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LIANAKIS CASE STUDY

**LIANAKIS AND OTHERS V DIMOS
ALEXANDROUPOLIS AND OTHERS**

ECJ ruling on lawful award criteria and stipulating weighting factors and sub-criteria post-publication of tender documents.



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Case C-532/06: Lianakis and Others v Dimos Alexandroupolis and Others

Summary

In 24 January 2008 the European Court of Justice (ECJ) handed down a preliminary reference clarifying two important points relating to the obligations of contracting authorities in relation to award criteria. The proceedings arose by way of a challenge in the Greek courts to a tender process for the award of a services contract by a Greek local authority under Directive 92/50 coordinating the procedures for the award of public service contracts (the Services Directive).

The Greek court asked the ECJ to clarify under what circumstances a contracting authority may subsequently stipulate weighting factors and sub-criteria to be applied to award criteria stated in the contract notice.

In its ruling, the ECJ made two important findings:

- 1 A contracting authority cannot apply weightings and sub-criteria to award criteria set out in tender documentation unless those weightings or sub-criteria have been previously brought to the tenderers' attention; and
- 2 A contracting authority cannot take account of a tenderer's experience, manpower, equipment or ability to perform the contract by an anticipated deadline as part of the award criteria. Such criteria can only be taken into account at pre-qualification stage.

Background

This ruling arose from the disputed award of a contract for urban planning services by a Greek contracting authority utilising an open procedure. The contracting authority had referred to the following as award criteria in the contract notice and placed them in the following order of priority:

- Bidder's proven experience;
- Bidder's manpower and equipment; and
- Bidder's ability to complete the project by the anticipated deadline, together with its commitments and professional agenda.

During the evaluation process, the evaluation team decided that they would evaluate each of the above criteria on the following basis with the following weightings and sub-weightings:

- Bidder's proven experience (60%) – evaluated by reference to the value of projects previously completed eg:
 - 1 between €500,000 and €1 million = 6 points;
 - 2 between €1 million and €1.5 million = 12 points
 - 3 ... (up to a max score of 60 points for experience on projects worth over €12 million)
- Bidder's manpower and equipment (20%) – evaluated by reference to the size of the teams proposed for the project eg:
 - 1 1-5 persons = 2 points
 - 2 6-10 persons = 4 points
 - 3 ... (up to a max score of 20 points for a team of 45 persons or more)
- Bidder's ability to complete the project by the anticipated deadline (20%) – evaluated by reference to the value of current commitments eg:
 - 1 Current work worth less than €15,000 = 20 points
 - 2 Current work between €15,000 and €60,000 = 18 points
 - 3 Current work between €60,000 and €100,000 = 16 points
 - 4 ...(down to a min score of 0 points for work worth more than ?1.5 million)

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Two unsuccessful bidders challenged the award of the contract before the Greek courts arguing that the successful consortium had been awarded the contract on the basis of weighting factors and sub-criteria stipulated after the publication of the tender documents. The case came before the ECJ by way of a preliminary reference from the Greek court.

ECJ ruling

The ruling first considered the lawfulness of using criteria relating to experience, manpower and ability to complete the project as award criteria. The ECJ noted that while the Services Directive did not in theory preclude the examination of the tenderers' suitability and the awarding of a contract from taking place simultaneously, the two procedures are nevertheless distinct and are governed by different rules.

It affirmed the basic principle that qualitative selection criteria are to be evaluated on the basis of economic and financial standing and technical capability whereas award criteria are limited to the lowest price or most economically advantageous tender.

The evaluation of the most economically advantageous tender excludes criteria linked to evaluating a tenderer's ability to perform the contract. The ECJ concluded that by evaluating criteria linked to the experience, qualifications and ability to properly perform the contract, the Greek contracting authority had erroneously laid down award criteria which were more appropriately characterised as criteria for qualitative selection.

The Court next considered whether a contracting authority is permitted to subsequently set down weighting factors and sub-criteria in respect of award criteria published in the tender documents. The ECJ noted that procurement rules require that tenderers are made aware at the time they prepare their tenders of the existence and scope of all elements taken into account by a contracting authority in identifying the economically most advantageous offer as well as their relevant importance.

Moreover, contracting authorities are bound to place tenderers on an equal footing throughout the tender procedure by adequately publishing the criteria and conditions governing the award of a contract. Accordingly, the ECJ concluded that a contracting authority cannot subsequently apply weighting rules or sub-criteria in respect of published award criteria which it has not previously brought to the tenderers' attention in the tender documents.

Effect of decision

This ECJ decision in relation to publication of sub-criteria and weightings is important as it underlines the strict duty upon contracting authorities to act as transparently as possible in all aspects of the tendering process.

The Court was careful to distinguish a previous finding of the Court in Case C-331/04 – ATI EAC and Others v ATCV Venezia SpA and Others – where it had ruled that sub-weightings could be developed subsequently to the publication of the tender documents subject to certain conditions being met. The Court noted that in the ATI EAC case, the sub-criteria had been published beforehand and it was only the sub-weightings that were subsequently stipulated whereas in the present case both the sub-criteria and weighting factors were subsequently developed.

The Court's findings in relation to the distinction between pre-qualification criteria and award criteria accords with previous case law from the Court, particularly Case 31/87 Beentjes; Case C-19/00 SIAC Construction; Case C-513/99 Concordia Bus Finland; etc.

Whilst this ruling was made on the basis of the repealed Services Directive (92/50/EEC), the obligations placed upon contracting authorities on the basis of this decision are just as valid under the current procurement directives (ie Directive 2004/18 and Directive 2004/17). It is notable that there is now an obligation under the new procurement directives to publish weightings for award criteria in advance in the tender documentation unless it is not possible in which case the criteria must be stated in descending order of importance.

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