

The Constitutional Court has adopted its judgement regarding the equal possibilities to participate within a public procurement and the provable criteria for exclusion of tenderer from a public procurement procedure

On 3 November 2011 the Constitutional Court has adopted the judgement in case No 2011-05-01 regarding the criteria for exclusion of tenderer from public procurement procedures. Within this case Article 39 Part 1 Point 6 of the Public Procurement Law was contested. The respective provision sets forth the following:

a contracting authority shall exclude a candidate or an tenderer from further participation in a procurement procedure, as well as shall not review the offer of tenderer, if the average remuneration of employees of a candidate or a tenderer registered in Latvia (has its domicile in Latvia) for the first three quarters of the year during the last year consisting of four quarters before the date of submitting a tender offer or an application is less than 70 per cent of average employee remuneration in the state for the same period and in the same field pursuant to NACE 2.red. qualification level of two figures pursuant to data summarized by the State Revenue Service and published in the home page of the State Revenue Service. If the candidate or the tenderer is registered as a tax payer during the last year consisting of four quarters before the date of submitting a tender offer or an application, average monthly salary of employees for the period starting on the second month after the registration up to the date of submitting a tender offer or the application is taken into account.

When evaluating the possible violation of rights to property, the Constitutional Court pointed out that there is no protected fundamental rights to derive a profit from the participation within a procurement procedure. Taking into account that, the Court concluded that the contested provision did not violate the fundamental rights (in relation to the property) established by the Article 105 of Constitution and terminated the proceedings in this part.

The Constitutional Court inferred from the constitutional complaint that only the compliance of contested provision with the first sentence of Article 91 of the Constitution, which warrants the equality of all persons before the law, has to be evaluate, if within the case there is not dispute regarding the compliance of contested provision with the principle of prohibition of discrimination. When analyzing whether the contested provision achieves its legitimate aim, the Constitutional Court pointed out that it has to be evaluate in connection with the application practice of the contested provision and concluded that the contested provision can limit the rights of such persons, who have complied with all obligations of tax payments. Likewise, the Constitution Court indicated that the contested provision does not ensure the possibility to exclude all those applicants, who are not paying taxes in the full amount, since the exclusion criterion included into the contested provision is not applicable to all. In addition to that, there could be various reasons, due which a tenderer corresponds to the exclusion criterion provided by the contested provision, although has performed in good faith all tax payments provided by the normative acts.

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Furthermore, the Constitutional Court has also emphasized that the limitation of rights is not permissible on the basis of indisputable presumption, if by that the principles of equality, proportionality and clearness are violated. The formal character of exclusion criterion included into the contested provisions and the procedure of its application does not allow the person, who is applying this provision, to ascertain regarding the compliance of tax payment obligations of particular tenderer and the validity of exclusion, but the legislator has to select such means for achieving of the legitimate aim of contested provision, which enables to ascertain the compliance of tax payment obligations of a tenderer.

By recognizing the contested provision as non-compliant with the Constitution, the Constitutional Court has not admitted that the legislator would not have rights to establish limitations of rights of such character, but the Constitutional Court has pointed out that the means selected by the legislator may not limit the rights of tenderers of procurement procedures, who have paid taxes accordingly. Therefore, within this case the Constitutional Court recognized that the most appropriate solution is to invalidate the respective provision by the specified time in future, thus providing the time for the legislator to improve the legal regulation provided by the contested provision or to evaluate the necessity to exclude at all the contested provision from the Public Procurement Law. Consequently, the Constitutional Court decided that the contested provision will become invalid on March 1, 2012.

Taking into account the respective judgement of the Constitutional Court, on November 14, 2011 within its homepage www.iub.gov.lv the Procurement Monitoring Office (the "PMO") has published the Explanation on the Application of Article 39 Part 1 Points 6, 7, 8, and 9 of the Public Procurement Law. Within its explanation the PMO has indicated that within the judgement of Constitutional Court the frame of necessary activities is not specified *expressis verbis* in relation to the application of the contested provision within the time period from the effective date of judgement of Constitutional Court on November 3, 2011 until the moment, when the contested provision will become invalid or will be amended. As follows, the PMO explains that, therefore, contracting authorities, in order to ensure the legal certainty to private persons, have to apply this provision reasonably and in accordance with the provisions of law having higher legal force and the general legal principles, taking into account the interpretation included into the judgement of Constitutional Court. Therefore, in the period from the effective date of judgement of Constitutional Court until the amending of contested provision or its revocation to ensure the correct application of laws of the European Union, as well as to ensure the legal certainty and to reduce the disputing of decisions taken by contracting authorities regarding the exclusion of candidates and tenderers from the participation in procurement procedures on the basis of the contested provision, the contested provision shall be recognized as the inapplicable from the effective date of judgement of the Constitutional Court. As it is explained by the PMO, currently it is not possible to ensure the application of the contested provision according to the instructions provided by the Constitutional Court.

Moreover, taking into consideration that the exclusion rules of candidates and tenderers included into the Article 39 Part 1 Point 7, 8 and 9 of Public Procurement Law are of the same kind regarding their content as the contested provision, as the Constitutional Court has indicated within its judgement accordingly, the said explanation is equally referable to the Article 39 Part 1 Point 6, 7, 8 and 9 of Public Procurement Law. Subsequently, the PMO has explained that from November 3, 2011 the exclusion rules of candidates and tenderers set forth by the Article 39 Part 1 Point 6, 7, 8 and 9 of the Public Procurement Law are not applicable.

