the Public Procurement Contracts Code, the contracting authority can not later put forward the fact that these documents have not been provided, to contest the chances that the tenderer would have had to be awarded the contract.
- In the other side, if its requirements were limited to the only information the contracting authority could regularly require from tenderers, the contracting authority may claim for the insufficiency of such information or for the fact that these information aimed at disqualifying the application to contest the compensation request up to the loss-of-income, insofar as the tenderer had no significant chance to be awarded the contract.

<u>Case 4 – The cleaning</u>

1. **Did the Contracting Authority act in accordance with the Public Procurement Contracts Code?**

Only two avenues enable the contracting authority to legally cancel a competition procedure : either the procedure is declared “infructueuse” (unfruitful), or it is declared “sans suite” (without any following). The implementation of both procedures requires nonetheless to be justified by the collection of conditions for which the contracting authority will have to motivate its decision.

A procedure may be declared “infructueuse” (unfruitful) when no application or no bid has been presented or when only inappropriate bids in the sense of 3° of II of article 35, or when irregular or unacceptable bids have been presented.

In the case in point, nothing indicates that the bids made would have been inappropriate. Indeed, it is without any real reason that the contracting authority has estimated that the tenderer who has submitted the most economically advantageous bid would not be able to fulfil his obligations.

Hence, the procedure could not legally be declared “infructueuse” (unfruitful).

A procedure may also be declared “sans suite” (without any following) if this decision is justified by reasons of general interest. This condition did not seem to be fulfilled in this case, the fact the contracting authority estimates without any real reason that the tenderer who has submitted the most economically advantageous bid would not be able to fulfil his obligations, does not consist of a reason of general interest.

As a consequence, the cancellation of the procedure appears to be unjustified and as so illegal. Therefore, the cancellation constitutes an infringement to the rules of public order.

On the other side, the arguments further put forward by the contracting authority, ie the necessary general reorganization of this public entity, are liable to constitute a reason of general interest justifying a statement “sans suite” (without any following). Moreover, within the framework of a litigious procedure aiming at the cancellation of the litigious decision, the administrative judge may proceed to a substitution of motivation to finally declare legal the decision of cancellation.

2. **Which measures would be appropriate if the rules in the directive were not complied with?**

In this case, the action claims open to tenderers are the compensatory claim and the claim for abuse of power to request the cancellation of the decision putting an end to the procedure. For want of contract signed at the conclusion of the procedure, the pre-contractual emergency proceeding and the cancellation request before the judge are not admissible.

3. **Would the contractor be awarded any kind of compensation? In the affirmative, please state the legal "frame of the compensation" and "the amount awarded".**

If the contracting authority manages to justify any reason of general interest that has led to the cancellation of the procedure, the tenderers shall not be able in theory to be compensated.

However the judge may find appropriate to award them compensation up to the cost spent for the preparation of their bid.

On the other hand, if it transpires from the facts that the procedure has illegally been interrupted and that the judge refuses to carry out the substitution of motivation abovementioned, the winner may indeed request compensation for his loss of benefit, and the other tenderers will be allowed to request compensation for the amounts spent to draw up their bid.

Concerning the calculation of the compensation that the winner may ask for, it is calculated on the basis of the beneficiary margin that the tenderer could expect by performing the contract. All the documents evocated could be taken into account by the judge: decomposition of the price of the bid, comparison with the average margins of the previous years for equivalent contracts, knowing that once again the documents directly related to the activity of the company shall prevail for this calculation on those related to the general industrial activity.

The contracting authority claims that the bid is abnormally low (article 55 of the Public Procurement Contracts Code).

According to article 55 of the Public Procurement Contracts Code, a bid abnormally low can be rejected by reasoned decision after the contracting authority requested whatever written clarification it considers appropriate and after verifying the explanations provided.
Explanations relating, inter alia, to the following aspects may be taken into consideration:

a) The methods used to manufacture the products, the manner of providing the services, the construction processes;

b) The exceptionally favourable nature of the conditions of implementation which the bidder enjoys;

c) The originality of the project.

d) The specifications related to the conditions of work in force where the services are undertaken.

e) Gaining eventually a help from the State by the bidder.

If the tenderer manages to prove that one of the above conditions is fulfilled, the argument of the contracting authority will not be taken into account by the judge.

CONCLUSION

A last scream, before rejoining the sky of the European Union.
In France, without meaning to call into question the main principles of competition and if we struggle to give fair answers as well as legally accurate to daily questions, such as those that bring us together today, three points regarding architectural and urban services are particularly important :

1. Anonymity

We wish the rules of anonymity, in particular regarding the competition, were abolished, because we consider that the architectural services can not be treated like a product. We plead for a personal view of the architectural project, led besides by our conception of intellectual property rights.

2. Project Definition Contracts

Because the continuity of the architectural and urban act matches, according to us, the general interest led by public decision-makers, we would like Project Definition Contracts to enable to entrust into a same team, without any new competition procedure, the program of an operation and its architectural project.

3. Project Management Contracts

In the same spirit, we set a high value upon negotiated procedures of Project Management Contracts where the choice of a project is as important as the price, contrary to calls for tenders which focus on the price.

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