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Rethinking the confidentiality in public procurement: does *public* mean *naked public*?

*Deividas Soloveičik**

1 Introduction

The topic of confidentiality in public procurement is becoming very controversial. To start with the notion of *public procurement*, which itself literally includes the half that is *public*. This means that it is completely opposite to any secrecy. Nevertheless, at the times of global disruptive innovations and another industry revolution market players are cautious about disclosing the sensitive information to both the contracting authorities and even more to the competing economic operators. Therefore, the public procurement practice, legal regulation and the case-law must embrace this worry and propose the relevant solutions, so that the public purchasers would have a solid supply from the market, reflecting their needs, and the economic operators escaped the feeling of distrust, while participating in the public procurement procedures.

The current practice, related to the subject, faces the following challenges. First, there is a lack of single definition what the confidential information is. Second, there is a diverse approach to the confidentiality when spoke of situations (i) where the tenderer requests the information related to the bid of the competitor and (ii) the occasions when the former asks for the inside information of the contracting authority, related to the evaluation of the bid. The nature of the legal issue is the same, albeit the approach is different. Third, there is an absence of the criteria allowing to make a correct judgement under the mentioned circumstances and to implement the simplified procedure of the decision making, allowing to decide on whether to disclose the information to the requesting tenderer or to keep it under the lock. All this leads to a practical mist making the procurement navigation very hard.

This article addresses the above-mentioned legal problems and seeks to provide the possible solutions. It is based on the analysis of the provisions of the Directive

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2014/24,[1] the Law on the Public Procurement of the Republic of Lithuania (hereinafter referred to as the "LPP"),[2] the EU and national case-law.

The article has two main parts. In the first part all the attention is focused on the definition of the confidentiality in public procurement. Therefore, the author seeks to examine the EU and Lithuanian legislation as well as the relevant case-law. The main purpose of the research is to outline the features of the confidentiality and to assess their practical applicability. Moreover, the first part of the article addresses the situations where the issue of confidentiality becomes relevant when the economic operator wants to receive the information about the other bidder and his commercial proposal to the contracting authority. The second part of the article examines the situations which are related to the contracting authority and the information which reflects the decision making process during the procurement procedure. It will be shown that this phase of procurement also inherits the need of the suppliers to get the information and, therefore, the necessity for the contracting authorities to know how to act in such cases with the purpose to safeguard the essential values of the public procurement. At the end of the article conclusions are made.

2 Confidentiality and the bids of economic operators

It is provided in the paragraph 51 of the recitals of the Directive 2014/24 that *it should be clarified that the provisions concerning protection of confidential information do not in any way prevent public disclosure of non-confidential parts of concluded contracts, including any subsequent changes*. Art. 21(1) of the same Directive envisages that *unless otherwise provided in this Directive or in the national law to which the contracting authority is subject, in particular legislation concerning access to information, and without prejudice to the obligations relating to the advertising of awarded contracts and to the information to candidates and tenderers set out in Articles 50 and 55, the contracting authority shall not disclose information forwarded to it by economic operators which they have designated as confidential, including, but not limited to, technical or trade secrets and the confidential aspects of tenders*. It is correctly noted by S. Arrowsmith that such procurement rules may seek the limitation of disclosure of information which is trusted to the contracting authority by the economic operators during the procurement procedure. It is contended that there are two main reasons for confidentiality.

[1] Directive 2014/24EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ L94/65. The present article refers to the regulation of this EU directive, leaving Directive 2014/25 aside. However, the discussed matters are also applicable to the latter directive, as the regulation of the both EU directives regarding the examined legal issues is the similar.

[2] Law on the Public Procurement of the Republic of Lithuania, Zin, 1996-09-06, No. 84-2000.

Firstly, it is the integrity of public procurement, which mostly relates to the prevention of situation where competitors may use the procurement procedure as a mean to receive the commercial and sensitive information about the market rival. Secondly, which is related to the first one, full disclosure of bids may hinder the participation of the tenderers because of the fair to be exposed from the business perspective.[3] It is also argued that the interpretation of the norms similar to Art. 21(1) of the Directive 2014/24, which were included into the 2004 public procurement directives, suggests that this provision even prohibits disclosure of the information, albeit to the extent that is "already prohibited by national law rules, in which case the effect would be merely to make a violation of national laws on confidentiality during public contract procedures a violation of the directive also".[4] The statements of the Directive 2014/24 are moderate. They implement the flexibility and give discretion of choice to the Member States while searching for the right balance between the transparency and confidentiality in public procurement. The wording of the Art. 21(1) of the Directive 2014/24 empowers the national regulation which would hinder the disclosure of information that is commercially sensitive to the economic operators (*the contracting authority shall not disclose information forwarded to it by economic operators which they have designated as confidential*). Thus, the text of the directive is formulated in the negative manner (*shall not disclose*) what leaves a room for a thought that confidentiality in public procurement is a value *per se* and deserves a due attention when considered if it must be fully yielded by the principle of transparency on a case-by-case basis. On the other hand, the quoted recitals of the EU law remind us that confidentiality is not a sacrosanct and must be balanced with the openness of procurement procedures, so that the goals of public spending (integrity, competition, *quid pro quo*, equality, etc.) were attained.

