

EU law governing tenders – lease agreements with building obligations subject to mandatory tenders

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In a ruling handed down on 10 July 2014 (C-213/13) the *European Court of Justice* ruled that a contractual agreement on the construction of a building structure that meets the requirements stated by the customer constitutes a public building contract and that a mandatory tender cannot be waived even if it involves an obligation to lease the respective building structure.

In the substance matter in which the decision was rendered, the local government in Bari (Italy) had published an announcement of a “market study” for the quickest possible construction of a uniform, suitable and appropriate new building for all the courts of Bari. The announcement contained an annex in which an “official and complete framework for the structural, functional and organisational requirements (“requirements framework”) for the construction of the planned court complex was supposed to be presented. Bari local government selected the offer submitted by Bieters Pizzarotti. This stipulated that part of the building being constructed was to be sold to Bari local government for € 43 million and the rest leased to it for an annual lease amount of € 3 million. The Ministry of Justice informed Bari local community that the public financial resources available for the project had been reduced to € 18.5 million. Upon request, Pizzarotti submitted a revised offer, which Bari local government did not add any subsidies to. Pizzarotti took action for the procedure to be continued and completed. The Consiglio di Stato, which was last assigned with the procedure, referred the dispute to the *ECJ* inter alia with a request for a preliminary ruling on the question of whether a contractual agreement for the leasing of a future real estate property in the form of a declaration of obligation was tantamount to a (public) building contract in spite of possessing the nature of a lease agreement.

The *ECJ* affirmed that it constituted a public building contract in the meaning of Union provisions (Art. 1 II of RL 2004/18/EC). Public building contracts are accordingly deemed to be public contracts on either the execution or at the same time the planning and execution of building projects or a building structure or the rendering of building services by third parties regardless of the resources used in accordance with the requirements laid down by the public customer. The latter was held by the *ECJ* to be the case if the public customer has taken steps to stipulate the features of the building service or at least exercise a decisive influence on the building service. This was affirmed by the *ECJ* because the “framework of requirements” set out details on the various technical and technological features of the planned building and also conceded Bari local government corresponding review possibilities. The fact that the draft “declaration of obligation to lease” also contained characteristic features of a lease agreement, in particular in the form of the “annual lease amount” was not held to be decisive. The crucial aspect, rather, in classifying the respective agreement was its subject and not the amount of remuneration of the businessperson or the type and manner of its payment.

The ruling handed down by the *ECJ* was issued on the basis of European law governing public tenders from 2004. RL 2004/18/EC was replaced on 26 February 2014 by RL 2014/24/EC (the regulation for Art. 1 II of RL 2004/18/EC is contained in Art. 2 (1) no. 6, letters a) to c)). As a result of the revision of RL 2004/18/EC, European lawmakers adopted more recent case law handed down on public building contracts. The *ECJ* did not have to state a position on new RL 2014/24/EU. The new arrangements had to be respected in the case of new (building) projects, however. The decision handed down by the *ECJ* once again demonstrated the importance of law governing public tenders in the area of “law governing leases” as well. If public customers want to lease buildings that are specially constructed to meet their needs and corresponding building obligations are agreed upon, such lease agreements constitute public building contracts subject to mandatory tender if the building requirements stand at the forefront as a result of the purpose for which the building is to be used. In actual practice this is frequently not taken into account (see, for instance, *Düsseldorf Superior*

Regional Court, decision from 7 August 2013 – VII Verg 14/13 “Police Station”). This may lead to serious repercussions ranging from the invalidity of (lease) agreements all the way to possible demands for compensation against the Federal Republic of Germany (see *European Court of Justice*, ruling handed down on 29 October 2009 – C-536/07 “Cologne Trade Fair Halls”).



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