



Court of Justice of the European Union

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Judgment in Case C-771/19

NAMA Symvouloi Michanikoi kai Meletites AE - LDK Symvouloi Michanikoi A.E. and Others v Archi Exetasis Prodikastikon Prosfigon (AEPP) and Attiko Metro A.E.

Press and Information

**EU law precludes a national practice by which a candidate excluded from a public procurement procedure may rely, in that candidate's appeal against the decision to admit the bid of another tenderer, only on the infringement of the principle of equality in the assessment of bids**

*The dismissal of the pre-litigation administrative appeal against the decision to exclude a candidate does not affect that candidate's interest in bringing proceedings, provided that that dismissal by an independent national review authority does not have the authority of res judicata*

On 24 January 2018, the company Attico Metro launched an open tendering procedure for technical consultancy services for the project to extend the Metro in Athens (Greece),<sup>1</sup> worth approximately € 21.5 million. The first stage of the tendering procedure consisted, inter alia, in reviewing the candidates' technical bids, while the second consisted in the opening of economic bids and the overall assessment. Four candidates, including NAMA a.o. ('NAMA') and SALFO a.o. ('SALFO'),<sup>2</sup> which are technical consultancy business associations, each submitted a bid.

On 6 March 2019, the board of directors of Attico Metro decided to exclude NAMA's bid at the stage of technical offer review, on the ground that the experience of certain members of its team concerning construction works did not meet the requirements of the contract notice, whereas it admitted SALFO's bid through to the second stage of the procedure. On 26 March 2019, NAMA brought a pre-litigation administrative appeal against that decision before the Archi Exetasis Prodikastikon Prosfigon (AEPP) (Public Procurement Review Authority (AEPP), Greece),<sup>3</sup> by which it contested both the rejection of its technical bid and the admittance of the bid made by SALFO. By a decision of 21 May 2019, the AEPP partially dismissed that appeal, allowing it only in so far as it was directed against the grounds of Attico Metro's decision concerning the proof of experience of one of the members of the team proposed by NAMA.

NAMA brought an action before the Symvoulio tis Epikrateias (Epitropi Anastolon) (Council of State (Suspension chamber), Greece) seeking the suspension of the AEPP's decision and of the decision of Attico Metro's board of directors.

Observing that it had consistently held that a tenderer who has been excluded from the tendering procedure cannot show an interest in bringing proceedings to dispute the lawfulness of the participation of another tenderer in that procedure, except on the grounds of an infringement of the principle of equality in the assessment of the bids, that court decided to submit questions to the Court of Justice concerning the interpretation of the directive on public procurement and on the

<sup>1</sup> This includes the extension of line 3, section Chaïdari-Peiraias, and the construction of line 4, first section, Alsos Veïkou-Goudi.

<sup>2</sup> SALFO kai Synergates Anonymi Etairia Meletitikon Ypiresion Technikon Ergon – Grafeio Doxiadi Shymvouloi gia Anaptyxi kai Oikistiki AE – TPF Getinsa Euroestudios SL and Others intervening.

<sup>3</sup> Law 4412/2016 on public works contracts, public supply contracts and public service contracts prescribed the creation of the AEPP, an independent central administrative authority tasked with the pre-litigation examination of acts adopted by contracting authorities, and introduced the possibility to request the stay of execution and the annulment of decisions taken by that authority.

award of concession contracts.<sup>4</sup> It seeks, inter alia, to know whether that national practice is contrary to EU law.

By today's judgment, the Court of Justice recalls, first of all, that the case-law principle<sup>5</sup> that, in the context of a public procurement procedure, tenderers, whose exclusion is requested, have an equivalent legitimate interest in the exclusion of the bid by other tenderers for the purposes of securing the contract, applies to the system of judicial protection established by the directive.

The objective of that directive is to provide effective and rapid judicial protection, in particular through interim measures, and does not permit the Member States to make the exercise of the right to bring an appeal conditional upon the public procurement procedure in question having formally reached a particular stage. In that regard, a national law which requires a tenderer to await the decision to award the contract before being able to bring an action against the admission of another tenderer would fail correctly to apply the directive.

Thus, the Court concludes that **an unsuccessful tenderer may bring an appeal against the decision of the contracting entity admitting the bid by one of its competitors, whatever the the stage of the public procurement procedure at which that decision is taken.**

Next, as regards the pleas that an unsuccessful tenderer may raise in the context of such an appeal, the Court takes the view that the directive does not set out any requirement other than that **a tenderer can rely on pleas based on the infringement of EU public procurement law or national rules transposing that law. It is entitled to raise any plea against the decision admitting another candidate, including those which have no connection to the irregularities on the basis of which its bid was excluded, provided that the decision to exclude that tenderer had not been upheld by a decision with the authority of res judicata**, which is for the referring court to determine.

Finally, as regards the fact that national law requires an unsuccessful tenderer to bring a pre-litigation administrative appeal before being able to bring an action before the referring court, the directive permits the Member States to confer responsibility on non-judicial authorities for deciding, on the first occasion, on the appeals provided for by that directive, provided that any purported failure in the exercise of its powers can be the subject of a court action or an action before another judicial body which is independent from the contracting entity and the non-judicial authority having given a decision on the first occasion.

In those circumstances, the Court concludes that the directive must be interpreted as meaning that **a tenderer who has been excluded from a public procurement procedure at a stage prior to the stage at which that contract is awarded and whose application for a suspension of the decision to exclude it from that procedure has been rejected, can rely**, in its application for the suspension of the decision to admit another tenderer's bid that was introduced at the same time, **on all pleas alleging the infringement of EU public procurement law or national rules transposing that law, including pleas which have no connection with the irregularities on the basis of which its bid was excluded.**

**That possibility is not affected by the fact that the pre-litigation administrative appeal before an independent national review authority, which, under national law, was required to be brought beforehand, by that tenderer against the decision to exclude it was dismissed, provided that that dismissal has not acquired the authority of res judicata.**

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<sup>4</sup> Council Directive 92/13/EEC of 25 February 1992, on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts of entities operating in the sectors of water, energy, transports and telecommunications (OJ 1992, L 76, p. 14), as amended by Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ 2014, L 94, p. 1).

<sup>5</sup> That case-law principle was established by the judgments of 4 July 2013, *Fastweb* (C-100/12), of 5 April 2016, *PFE* (C-689/13) and of 11 May 2017, *Archus and Gama* (C-131/16). (32)

**NOTE:** A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the judgment is published on the CURIA website on the day of delivery.

Press contact: Jacques René Zammit ☎ (+352) 4303 3355