



Unsuccessful tenderers may bring an action to review award decisions if they are not yet final and definitive

Judgment of the Court of Justice of the European Union (CJEU) of 11 May 2017 (Case C-131/16)

Background

The judgment in question dates back to an appeal filed by Archus and Gama against the decision of a Polish contracting body refusing its offer and awarding the contract to Digital-Center. The Polish court was unsure as to whether Polish law complied with Community law and decided to stay the proceedings and to refer questions to the CJEU for a preliminary ruling. Amongst the questions referred, the legitimate interest of Archus and Gama in the cancellation of Digital-Center's tender is of particular interest.

Position of the referring court

The Polish court's approach established that, pursuant to Polish law, an economic operator whose tender had been rejected as part of a tender process had no legitimate interest in challenging the decision awarding the contract. However, the court reflected, European law establishes that Member States must ensure that legal protection measures are accessible to anybody who has an interest in obtaining a particular contract.

In the specific case in question, the tenders of Archus and Gama had been excluded from the tender procedure as part of a resolution that simultaneously awarded the contract to Digital-Center. Archus and Gama appealed against the two decisions set out in the same resolution and the Polish court doubted whether Archus and Gama could have an interest in challenging

not only the decision rejecting their tender, but also the awarding of the contract to Digital-Center.

Resolution of the CJEU

The CJEU resolved the question posed by the Polish court, firstly offering a reminder that the CJEU had actually ruled previously that a tenderer whose offer had been excluded from a public procurement procedure could be refused access to a review of the decision awarding the public contract, provided that the decision to exclude said tenderer had been confirmed by a final resolution in such a way that said party was regarded as being definitively excluded from the procurement procedure.

Following said reminder, and addressing the specific case in hand, the CJEU declared that as Archus and Gama brought an action against the decision excluding their tender and against the decision awarding the contract, which were adopted simultaneously, the tenders of said companies should be considered to be definitively excluded from the public procurement procedure and therefore, their legal interest in challenging the award subsists.