

Public procurement in the decision-making practice of the Office of Public Procurement and the case law of the ECJ

Abstract

This thesis deals with the issue of public procurement and is focused primarily on the decision-making practice of the Office for the Protection of Economic Competition and the Court of Justice of the European Union. The thesis contains a critical analysis of several decisions, which were chosen, in particular for their possible impact on the practice of public procurement, as well as for their recency.

The introductory part of the thesis is primarily theoretical. In the first chapter, the basic sources of law are described, while in the second chapter, definitions of the most important basic terms of the Act on Public Procurement are described. The third chapter describes the procedural options for defense against incorrect procedure of the contracting authority. The role of the Court of Justice of the European Union in these proceedings is also mentioned.

The key part of the thesis is the fourth chapter, which contains a critical analysis of selected recent decisions (mostly from 2022 and 2023). In particular, the possible impact of the analyzed decisions on the practice of public procurement as well as proposals for a suitable *de lege ferenda* change in the legislation are described, in each case taking into account the author's practical experience with the issue of projects financed from the structural funds of the European Union.

Several decisions concern compliance with the requirement of reasonableness of tender conditions. The decision-making practice is generally evaluated negatively, in the case of assessing the adequacy of contractual terms and conditions. It allows contracting authorities to enter into contracts that are unreasonably disadvantageous and risky for suppliers. In practice, this fact can cause an unnecessary increase in the pricing of public contracts. On the contrary, decisions regarding the assessment of the adequacy of qualification requirements are evaluated positively.

The decision, which resolves the issue of excluding a supplier from a public contract due to breaches he committed in the past when performing other public contracts, is groundbreaking to a certain extent. The controversial question, whether the contracting authority can be excluded if its past misconduct is not proven by an indisputable fact (e.g. a final judgment), but only by the assertion of the contracting authority, which excludes it, was resolved in this thesis.

The remaining decisions deal with issues of conflict of interest, the obligation to provide an explanation of the procurement documentation or compliance with the principle of transparency when disclosing the reasons for the selection of the winning supplier.

Keywords:

Public procurement

Adequacy of qualification requirements

Adequacy of contractual terms

Exclusion of a supplier for misconduct in past public contracts

Conflict of interests of the co-author of the procurement documentation

Justification of supplier selection