

Customer's right of appeal against Procurement Regulator's decision (2/8/19)

To complete a public procurement procedure, the customer makes a decision to award a contract to the winner. Other bidders may appeal this decision to the Procurement Regulator. If the regulator's commission finds that the customer has committed a material breach, the commission will prohibit him from entering into a procurement contract. Can the customer disagree with the commission's findings and appeal its decision to the courts?

The issue

The Public Procurement Act and the Public Service Providers Procurement Act both provide that the commission's decision may be appealed to the Administrative District Court in accordance with the Administrative Procedure Act. Interpreting this rule grammatically leads to the conclusion that the right of appeal has been granted also to the customer. However, this interpretation is incorrect and contrary to the purpose and meaning of the rule for the following reasons.

If the procurement procedure is governed by provisions of public law (i.e. both Procurement Acts), then the customer's activities, such as planning and announcing public procurement, developing the procurement procedure rules, receiving and evaluating the bids, selecting the best bid and announcing the contract award decision, take place in the area of public law. And the customer's decision as to which bidder wins the contract is an administrative instrument.

The Procurement Regulator is a direct government agency subordinated to the Ministry of Finance (MOF). The Public Procurement Act provides that the regulator is a functionally higher institution for performing the function associated with the power to examine submissions regarding statutory procurement procedures and breaches. So a relationship of subordination arises between the customer and the regulator in the area of procurement. This means that the customer and the regulator are a lower and a higher institution within a single administrative process.

Consistent case law

According to the Supreme Court's case law, the customer and the regulator both represent the public at large and further the public interest in using national revenue efficiently by acquiring goods or services necessary for performing its public functions. While it may seem to the customer that the regulator's decision is against him, the difference of interest is merely apparent. As stated above, the common and sole interest is to make the best use of national revenue, and a higher institution in procurement proceedings (and any other administrative proceedings) rectifies a lower institution's errors. Clearly, a higher institution's views on the correct content of the decision may differ from a lower institution's views, but that is exactly the purpose of the hierarchical structure of government: a higher institution may revise a lower institution's decision to ensure the lawful operation of the government as a whole.

Trader status

The above fully applies also to the customer, who is a legal entity of private law (Ltd, plc, national plc) and

not recognised as an institution within the classic meaning of the Administrative Procedure Act. Indeed, public persons' companies do not come within the institutional system of government, yet the law imposes obligations on public persons' companies that are equivalent to those imposed on public persons.

The Supreme Court's case law provides a finding that in the case of public procurement, the customer and the regulator are elements of a single administrative mechanism, and so the customer cannot invoke a legitimate interest in challenging and appealing the regulator's decisions just like private persons participating in the procurement procedure. In providing public services, a legal entity of private law acts in the public interest, and it is not, therefore, possible for such a subject's interests in the area of procurement to conflict with the interests of the regulator as a functionally higher institution. Such a person is not fully comparable with a trader that pursues solely its commercial interests, because its special status in terms of rights and powers differentiates it from other traders.

Conclusion

The right of appeal against the regulator's decision has been granted to a person that has a subjective interest in the particular procurement procedure, i.e. the bidder. The customer does not have this right. Any disagreement between the customer and the regulator cannot be resolved through the MOF. The Supreme Court finds that although the regulator is part of the government and subordinated to the MOF, the Public Procurement Act ensures that the regulator is independent from the instructions and orders of higher government agencies in dealing with submissions regarding procurement procedure breaches. So the regulator's decision binds the customer and must be carried out. However, if the customer rectifies any errors committed within the procurement procedure but still achieves the same outcome, this is not considered a failure to carry out the regulator's decision.