

SCHOUPS

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The signing of offers for public procurement contracts and the Council of State: the saga continues

In two recent high-profile decisions relating to the same case, the Council of State pronounced on the (im)possibility of regularising a defective signature within the framework of the maintenance of an offer after expiry of the commitment period.

1. Council of State 22 March 2016, no. 234.189

This case related to the awarding by the Flemish Region of a European public procurement contract for works on the "N31 in Bruges. Renovations of the intersection with the N351 Bevrijdingslaan kmp 6.022". It fell within the scope of application of the Public Procurement Law of 15 June 2006 and its implementing decrees.

On 19 December 2014, the Flemish Region awarded the contract by means of call for tenders to THV A (composed of NV A' and NV B'). The second-ranked regular tenderer was THV B. This tenderer filed a demand for suspension against the award decision due to UDN ("uiterst dringende noodzakelijkheid" = extremely urgent necessity) on 27 January 2015. By decision no. 230.345 of 26 February 2015, the Council of State suspended implementation of the aforementioned award decision.

With reference to the suspension decision of 26 February 2015, the Flemish Region withdrew its award decision of 19 December 2014 by decision of 3 March 2015.

After the withdrawal of the award decision, the Flemish Region asked THV A for additional price justifications with regard to specific items. After having gathered advice from ATO [the "Algemene Technische Ondersteuning" (General Technical Support) department of the Government of Flanders], the Flemish Region decided that the price justifications in question could be accepted.

In the meantime, the commitment period of 240 calendar days expired on 1 July 2015. On 5 October 2015, the Flemish Region sent a request for maintenance of the offer to THV A. On 7 October 2015, the latter consented to maintain its offer.

With a new award decision on 3 December 2015, the Flemish Region awarded the contract to THV A.

Once again THV B filed a demand for suspension due to UDN against the Flemish Region's award decision. It argued *inter alia* that THV A's offer was invalid, given that, according to it, Mr A' as managing director acting alone, had signed the offer, yet he was not competent to do so.

The Council of State had two doubts about the argument of THV B. Firstly, the Council found that the offer of THV A was signed by BVBA A', not by Mr A' in his own name, so that on this point the argumentation of THV B rested on a mistaken factual starting point. The mistaken factual starting point however did not detract from the fact that the offer was signed by a managing director (namely BVBA A', with Mr A' as its permanent representative). At the time of the submission of the original offer, this managing director alone was not competent to sign offers for public procurement contracts.

Secondly, the Council ruled that, at the time of the maintenance of the offer by THV A., after expiry of the commitment period, the managing director was competent to sign the offer because, since 16 June 2015, the articles of association of NV A' provided that a single managing director does have the authority under those articles to sign an offer for public procurement contracts without limitation of amount.

It is also noteworthy that the decision stated that the normative objective was fulfilled because the commitment in the meantime was renewed in conformity with the regulatory rule.

Ultimately the Council of State rejected THV B's demand for suspension due to UDN.

With this decision, the Council seems to open the door somewhat to, in specific cases, regularising the lack of a valid signature *post facto*, i.e. after submission of the offer.

For an extensive discussion of this decision with several important considerations, we refer to a contribution by Marco Schoups and Jan De Leyn in the Tijdschrift voor Aannemingsrecht [Contracting Law Journal] (SCHOUPS, M., and DE LEYN, J., "Recente rechtspraak van de Raad van State betreffende de ondertekening van offertes voor overheidsopdrachten" [Recent case-law of the Council of State concerning the signature of offers for public procurement contracts], T. Aann. 2016, 222-241).

2. Council of State 12 October 2017, no. 239,366

Although the Council had rejected the suspension appeal by decision of 22 March 2016 (see above), on 12 October 2017 it proceeded in the same case to nullify the award decision. This is *per se* already rather unusual, given that nullifications following the

rejection of a suspension demand are a statistical rarity.

The Council of State found that, at the moment of the submission of the offer, the managing director of NV A' (as partner of THV A and) as signer of the offer, was not in fact authorised to sign the offer. According to the Council, this could not be regularised post facto, because:

a legally valid obligation of the commitment period which is given post facto and outside the period for the submission of the offers cannot be accepted if, at the moment of the submission of the tender, absolutely no obligation of the tenderer is present (and the contracting authority at that moment thus had absolutely no certainty about this);
even if it were assumed that at the moment of the extension of the commitment no doubt can exist any longer about the commitment of the tenderer, the finding remains that only after the date established in the specifications for submission of the offers was there for the first time a certain obligation (in other words, there is only a binding offer first *after* the period for submission established in the specifications);
it appears to be in conflict with the principle of equality that the other tenderers upon the submission of their offer already had to bind themselves vis-à-vis the contracting authority, while the chosen tenderer alone had received an opportunity to bind itself only later at the moment that it saw a good chance that the contract would be awarded to it.
The Council of State thus concluded that the offer of THV A was substantially irregular, because at the time of submission it was not validly signed by one of the participating partners.

So what about the assertion in the suspension decision of 22 March 2016 that the normative objective had been fulfilled because the commitment in the meantime was renewed in conformity with the regulatory rule? In its nullification decision, the Council of State clarified that the aforementioned consideration was merely paraphrasing the defence in the UDN proceeding, after which the Council rules that the mistaken factual starting point of the argument in this proceeding and the defence make it impossible to accept the seriousness of the argument.

This nullification decision thus links (back) to the earlier case-law of the Council of State, in which a defective signature cannot be covered / regularised.

3. New public procurement contract regulations

As already mentioned, the above decisions still fall within the scope of application of the Public Procurement Law of 15 June 2006 and its implementing decrees.

The new Public Procurement Law of 17 June 2016 and (primarily) its implementing decrees make a number of changes with regard to the signing of offers (art. 41-47 Award RD of 18 April 2017). These have to do above all with the electronic processing of a public procurement contract and with a number of relaxations within the framework of procedures with negotiations (e.g. in a competitive procedure with negotiation, only the initial and the definitive offer have to be signed).

The principle that an unsigned (or invalidly signed) offer can lead to the substantial irregularity of the offer remains in force (art. 76, § 1, 4th paragraph, 2° Award RD of 18 April 2017).

We do, however, wish to point out that for procedures with negotiations (which reach or exceed the European announcement thresholds) a substantial irregularity can be regularised on condition that this possibility is provided for in the contract documents, this is a non-final offer and the regularisation takes place prior to initiating the negotiations (art. 76, § 4 Award RD of 18 April 2017). For procedures with negotiations below the European announcement thresholds the contracting authority can itself always decide to either declare the substantial irregular offer invalid or to allow this irregularity to be regularised (art. 76, § 5 Award RD of 18 April 2017).

For more information on this topic, you can consult Jan De Leyn and Kris Lemmens.

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