

Public Procurement – Court of Justice of European Union Clarifies Application of Optional Exclusion Grounds and Right to “Self-cleaning”

On 14 January 2021, the Court of Justice of the European Union (**CJEU**) held that tenderers who find themselves in one of the optional grounds for exclusion referred to in Article 57(4) of Directive 2014/24/EU of 26 February 2014 on public procurement (the **Directive**) are only obliged to spontaneously demonstrate that the corrective measures which they have taken are sufficient to demonstrate their reliability despite the existence of a relevant exclusion ground, if this is required by national law or set out in the tender documents. Furthermore, the CJEU held that Article 57(6) of the Directive has direct effect (CJEU, judgment of 14 January 2021, Case C-387/19, *RTS Infra and Aannemingsbedrijf Norré-Behaegel*).

Article 57(6), first paragraph of the Directive provides for the right to “self-cleaning” in that it allows tenderers who fall within the ambit of an optional ground for exclusion to “*provide evidence to the effect that measures taken by [them] are sufficient to demonstrate [their] reliability despite the existence of a relevant ground for exclusion*”. The provision continues that “[i]f such evidence is considered as sufficient, the economic operator concerned shall not be excluded from the procurement procedure”. The subsequent paragraphs describe the burden of proof that rests on the economic operator and the evaluation criteria to be applied by the contracting authority.

The CJEU issued its judgment in response to a question referred for preliminary ruling by the Belgian Council of State (*Raad van State / Conseil d'État*) in a dispute opposing two road construction companies, RTS Infra BV and Aannemingsbedrijf Norré-Behaegel BV (the **Applicants**), to the Flemish Region. In the context of a procurement procedure, the Flemish Region had excluded the Applicants from participation in the procedure, and thus disregarded their tenders, and awarded the contract to the bidder with the lowest regular tender. The Flemish Region had justified its decision to exclude the Applicants by the fact that they had been guilty of “*serious professional misconduct*” in the performance of previous contracts awarded by the Flemish Region. According to the latter, the serious and repeated contractual shortcomings of the Applicants in past contracts created doubt and uncertainty as to their ability to carry out the new contract in a correct manner.

The Applicants requested the Council of State to annul the Flemish Region’s exclusion decision. They claimed that, before being excluded on account of the alleged serious professional misconduct, they should have been given the opportunity to defend themselves and to demonstrate that they had remedied the consequences of that misconduct by taking appropriate corrective measures, as provided for in Article 57(6) of the Directive, which they claimed has direct effect. The Flemish Region challenged these claims and referred to Article 70 of the Law of 17 June 2016 on public procurement (*Wet van 17 juni 2016 inzake overheidsopdrachten / Loi du 17 juin 2016 relative aux marchés publics* – the **Law**). While admitting that Article 70 had not yet entered into force at the time of the facts of the case, the Flemish Region noted that this provision currently requires economic operators to indicate the corrective measures taken on their own motion.

In this context, the Council of State sought guidance from the CJEU as to whether:

- (i) Article 57(6) of the Directive precludes EU Member States from requiring economic operators, when submitting their request to participate or their tender in the context of a public procurement procedure, to provide, spontaneously, evidence of the corrective measures which they have taken in order to establish that they are reliable despite the existence of an optional ground for exclusion referred to in Article 57(4) of the Directive, where no such obligation arises from the applicable national legislation or the tender documents; and
- (ii) Article 57(6) of the Directive has direct effect.

As regards the first question, the CJEU started by noting that, in the absence of any stipulations to the contrary in the Directive and in view of its goals, Article 57(6) of the Directive must necessarily be interpreted as allowing economic operators to furnish evidence of the corrective measures taken both on their own initiative and on that of the contracting authority, and both when submitting their tender or the request to participate in the procurement procedure and at a later stage of the procedure.

Referring to (i) the principles of procurement, including the principles of non-discrimination, transparency and proportionality; and (ii) the general principle of respect for the rights of the defence, the CJEU continued that, in view of Article 57(6) of the Directive, the Applicants could reasonably expect the Flemish Region to give them the opportunity to demonstrate that the corrective measures which they had taken are sufficient to remedy the optional grounds for exclusion invoked by the Flemish Region. Admittedly, the principles of transparency and loyalty required the applicants to include in their tender information on their serious professional misconduct in the performance of past contracts awarded by the same contracting authority. However, this cannot exempt the Flemish Region from its obligation to give the Applicants the opportunity to provide evidence of the corrective measures taken.

In response to the second question, the CJEU confirmed that Article 57(6) of the Directive has direct effect and, thus, can be invoked directly by the Applicants. Even though Article 57(6) leaves the EU Member States a degree of latitude when adopting further procedural rules, the provision provides economic operators with a minimum of protection. Moreover, Article 57(6) of the Directive lays down the basic elements of the “self-cleaning” scheme and the economic operator’s rights in that it clarifies what, as a minimum, must be proved and which evaluation criteria must be applied.

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Van Bael & Bellis