There is no need to discuss the importance and meaning of the transparency both as a goal of public procurement as well as its' highlight principle. However, surprisingly as it may seem to be, it is not the single guiding light when conversation turns to the balance between the transparency and the protection of confidential information, obtained by the contracting authority during the procurement procedures. Quite long ago the CJEU expressed its support towards the protection of confidentiality in *Varec* when stated that *"in order to attain that objective it is important that the contracting authorities do not release information relating to the contract award procedures which could be used to distort the competition, whether in an on-going procurement procedure or in subsequent procedures"*.[5] The issue has also been addressed by international organisations as well. For instance, the OECD

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[3] Arrowsmith, Sue, *'The Law of Public and Utilities Procurement. The Regulation in the EU and UK'*, 3rd edition, Volume 1, Sweet & Maxwell, 2014, p. 634.

[4] *Ibid*.

[5] Judgment of 14 February 2008, Case C-450/06, *Varec*, ECLI:EU:C:2008:91.

maintains the view that "*strategies to address collusion and corruption in public procurement must address a fundamental tension: while transparency of the process is considered to be indispensable to corruption prevention, excessive and unnecessary transparency in fact facilitates the formation and successful implementation of bid rigging cartels*".[6] Hence, taking this into consideration, there are a few important remarks to be made. First, under certain circumstances there exists the "excessive and unnecessary transparency" which should be avoided during the procurement procedure. Second, this leads to, as precisely noticed by K.M. Halonen, the need of protection of confidential information which is both a subjective right to property as well as a matter of public interest: a necessity to secure undistorted competition.[7] In practice it is extremely hard to identify which is the situation of "excessive and unnecessary transparency", negatively affecting the market competition and, on the other hand, what are the boundaries of "correct" and sought transparency, leading to the implementation of the other public procurement principles and goals. Therefore, it is mainly the task for each Member State to give a guiding impetus and set the direction towards either the balanced system of transparency and confidentiality or giving a specific priority to one of them.

The limitations on transparency and conditions for confidentiality in the procurement procedures, executed under the LPP, are addressed by Art. 20 of the LPP. The provisions of it are structed in a twofold manner. On the one hand the law regulates which information can be covert. It is important to mention that the law does not provide an exhaustive list of confidential information. It merely states that *the confidential information may be, including but not limiting, commercial (industrial) secret and the confidential aspects of the bid* (Art. 20(2) of the LPP). What is considered a *commercial secret* and (or) *confidential aspects of the bid* remains open to the legal interpretation and the case-law, albeit the bidders play a crucial role here because namely they identify the specific parts of their bids which they want to protect from the public eye and the competitors. Therefore, it is a prevailing thought that if there is no clear and direct indication from the bidder that the information is confidential, there is also no obligation to the contracting authority to even consider any matters related to the confidentiality of the bid.[8] It is quite a direct approach. There is a room for an alternative thinking though, and it's based on the nature of the relationship which occurs between the contracting authority, which receives a bid together with the sensitive

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[6] Organisation for Economic Co-operation and Development (OECD), *'Competition and Procurement'*, 2011, Key Findings p. 19.

[7] Halonen, Kirsi-Maria, *'Disclosure Rules in EU Public Procurement: Balancing Between Competition and Transparency'*, Emerald Publishing Limited, Journal of Public Procurement, Vol. 16, Issue: 4, 2017.

[8] Jankauskyte, Dovile, '*Konfidencialumo uztikrinimo ir skaidrumo santykis viesuosiuose pirkimuose*', Law Review, ISSN 2029-4239, No.1 (17), 2018, p. 12.

information, and the tenderer, who trusts this information into the awareness and knowledge of the contracting authority. As precisely noticed by the CJEU in *Varec*, the latter relationship is a fiduciary, meaning that it is based on trust and free will. This also means that the tenderer must feel totally confident and relaxed when taking part in the public procurement procedure and giving his sensitive information to the contracting authority.

