



Co-funded by the Justice Programme of the European Union (2021-2027)

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Practical case

On 13 December 2017, the Municipality of R (Malta) ('the municipality') launched a tendering procedure for the purpose of awarding a public contract to an employment agency for the temporary supply of personnel.

A 'minimum threshold' – set at 48 points – was stipulated for technical offers, and tenderers awarded points below that threshold were to be excluded.

Eight tenderers participated in the process, including a consortium of which RAD was lead contractor ('Consortium RAD) and two other temporary association of undertakings formed by Consortium Hope and Consortium Babel.

On 3 October 2018, after evaluating the technical offers, the procurement committee admitted only Consortium RAD to the next stage, relating to the economic assessment of tenders. Consortium Hope and Consortium Babel, which were in the second and the third place after the evaluation of technical offers, were excluded. Consortium Hope because its technical offer having been awarded one mark less than the minimum threshold and after observing the existence of reasonable indication for considering that it concluded an agreement with other companies (from Consortium Babel) aimed at distorting competition in connection with the pending award procedure. For this last reason, Consortium Babel was also excluded. This last reason for excluding the undertaking is based on the national law that implement the Directive 2014/24.

Article 57 paragraph 4 from the directive provides:

„Contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure any economic operator in any of the following situations:

[...] (d) | where the contracting authority has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition;”

Public Procurement Regulations of Malta establish:

„ 4. Contracting authorities exclude from participation in a procurement procedure any economic operator in any of the following situations:

[...] (d) | where the contracting authority has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition;”

Specifically, the procurement committee observed that the technical and economic offers for Consortium Babel and Consortium Hope are identical and that within the management bodies of 2 undertakings from Consortium Hope and, respectively, Consortium Babel, are persons who are close relatives.

Consortium Hope and Consortium Babel brought an action before the competent court, the Court, disputing, first, its exclusion from the tendering procedure and, second, the regularity of that procedure.

By judgment of 15 December 2021, the national court rejected all the pleas put forward and, therefore, dismissed the action in its entirety.

Consortium Hope and Consortium Babel brought appeals against that judgment before the Court 2.0, reiterating the pleas it had raised at first instance. Also, it expressed doubts as to the interpretation of the concept of ‘sufficiently plausible indications’ on account of a possible inconsistency in the certain language versions of Directive 2014/24. For example, it showed that in the Romanian version of the same directives it is referred to the **sufficient indications that are plausible**. Hence, the emphasis is on the quantity of the plausible indication which is not the case in the English and Maltese versions which state a qualitative criterion.

By judgment of 7 May 2022, the Court 2.0 rejected on the merits the grounds of appeal. Although the appellants sought that the Court 2.0 refer a case to the European Court of Justice under the preliminary reference procedure in order interpretate Article 57 (4) (d) of the Directive, the Court 2.0 did not follow this suggestion. In fact, the Court 2.0 mentioned:

1. that the concept of ‘sufficiently plausible indication’ is described in the national law in details, with specific examples and since the directive doesn’t offer a definition of this concept, the national law must be taken into consideration. Moreover, in the interpretation of the national law regarding ‘sufficiently plausible indication’ there is a compulsory decision of the Supreme Court of Malta, and the Court 2.0 is bound by this decision. There is also national practice under which the ordinary courts of Malta have no jurisdiction to examine the compatibility with EU law of national legislation which the Supreme Court has found to be consistent with EU law.
2. The directive has no horizontal direct effect and so it is not directly enforceable in relations between individuals and the case is, in its essence, between private individuals (undertakings). Hence, there is no need to refer to the directive in this case.
3. According to the Maltese national procedural law, the appellant cannot raise new grounds to challenge the original award decision directly in the appeal procedure. The interpretation of the directive and the consequences regarding the exclusion criterion were not originally raised in the application for setting aside the award decision. In this situation, the Court 2.0 cannot examine this issue in the appeal.

4. The fact that Consortium Hope was excluded also for the fact its technical offer have been awarded one mark less than the minimum threshold imply that this party has no interest in raising the problem of the application of EU law.

Analyse and conclude about the judgment of 7 May 2022, the Court 2.0, taking into consideration reasoning related to the application of EU law.