



Possibility of applying for a review of preparatory acts prior to contracts being awarded

Judgment of the Court of Justice of the European Union (CJEU) of 5 April 2017 (Case C-391/15), Marina del Mediterráneo S.L. and others

Background

This judgment has its origin in the action brought by Marina del Mediterráneo S.L. and other companies against a decision taken by the contracting authority allowing a tenderer to participate in the public procurement procedure. The action was dismissed and Marina del Mediterráneo, S.L. and others applied for a review of the decision before the High Court of Justice of Andalusia.

The High Court referred the matter to the CJEU, as it was unsure as to whether the applicable Spanish law was compatible with the provisions of EU law on public procurement matters.

Spanish regulations stipulate that only preparatory acts which decide, directly or indirectly, on the award of the contract, make it impossible to continue the procedure or to put up a defence, or cause irreparable harm to legitimate rights or interests, may be the subject of an action in procurement proceedings

The decision of the contracting authority which was contested refused to exclude the tenderer, and it allowed the tenderer to participate in the procedure, meaning that *a priori*, the decision failed to comply with the requirements set out by Spanish law for challenging a decision. Therefore, it was only possible to challenge this aspect at the same time as the review of the decision.

Resolution of the CJEU

Regarding the question posed, the CJEU responded that, although Community law has not established the time from which the review of the decision may be sought, it does not authorise Member States to link the exercise of the right to challenge a decision on the fact that the public procurement procedure has formally reached a particular stage.

In terms of the decision allowing a tenderer to participate in a procurement procedure, the CJEU states that the fact that Spanish legislation forces tenderers to wait until the contract has been awarded before a review of said decision can be requested breaches Directive 89/665. Therefore, national rules must establish reasonable time limits for applying for a review of the decisions which may be challenged.

Change of the legal doctrine regarding challengeable preparatory acts

Until now, tenderers had to wait until the contract was awarded before applying for a review of certain preparatory acts. This judgment will make it possible for tenderers to apply for a review of preparatory acts before the contract is awarded.