FORMALITY VS. 3 E PRINCIPLES IN PUBLIC PROCUREMENT

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ABSTRACT. Aside from aspects of efficiency, effectiveness and economy, public procurement is also defined by other principles, such as equal treatment and non-discrimination. Due to the fact that public procurement is a set of several principles, it is often accompanied by conflicts, which can significantly limit the achievement of individual objectives. I would like to highlight the importance of individual principles for particular objectives and illustrate how to act in cases of conflicts between these principles and how to find a solution when it is required to weight them. It is the cases of corruption in public procurement procedures that require consideration which principle should be given priority and whether great formality of procedures can improve fight against corruption or does it merely intensify it. With many years of extensive case studies I can confirm that in practice institutions choose especially the principle of formality as the most important principle.

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BASIC PRINCIPLES OF PUBLIC PROCUREMENTS

Due to diversity of living situations, legislation cannot establish norms for each legal situation; hence knowledge of public procurement basic principles is very important. It is necessary to understand legal regulations through certain principles guiding the contracting authority in its decision-making, and the tenderer in the assessment of its rights in public procurement procedures. In the area of public procurement as well, it is considered that, in addition to public procurement specific principles, principles having become common value criteria of our civilization and covering the whole legal system are to be taken into consideration.

Public procurement system setup, development and implementation must be based on the principle of free movement of goods, the principle of freedom of establishment, and the principle of freedom to provide services, all deriving from the Treaty establishing the European Community and on the principles of economy, efficiency and effectiveness, of ensuring competition among tenderers, of public procurement transparency, of equal treatment of tenderers, and of proportionality.

The basic principles are specified in Article 2 of Directive 2004/18/EC, as follows:

- principle of equal treatment,
- non-discrimination and
- transparency.

Treaty establishing the European Economic Community (hereinafter referred to as: EEC Treaty) provides the basic framework for public procurement legal regulation. This act was primarily aimed at establishing a relevant common internal market of Member States at prohibiting any national discrimination and any restriction in the selection of products and services including the free movement of goods exclusive of all customs duties, as well as at prohibiting quantitative limits (quotas) and measures having equivalent effect over customs duties and quotas among Member States. The objective of the EEC Treaty would be best attained also by prohibiting restriction

placed to the free movement of labour force and services, capital, salaries and self-employment, as well as by the freedom of choice of establishment of enterprises in Member States. The attainment of the Treaty objective is to include the development of European Community significant policies, notably in the areas of competition law, state aid and agriculture.

The EEC Treaty does not specifically mention public procurements, except in the context of funding Community contracts in overseas countries and when in relation to industrial policy, though provisions might be found in the EEC Treaty constituting a basis for public procurement system establishing. These are principally provisions referring to the free movement of goods (Article 28), the freedom of establishment (Article 43), and the freedom to provide services (Article 49) (Arrowsmith, 2005: 182). Other provisions are equally important relating to the prohibition of discrimination (Article 12) and to the issue of acquired undertaking (Articles 81, 86, and 87).[1]

{XE "Treaty establishing the European Community"}The regime of free movement of goods and services is the most important for the area of public procurement. EC Treaty contains the basic objective of the public procurement acquis, meaning the opening of the public procurement market among Member States and allowing tenderers to participate in public contact awarding procedures beyond the frontiers of individual Member States. Since it would not be possible for Member States, on the basis of the EC Treaty, to establish more specific public procurement rules, public procurement directives have been adopted as a secondary legal source[2]. Understanding basic principles and establishing thereof to a legislation system is even more significant in view of the fact that, though the implementation of the directives was not effective everywhere, the principles as such create a single core for interpreting and attaining objectives accompanying the public procurement system through founding contracts and relevant directives.

The principles have an important role to play, both in directing the legislator when adopting the content of legal norms and in the understanding of legal provisions, particularly in cases of imprecise determination thereof. Primarily proper understanding and interpretation of certain principles facilitates the interpretation of legal norms in terms of content, context, and purpose. Legal principles connect legal norms to a single whole

providing such norms with the required content, particularly in cases where the flamboyance and diversity of accrual circumstances cannot always be covered by a legal norm. A legal rule needs to be understood by means of a specific principle constituting both the direction and the purpose of drafting a particular legal norm.

CONFLICT OF PRINCIPLES IN PRACTICE THROUGH VALUES, NORMS, AND RELATIONS

Proper understanding of public procurements is important for contracting authorities also in terms of awareness on the limitation of rights while using public assets for public procurement purposes, which must not be directed towards the attaining of personal benefit or of the benefit of specific groups, rather to the meeting of the public interest »*in largo sensu*«. The importance of principles also reflects itself in their restrictive state function within its regulatory attributes.

