

Conclusions of the summary report on the courts' public procurement-related jurisprudence

The scope and aim of the examination by the jurisprudence-analysing working group of the courts' public procurement-related adjudication was affected by the circumstance that in the previous years legislative changes and amendments had been quite frequent in the field of public procurement law. Last time Act No. CXLIII of 2015 on Public Procurement ("2015 PP"), which entered into force on 1 November 2015, replaced Act No. CVIII of 2011 on Public Procurement ("2011 PP"), which entered into force on 1 January 2012. Under the 2015 PP no jurisprudence had yet developed by the time the working group was set up in December 2015 and, consequently, no jurisprudence under that PP could be examined by the working group. Therefore the scope of the jurisprudence-analysis had to be confined to areas which were either identically regulated under the former and the subsequent public procurement Acts, or raised practical problems, or required interpretation and could serve as guidance under the new regulation as well.

Therefore, in examining the various questions, the working group analysed not only the provisions and the related jurisprudence of the 2011 PP but also, depending on the nature of the issue, the jurisprudence of the pre-2011 PP regulation. The examination covered first-, second- and Curia instance judgments given in completed cases. As to the procedural time limits, the working group examined compliance with the time limits and identified problems that had arisen in that context. The following issues were covered by the analysis: principles, suitability/non-suitability, validity/invalidity of a call for tender and a tender, conflict of interests, conformity of domestic law grounds for exclusion with EU law, supplementation, request for information, ability to become a client, business secret, procedural time limits and compliance with the time limits in remedy proceedings, joinder of cases and problems arising in connection with joint proceedings, the experiences of the lawsuits, procedural time limits and compliance with the time limits in contentious/non-contentious proceedings, and contract invalidity in the various types of lawsuits.

As to these issues, the following findings have been made:

Principles

Whereas formerly, due to the short and straightforward regulation, the tendency was to include the principles in general clauses, as a result of a change in the nature of the regulation the principles have become incorporated in the detailed rules, consequently regulation via general clauses has almost entirely disappeared.

Suitability/Non-suitability

The courts have developed general principles, interpreted the suitability rules of the public procurement Acts, and provided guidance for law-appliers in setting forth the lawful suitability requirements and by specifying the public procurement boundaries and limits of this legal institution. In addition to elaborating the principles, the courts' further important task was to define the legal contents of legal and metajuristic concepts in the context of various verification manners and thereby to promote the lawful application of the law.

Conflict of interests

In case of a suspicion of a conflict of interests, the possibility of proving the contrary

must, in line with EU law, be ensured by the tender-issuer by requesting for supplementation or additional information. Upon such a request, however, evidence-taking is only possible on issues other than on-merits, therefore the application of several detailed rules in the context of conflict of interests will probably raise interpretation-related questions in the course of the application of the new Act.

Business secret

Tender-issuers attempted, from time to time, to classify data as business secret even where legally it was not possible. As of 1 July 2013 the 2011 Kbt., as amended by Act No. CXVI of 2013, introduced changes in this respect, as it declared that in public procurement proceedings, too, access to documents on grounds of alleged business secret can only be denied in a limited scope, namely where disclosure would be disproportionately injurious for the tender issuer's business activities.

Ability to become a client

In examining an applicant's ability to become a client, the ability of 'another interested person' to become a client was a widely disputed issue. Whether 'another interested person' is, or is not, to be regarded as being *concerned* or having a *rightful interest* and whether client rights are to be conferred on such a person can only be determined on a case by case basis, following a detailed and careful examination of the facts. In case of remedy requests, the existence of an *interest* must be verified and examined by the adjudicating authority separately in respect of each element of the request.

The working group has established that the legal means needed to comply with the short time limits set forth in the 2011 Kbt. (and in the 2015 Kbt.) were ensured, the questions of interpretation that arose in connection with this frequently changing body of law were answered by the courts, and some of the answers were even incorporated into the new Kbt. According to the findings of the jurisprudence-analysing working group, Hungarian courts monitored and followed the case law of the European Union and applied that case law in their adjudicative activities.