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Public Tenders: The Participant's Right to Provide Explanations When Potential Grounds for Its Exclusion Arise - The Participation Right of Affiliated Entities

In January 2019, the Greek Supreme Administrative Court was called to issue a decision in response to a petition to suspend the enforcement of a decision issued by the public authority responsible for the examination of pre-judicial recourses concerning the awarding of public procurements (AEPP, as its per Greek acronym). The under-examination issue concerned the award of a public contract (e.g. for the construction of a part of Greek National Highway) to a Consortium which was in breach of a provision of **Directive 2014/24/EC** (transposed by **Law 4412/2016**) on public procurement.

In particular, the underlying Directive, **article 57 par.4** (transposed by **art.73par.4**), provides potential grounds for excluding an economic operator from participating in a public tender; particularly when matters arise in relation to a participant's professional honesty, solvency and reliability that might jeopardize the integrity of the tendering process and are against of EU principles e.g. secrecy of public tenders, equality of treatment of participants and transparency in procedures.

More specifically, in the present case the petitioner invoked that the selected consortium was in breach of article 57 par.4 of Directive 2014/24/EC, since an administrative fine has been imposed to it for anti-competitive behavior in past public tenders. The Court (**Decision No. 40/2019**) decided in favor of the company that filed the petition. However, the most critical issue lies in the decision's rationale which clarifies the legal right of a participant to provide explanations when such matters arise. It was the first time that the Greek Supreme Administrative Court was called to face this legal issue and implemented exactly "*the letter of the Law*", while in the past other Greek public authorities had adopted a more conservative approach to the implementation of art. 57 par.6 of the Directive, which sets out the following:

"Any economic operator that is in one of the situations referred to in paragraphs 1 and 4 may provide evidence to the effect that measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion. If such evidence is

considered as sufficient, the economic operator concerned shall not be excluded from the procurement procedure.

For this purpose, the economic operator shall prove that it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct, clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and taken concrete technical, organizational and personnel measures that are appropriate to prevent further criminal offences or misconduct.

The measures taken by the economic operators shall be evaluated taking into account the gravity and particular circumstances of the criminal offence or misconduct. Where the measures are considered to be insufficient, the economic operator shall receive a statement of the reasons for that decision”.

The abovementioned provision has been transposed by **art.73 par.7 of Law 4412/2016**, however up to the issuance of the Decision 40/2019, there were issues concerning its implementation. The Greek Supreme Administrative Court by its decision eradicates any doubt with respect of its enforceability and establishes the right of a participant to provide solid evidences and remedy any potential ground that might lead to its exclusion from a public tender. Last but not least, according to the Council of State, both the aforementioned Greek Law and EU Directive deprive this right (to provide solid evidences and remedy any potential exclusion ground) from those economic operators who have been condemned by a final decision for any of the grounds mentioned above.

The participation right of affiliated entities

The above analysis provides us with the opportunity to further examine a specific case of a potential ground that might lead to the preclusion of an economic operator from participating in a

public tender. The legal issue that is under-examination, is whether or not the simultaneous participation of two undertakings linked by a relationship of control or affiliated to one another in a public tender, should lead to their “*a priori*” preclusion.

Prima facie, in the scenario where there is a simultaneous participation of two affiliated entities jointly or independently in a public tender, this act could be construed as an infringement of the general EU principles, particularly such as the principle of proportionality, of safeguarding the public interest, of amplifying competition etc.

However, both EU courts (**e.g. Case C-538/07**) as well as Greek public authorities (**e.g. Decision no. 42/2017 issued by Hellenic Single Public Procurement Authority**) have decided that an “*a priori*” exclusion of related companies from participating in public tenders constitutes a strict and absolute measure which is against the effective implementation of the EU laws since this could considerably limit competition within the EU. The EU jurisprudence has set out that such measure would have the opposite result by adulterating the validity of public tenders instead of achieving the pursued objective of securing the principles of equal treatment and transparency. The main argument is that the existence of a relationship between two tenderers doesn’t mean by definition that these are influenced by one another. Such an assumption would be infringing the EU principle of proportion, since it would lead to the participant’s beforehand preclusion, without even having the opportunity to prove that there is no real risk of cooperative practices between them which could jeopardize the smooth conduct of the tender process. Moreover, this absolute measure would lead to the radical decrease of participants’ number in tender processes.

Furthermore, AEPP (**Decision no.116/2017**) issued a decision supporting that in case a third party invokes violation of the principle of effective competition by any such related entities

participating in a tender, such third party should be able to produce concrete evidence of the level and kind of dependence between them and evidence that supports their allegations. The fact alone that they have a shareholding relationship does not constitute just by its existence sufficient reason to exclude them from the process without identifying if their relationship has affected in a legally adverse way the behavior of each of them during the tendering procedure.

As a conclusion, a strict provision that would preclude related undertakings from participating in a tender process, would be contrary to the aforementioned EU principles and would impede competitiveness. Instead, a more moderate and conservative approach should be implemented i.e. on the one hand, a third party making such allegations, should be in a position to prove that a control relationship between the participants exist by providing authorities with concrete and solid evidences and on the other hand, related entities should provide authorities with sufficient evidence that their offers are not affected by one another.

It is therefore, concluded both in case of an anti-competitive case and in the latter case of affiliated entities, examined hereinabove, that participants' right to prove that an exclusion ground does not exist or has been alleviated is undoubtable in any case and its' exercise is in absolute accordance with the EU principles of public tenders (equality, transparency, effective competition etc.).

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