An interesting question occurring with the presentation of fundamental principles is whether these principles are mutually equal in rank, whether they are placed in a subordinate-superior order, whether they are mutually exclusive or complementary, and whether they support public procurement objectives to a same direction. So far, the relation between the principle of formality and the principle of economy (often opposed to each other) has shown itself to be a problematic one. Contracting authorities especially understand this conflict in cases when, due to formal reasons, an offer must be rejected which is not regular due to a missing document that is actually non-essential for good performance of the work but has been demanded by the contracting authority in the documentation — and that particular offer is most appropriate according to tender documentation criteria. Such an offer must be rejected in order to abide by the formality principle in terms of the practice of control institutions, though a decision in favour of this offer would be in accordance with the principle of economy. Then where is the boundary in the weighing between significance and relation when these two

principles are racing? Is it even possible to place them within a system of values which would, in a relatively objective manner, establish in advance boundaries and circumstances under which one of the principles becomes more appropriate than the other - or should the formality principle be simply placed above the principle of economy not taking into account any economic implications? It would be ideal if we could offer an answer; yet, unfortunately, it cannot be given till the time wider consensus is reached among various institutions on the importance of a specific principle in relation to other principles. While solving this problem, we could consider as an initial point the case law of the Constitutional Court of the Republic of Slovenia in the process of its evaluation of proportionality, when significance is weighed against the intervention with a specific right in the case of a right tending to protect itself against such intervention, and when it judges there has been more severe intervention proportionate to the higher level of such right being affected. If the Constitutional Court finds that the importance of the right which is to be protected by intervention prevails over the importance of the intervention to the right in question, the intervention will undergo this aspect of the proportionality test.

A certain form of a proportionality test could be established also in the case of public procurements, when an attempt is made to protect a principle by violating another principle this may occur in cases where, for example, for the purpose of protection of the principles of economy, efficiency and effectiveness, the formality principle is violated under assumptions determined in advance, on the basis of which the proportionality test could be examined.

A certain right (in our theoretical, case the principle of formality) may be limited only in cases where it is necessary for the purpose of protection of other rights (in our theoretical case, protection of the principle of economy),[3] where it is necessary to respect the constitutional principle of proportionality[4], this meaning that it is obligatory to fulfil three conditions for admissibility of those limitations or interventions: urgency, adequacy and proportionality in the narrow sense. The intervention to the constitutional right is allowed only in cases where such intervention is necessary (inevitable) for the protection of other human rights, which means that a legislative objective cannot be achieved with one more lenient intervention in the constitutional right or without it. The intervention must be appropriate for achievement of a desired,

constitutionally allowed objective (for example, protection of the rights of others or of public interest, where the protection of the public interest represents a constitutionally allowed objective.). The intervention should not be excessive, this meaning that only the mildest of all possible interventions is allowed whereby a constitutionally allowed and wanted objective can be achieved, as well as protection of equally important rights of others. Within the frames of proportionality, the importance of the intervention should be also assessed compared with the importance of the right which is to be protected by the intervention[5].

Of course, we do not make direct equation between public procurements and constitutional rights; some of them may even be derived from the use of public procurements or are violated for the purpose of misuse or limitation through legal or executive acts, or by decisions of certain institutions or authorities. In spite of this, mentioned conditions allowing interventions to constitutional rights could, in a reasonable adjustment, create assumptions and basis for assessment of the admissibility of the limitation and exclusion of one fundamental principle of public procurements for the purpose of implementation of another principle. Not only necessity, but also adequacy and proportionality, may be considered input elements in the test of proportionality in the area of public procurements, in which case we would also have to assess the nuisance of the implications of violation of one of the principles in view of the benefit and objectives which are to be achieved through the implementation of another principle and which must be based on the Law. In this way, determined formal insufficiency or violation would not necessarily mean the exclusion of a tenderer from a procedure, in case such insufficiency or violation would not have any negative or adverse implications on other principles of public procurement (the principles of equal treatment of tenderers, non-discrimination etc.), this disregard would then enable the selection of an offer that would mean implementation of the principle of economy for the purpose of economically most advantageous conditions, appropriate relationship between investments, and obtained value. The disregard of the principle of formality on behalf of the principle of economy in this case would also be necessary, appropriate, and proportional.

CONCLUSIONS

The above discussed could represent a consideration regarding the formulation of the proportionality test in the area of public procurements, which would represent an important and necessary step ahead in view of recent practice, both for contracting authorities and institutions monitoring regularity and deciding on violations in public procurement procedures, as well as on violations of fundamental principles. One of the more difficult tasks of legal regulation and practice is to find an appropriate ratio between fundamental principles of the public procurement. We can say that no principle can be excluded, but no principle can also be definitely implemented.

NOTES

1 The order of Articles and decisions (EC Treaty) was renumbered as a result of the amendments to the 1957 Treaty of Rome as well as 1992 Maastricht Treaty and 1997 Amsterdam Treaty and 2001 Treaty of Nice.

2 Directive 92/50/EEC – relating to the coordination of procedures for the award of public service contracts,

Directive 93/36/EEC – coordinating procedures for the award of public supply contracts,

Directive 93/37/EEC – concerning the coordination of procedures for the award of public works contracts,

Directive 93/38/EEC – coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors,

Directive 97/52/EC – amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC, 98/4/EC – amending Directive 93/38/EEC,

Directive 2001/79/EC – amending Directives 92/50EEC, 93/36EEC, 93/37EEC, 93/38/EEC, 97/52/EC and 98/4/EC.

According to Article 189(3) of the EEC Treaty, directives oblige the Member State in terms of the objective to be achieved;

national authorities are free to choose the form and means. As regards the freedom to choose the form, it should be mentioned that this freedom is rather restricted, on the basis of experiences with pre-access and access to full membership.

3 Such position derives from the Constitutional Court of the Republic of Slovenia decisions No U-I-47/94.1 and U-I-276/96.

4 Article 15 of the Constitution of the Republic of Slovenia inter alia states that restrictions of constitutional rights are permitted only if in accordance with the so-called principle of proportionality.

5 Such position derives from the Constitutional Court of the Republic of Slovenia decisions No U-I-158/95 and VII, 56.

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