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Long-awaited Council of State decision (TNS DIMARSO) imposes on contracting authorities the obligation to establish the assessment method in advance (RvS 23 November 2017, no. 239.937)

1. Context

The nullification case before the Council of State (RvS = *Raad van Staten*] of 6 January 2015 (no. 229.723) related to an award decision for a public procurement contract issued by the Flemish Region to conduct a survey on housing and housing consumers in Flanders.

The applicable contract documents provided for two award criteria, i.e. “quality of the tender” and “price”. A weight of 50% was attributed to each of the two criteria. The petitioner reproached the Flemish Region for having made an unauthorised change in this relative weighting by the way in which the Flemish Region attributed a score and ranking to the tenders for the "quality of the tender" criterion. Specifically, the reproach was that this so-called assessment method, which consisted of an ordinal scale with the classes "low-satisfactory-high", was not published in advance and, according to the petitioner, minimised the importance of the "quality of the tender" award criterion.

An assessment method is distinguished from the award criteria and their respective weightings. The method of evaluation is the manner in which the contracting authority, when evaluating the tenders, analyses and values the (sub)award criteria in order to arrive at scores and rankings based on these scores.

The question was posed whether a contracting authority is obliged to always communicate the assessment method, such as award criteria and their weighting, in advance in the contract notice or the contract documents. Given that the Council of State found no decisive answer to this question in a regulatory provision or the case-law of the European Court of Justice, it submitted - at the petitioner´s demand - the following request to the European Court of Justice for a preliminary ruling:

"1/ Must Article 53 (2) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 ´on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts´ both in isolation and in conjunction with the scope of the principles laid down by European law concerning equality and transparency in the field of public procurement, be interpreted as meaning that, if the contract is awarded to the tenderer who submits the most economically advantageous tender from the point of view of the contracting authority, the contracting authority is always required to establish in advance, and indicate in the contract notice or contract documents, the method of assessment or the weighting rules, irrespective of their scope, predictability or commonness, in the light of which the tenders will be assessed in accordance with the award criteria or sub-criteria,

2/ or, if no such general obligation exists, that there are circumstances, such as, inter alia, the scope, unpredictability or uncommonness of these weighting rules, in which this obligation does apply?"

By decision of 14 July 2016, the European Court of Justice decided that no general obligation exists for a contracting authority to communicate the assessment method in advance in the contract documents. This leeway is said to be justified by practical considerations as well.

Furthermore, the Court asserted that the assessment method in principle cannot be determined after the opening of the tenders, this in order to exclude any risk of favouritism. Nevertheless, the Court said that the contracting authority, cannot be reproached for having only established the assessment method after the opening of the tenders when, for demonstrable reasons, it was not possible to do so in advance.

In any event, the fact that the contracting authority determines the assessment method after the publication of the contract notice or the contract documents may not result in the award criteria or their relative weight being modified.

After the response of the European Court of Justice, the case came back before the Council of State.

2. RvS 23 November 2017, no. 239.937

Referring to the decision of the European Court of Justice of 14 July 2016, the Council of State confirmed that in principle there is no duty of communication for the contracting authority with regard to its assessment method. The Council of State then devoted most of its attention to the distinction between, on the one hand, the publication of the assessment method and, on the other hand, the establishment thereof.

It stated clearly that in principle it is not allowed to establish the assessment method after the opening of the tenders, without it having to be demonstrated that such establishment *after* the opening of the tenders had a discriminatory effect on one of the tenderers. Following the European Court of Justice, the Council accepts only a single exception to this: when there are "demonstrable reasons" why the assessment method could not be established before the opening of the tenders.

In this case the Council concluded that nothing in the administrative file demonstrated that the Flemish Region had established the "low-satisfactory-high" assessment method *before* the opening of the tenders. A general explanation of the ARGUS method[1], dating from October 2000, was not accepted.

Given that the advance establishment of the assessment method is a fundamental duty, the Council of State interprets the sole exception of "demonstrable reasons" restrictively. The argumentation of the defendant as to why the assessment method could only be established *after* the opening of the tenders, namely "in order to enable a correct and representative assessment and comparison of the tenders" because of so-called great similarities between the tenders with regard to quality, were not convincing as "demonstrable reasons". The additional argumentation that a numerical assessment, instead of an ordinal scale, would not have made any difference also could not be characterised as "demonstrable reasons".

Already simply because of the foregoing reasons the Council of State deemed the principle of transparency to have been violated and there was, in other words, a ground for nullification.

The Council of State also found a second ground for nullification. The Council ruled that the use of the limited assessment scale “low-satisfactory-high” for the criterion “quality of the tender” resulted in a change of the relative weighting of this award criterion, since *all* high-quality offers received the score “high”, and no further distinction was made within this score. Given that this assessment method does not make it possible to further differentiate the high-quality tenders from one another and rank them substantively, the other award criterion “price” became absolutely decisive. Given that the importance and impact of the "quality of the tender" criterion were thus reduced to the advantage of the "price" criterion, these criteria were de facto given a lower (for the former) respectively higher (for the latter) weight than the 50% stated in the contract documents would lead one to assume.

Because the assessment method for the "quality of the tender" criterion changed the reciprocal weighting of the award criteria, it not only had in any case - in line with the principles formulated by the European Court of Justice - to be *established* in advance, but also to be published in advance in the contract notice or the contract documents. Along with the violation of the establishment obligation, this disregard of the communication duty was an additional reason for the Council of State to decide to nullify the disputed award decision.

3. The establishment duty for contracting authorities

This judgement of the Council of State has important implications for the contracting authorities. Firstly, in principle they always have an establishment duty: the administrative file will in principle have to contain the necessary (internal) documents from which it appears that the assessment method for the various award criteria was established before the opening of the tenders. Within the framework of e.g. the public nature of administration and the principle of transparency, tenderers can demand this evidence, after which the burden of proof will rest on the contracting authority.

Only in the highly exceptional case where there are "demonstrable reasons" why the assessment method could not be determined in advance can it be accepted that the establishment of the assessment method take place a posteriori. This exception must nevertheless be restrictively interpreted. In our opinion, it is difficult prima facie to imagine what could qualify as "demonstrable reasons".

If however – even in the case of "demonstrable reasons" – it appears that an establishment of the assessment method after opening of the tenders changes the award criteria or their relative weighting, there is still and in any event a violation of the principle of transparency.

Furthermore, in certain cases the contracting authority has a **duty to communicate** the assessment method: if the contracting authority did establish the assessment method in good time prior to the opening of the tenders, but this method changes the award criteria or their relative weighting, it will to communicate this in advance to the tenderers as well. If it fails to do so, there is once again a violation of the principle of transparency.

The above-mentioned decision is also especially relevant for rejected tenderers. They should immediately review the award decision and the award report. If they find that the contracting authority used an uncommunicated method of assessment, they should as soon as possible request the decision establishing that method, given the running suspension and nullification periods. The possible violation of the establishment duty can furnish a potential ground for suspension or nullification.

[1] The ARGUS method is named in a manual of the Ministry of the Flemish Community from 1997: J. VERMANDER, Public procurement contracts in the classic sectors, a brief guide to the application of the Act of 24 December 1993 and its implementing decrees, D/1997/3241/109.

For more information on this topic, you can consult Cédric Vandekeybus, Jan De Leyn and Kris Lemmens (unit head).

De Burburestraat, 6-8 bus 5 2000 Antwerpen
Regentschapsstraat 58, bus 8 B-1000 Brussel
t. +32 3 260 98 60 f. +32 3 260 98 61 info@schoups.be www.schoups.be