This implies that the latter must be vigilant and protect the information *ex officio*, which is even not marked as confidential by the supplier but appears to be one under the judgement of the contracting authority in each particular case. In other words, there is a possibility to construe the provisions of the Directive 2014/24 and Art. 20 of the LPP as not only allowing, but also requiring the contracting authority to be judgmental and to safeguard the information included into the bid of the tenderer if it appears to be sensitive for the disclosure to the competitors and the market. However, such interpretation, although being pro-supplier type, would hardly be popular among the practitioners, acting on behalf of the purchasers due to the following reasons.

First, this approach would confer too much of discretion and the responsibility on the contracting authorities. Though the author of the present article is the proponent of the discretion given to the contracting authorities and believes that their procurement practices should be resemble to the private ones, except as much as it must differ due to the public procurement principles and the widest implementation of their content in public purchase, however, in reality the proposed discretion would be immense and often leading to the confusion and more procurement disputes. It is hard to image that procurement practitioner would take active role in identifying the particular data as the confidential information on behalf of the tenderer. None civil servant is interested in protection of private parties' commercial interests instead of the interested party and, indeed, is not supposed to. Therefore, the proposed interpretation of the EU directive and LPP legal norms would not be realistic in practical terms. Secondly, such approach would lead to a very diverse procurement practice. While one contracting authority would consider the specific information as confidential, the other would be silent and passive. This, again, would create more confusion among both the contracting authorities and the tenderers what would ignite another set of procurement disputes. Thirdly, the mentioned view would eliminate any initiative of the tenderers to protect their own interest, because they would consider that there is always someone over ones' shoulder to take care of the information which is deemed as secret. And, as it is mostly the case, only after becoming aware that the tender for the bidder was not successful, one would start searching for the legal grounds of dispute and the alleged lack of the contracting authorities' attention to the confidentiality of information would be often one of the first choices. Therefore, despite the fiducial nature of the relationship between the

supplier and the contracting authority during the procurement procedure, the law must be construed as requiring the tenderer to be active if one wishes to secure its' (his, hers) trade secrets.

On the other hand, Art. 20(2) of the LPP *expressis verbis* excludes the particular information from even the possibility to hold it as confidential one. Firstly, the latter legal norms state that the whole bid *in corpore* cannot be held as a confidential information. There was a vast practice when tenderers used employ their subjective right to indicate the information as a confidential and used to specify that the entire bid was confidential. Therefore, to eliminate such situations once and for all the Lithuanian legislator envisaged that these cases are not possible, and the tenderers are precluded from closing the whole bid from the other players of the market, who participate in the procurement procedures. Secondly, para. 1 of the Art. 20(2) states that the information which must be disclosed to any third party under the law, cannot also be locked. Therefore, one cannot hold the data as a secret if it has to be submitted to the law enforcement authorities, etc. Thirdly, the LPP precludes to deem the information as a confidential one if it must be disclosed under the requirements of the law itself. This refers to the Arts. 33 and 58 of the LPP which require to disclose the certain type of information, *i.e.* the awardee of the public contract, the winning price[9] or the score received, etc. Fourthly, the information cannot be confidential under the law if it is related to the selection and qualification criteria. This requirement under the LPP codifies the previous case-law of the Supreme Court of Lithuania which ruled that the information on the selection and qualification of the supplier is very transparent and can be accessed by anyone because either of the requirements of the law, for instance, the requirements under the EU company law directives to publish financial statements, etc., or due to the fact that many suppliers may participate jointly in procurement procedures and therefore find out much of the information related to the qualification of the competitor.[10] Fifthly, much related requirement to the previous one is to disclose the information related to the qualification of any third party whose capacity is being relied on in the concrete procurement procedure by the tenderer, except if such disclosure may breach the privacy legal requirements.

Although the general idea not to deem the requirements on selection and qualification criteria as confidential *in all cases* is a progressive one, its' absolute and rigid implementation, at least it has to be as such pursuant to the wording of the text of the law, may not be prudent under the particular circumstances.

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[9] Although not the parts of the price suggested by the supplier, which may be deemed as confidential. See the ruling of the Supreme Court of the Republic of Lithuania of 4th March, 2015 in a civil case No. 3K-3-122-690/2015.

[10] Ruling of the Supreme Court of the Republic of Lithuania of 18th October, 2013 in a civil case No. 3K-3-495/2013.

