

Bidder's right to challenge decision on winner of customer-funded procurement (3/10/19)

In an earlier article, we explained why the customer in a public procurement procedure has no appeal against the Procurement Regulator's decision, and we said only a bidder has this right. Yet there is an exception to this rule because in certain cases a bidder cannot go to the administrative courts and challenge the procurement commission's decision on the procurement winner.

The legal framework

This exception applies to any procurement procedure governed by the Cabinet of Ministers' Regulation No. 104 of 28 February 2017, *Procurement procedures on customer-funded projects* ("Rule 104") and not by the Public Procurement Act or the Public Service Providers Procurement Act.

Rule 104 governs the procurement procedure where the customer finances contract performance out of his own funds or from EU policy instruments or any other foreign aid and national co-financing (with exclusions prescribed by section 6 of the Public Procurement Act). An example of such co-financing is finance awarded from the Cohesion Fund.

Paragraph 2 of Rule 104 provides that this rule applies to any funding recipient who, by decision of an EU funding institution, any other foreign aid intermediary, a manager, or a person who is a customer under the Public Procurement Act (the institution in charge), receives financing for contract performance from EU policy instruments or any other foreign aid, as well as from a central or local government budget, except for financing awarded as compensation. Rule 104 is not so detailed as the Public Procurement Act, and its goal is to create a procedure for entering into contracts for supplies of goods, services and building work that is as flexible as possible.

The initial impact assessment report (annotation) to Rule 104 states that the decision in favour of a flexible procedure for awarding the right of contract and for efficient use of financing was made on the grounds that funding recipients covered by draft rules are neither central or local government agencies nor companies partly or wholly owned by such government agencies, nor any other public persons, but mainly traders (whose shareholders are none of those persons and whose business culture is about achieving efficiencies rather than observing procedures always aimed at transparency and equality) and associations. Thus, in this case the lawmaker has laid down a different standard for observing transparency, equal treatment and other principles prescribed by the Public Procurement Act, giving priority to the funding recipient's obligation to ensure the financing is used efficiently.

Scope for litigation

If a procurement procedure in the case of Rule 104 is different from the one prescribed by the Public Procurement Act, then it is also beyond the scope under the Act for challenging that procurement procedure in administrative proceedings. In other words, Rule 104 makes no provision for going to court to resolve any dispute arising within a procurement organised by the finance recipient. Aware of attempts to challenge the results of such a procurement procedure, the administrative courts will reject any petition concerning a subject matter like this.

A different mechanism of control

While Rule 104 does not expressly create a mechanism for controlling the procurement procedure, it provides that the institution in charge should assess whether the bid chosen by the funding recipient (in the absence of a contract) or the contract price is reasonable and consistent with an arm's length price of the goods, services or building work. The annotation to Rule 104 says a control mechanism is absent because the means prescribed by other pieces of legislation (such as the Petitions Act) might be used in this case. Thus, a supplier who believes the funding recipient has failed to choose the most economically advantageous tender may inform the institutions in charge, who should consider such information in making a decision about the reasonableness of the bid chosen by the funding recipient or of the contract price.