For example, there might be situations when sub-contractor, whose qualification is being used as a reference in the procurement procedure, is a kind of commercial secret due to the endeavours and attempts of the tenderer to find such source of qualification, negotiate the deal with him (her) or the company, agree on conditions of accessing the market, etc. Such process requires not only timeless efforts but also considerable amount of R&D investments. Therefore, to simply unlock this information to the third party solely on the basis of the Art. 20 of LPP sounds as distorting the fair competition. Especially this is so when such relationship between the business partners is not an exclusive one and any competitor, having found out about this source of qualification, may approach the latter and try to win it over the former business partner. Therefore, the author suggests that these provisions of Art. 20 of the LPP must be construed as requiring the contracting authority to disclose the envisaged information with caution and only to the extent which is objectively required. For instance, in case of a request the contracting authority might disclose the information on qualification being referred in the procurement procedure, however, leaving the name of the sub-contractor and identification details locked, if this was explicitly required by the tenderer whose bid is examined by the competitor.

Despite the mentioned national legal norms which narrow the possibilities to keep the information confidential, it is the recent case-law of the Supreme Court of Lithuania which significantly changed the approach to the discussed issue. The interpretation of the relevant provisions of the LPP suggested by the Court in a *KRS*[11] case is definitely a "game-changer" and exceeds the wording of the text written in the law regarding the matter. Amongst the other important legal questions, the Court gave the answers to, the most relevant one is the definition of the confidential information. In other words, the Supreme Court elaborated on what is held as the confidential information under the Art. 20 of the LPP and the suggested version may have the cross-border applicability. Before discussing the main rules which the Court delivered, it is important to highlight the background of the procurement practices that were dominant in Lithuania before the decision of the Court and which created the legal problem. Thus, scope of confidentiality had been discussed for a long time before the *KRS*[12] ruling. The principle has always been alike the one established in the Art. 20 of the LPP: each supplier can indicate which information of the bid is considered as confidential and governed by the rules of non-disclosure. To the most contracting authorities such indication was sacrosanct: they considered this data as the confidential and refused to disclose it to the interested party at any cost.

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[11] Ruling of the Supreme Court of the Republic of Lithuania of 4th January, 2018 in a civil case No. e3K-3-16-378/2018.

[12] Ruling of the Supreme Court of the Republic of Lithuania of 30th May, 2017 in a civil case No. 3K-3-301-469/2017; 3K-3-122-690/2015; 3K-3-309-248/2015 and others.

This created a sound legal problem with the implementation of the principle of effectiveness in remedies because such practices eliminated the possibilities to challenge most of the decisions taken by the contracting authority if the matter was related to the questioning the bid of the competitor. The interested supplier could not access majority parts of the bid and, therefore, it practically became impossible to review the decision of the public purchaser, even if there were actual discrepancies in the bid and it must have been rejected on the basis of the principle of equivalence. In such cases the practice of "guessing review" emerged. The tenderers used to base their claims to the contracting authorities and afterwards to the courts on the speculation that, to the best of their knowledge, the particular parts of the competitors' bid, which they could not access due to the requirements of the confidentiality, did not correspond to the relevant provisions of the procurement documentation and therefore had to be rejected. Such situations used to lead to paradox practices: the one who is truly aggravated was put into the situation which was much worse than the ones who must have taken some corrective measures (the contracting authority) or face the negative consequences (tenderer and the rejection of its' bid).

Moreover, such line of reasoning used to be repeated by the courts as well. After the claimants used to request the court to gather the evidence in a civil case, which were the parts of the competitors' bid the supplier considered to be the defected ones, the courts used to require such information, however, after having received it, almost always used to declare it as a confidential. This used to lead to even more hilarious situations where the claimants used to have the chance to examine the evidence which they had previously been familiarized with, meanwhile the core of a dispute remained locked and accessible only to the contracting authority and the third party whose bid used to be challenged. In other words, the one who must be given all the information to have the effective judicial review in public procurement disputes was the most prevented from accessing this information, *i.e.* the main evidence in a civil case. Again, this seriously hindered the effective review as well as the principle of effectiveness in procurement disputes. Therefore, one of the goals of the Court in *KRS* case was to address these issues and to solve them.

The Court started by precise and direct statement that full closure of the information during the public procurement procedures is an extreme exception. It is a genuinely strong and solid approach. It manifests not only the legal rule elaborated by the Court regarding the treatment of the confidentiality, but it also shows the very precise legal trend that the courts must obey and not tolerate confidentiality in public purchase as well as construe the provisions of Art. 20 of the LPP very strictly. The Supreme Court went on to say that though the tenderers have their right to name the concrete information which they consider as confidential, such instructions are not obligatory to the contracting authority.

It is obviously an opposite approach if compared to the wording of the text of the LPP. In other words, it is one of these cases when the judge-made interpretation of the law differs from what is written in it. Moreover, the Court explained that each time the contracting authority receives the request to hold the information as confidential, it is under a legal obligation to examine such request and to decide on the merits. Nevertheless, according to the Court, the contracting authority must decide if the request is well founded and whether it is based on sound evidence which would show that any disclosure of the information will severely negatively affect the tenderer. Hence, the Court has demonstrated its' view that transparency prevails over the confidentiality each time it is considered in any procurement procedure, happening under the Lithuanian public procurement law.

The next task for the Court, after it has narrowed down the interpretation of Art. 20 of the LPP to its' most possible limited extent, was the provision of the definition of confidential information. In other words, the Court had to elaborate the content of the confidential information and answer the question, what is this information in the terms of Art. 20 of the LPP. Since there was no previous case-law in the field of public procurement regarding the *definition* and *content* of the confidential information,[13] the Court navigated through its' practice in labour and competition law disputes, where the content of confidential information, especially in cases of unfair trade, was previously examined. In its' landmark *Auto Express* case[14] the Court divided the information into the four categories:

1. Information which is *per se obvious, direct and easily accessible* (*e.g.* published financial statement of the company, open source information related to the shareholders, managers of the company, implemented business activities, etc.). This information, albeit considered as confidential by the tenderer, shall not be deemed as such within the terms of Art. 20 of the LPP. In other words, contracting authorities must ignore the very will of the bidder and must disclose this information to 2) the competitor if requested by the latter.
2. Information, which must be secured by the employees because it becomes inseparable from them, however, after some time of employment, when the they use it (*know-how*, management methods, particular skills, etc.), this information becomes non-confidential or, in other words, it is only *temporarily confidential*.
3. The third category of data described by the Supreme Court is the *specific confidential information*. The Court considers that this is the information, on the contrary from temporarily confidential data, does not become inseparable from the employee once it becomes known to him or her. The Court ruled that this

[13] *Ibid*, p. 9. As mentioned above, the prevailing case-law related to explanation of procedures of behavior of the contracting authority when requested to disclose the information.

[14] Ruling of the Supreme Court of the Republic of Lithuania of 5th February, 2016 in a civil case No. 3K-7-6-706/2016.

type of data is protected, and the former employee may be held legally liable for the disclosure of such information to the third parties.

4. The fourth category, and – the most important one to the subject, is the information which is a *commercial secret*. The Supreme Court explained that this information is so vital and genuine to the economic operator that its' disclosure would inevitably harm the business of the tenderer. The Court explained that this is the data that each prudent commercial entity or person is taking a due care to safeguard and protect it (Art. 1.116 of the Civil Code) from becoming public or known to the people outside "the inner circle". Therefore, this information must be always protected by anyone whom it is entrusted and given to.

After mentioning what might be understood as the confidential information under the general provisions of law, the Court went on with its' reasoning that overall the notion of the confidential information is much broader than the one of the commercial secret. In other words, the latter is just one of the diverse types of the former. Therefore, the Court concluded that the subjective right of the economic operator to secure the confidential information from the other market players, enshrined in the Art. 20 of the LPP, encapsulates only the data which is and corresponds to the definition of the commercial secret.

Hence, any other type of information, despite the real wish of the supplier to keep it close as well as naming it as confidential will not have any legal obligation upon the contracting authority and it will be obliged to disclose the materials of the bid to the other competitors. The *ratio* elaborated by the Supreme Court demonstrates the ongoing obsession with the transparency in the government commerce. This means that anyone, participating in the procurement procedure, which will be regulated by the public procurement legislation of Lithuania, must know that at least in this jurisdiction public procurement literally means public. From the practical point of view, especially taking into consideration the evolution of the examined concept under the Lithuanian case-law, then the new legislation, regulating this legal issue in a narrower approach, it is hard to think of the information which will be held confidential. To put it otherwise, the author thinks that the level of secrecy of information strongly depends *a priori* on the subject matter of the future public contract. In cases of "ordinary" purchases, such as construction works, stationery, computers, etc., we could hardly believe the contracting authorities and especially the courts deem almost any information as being confidential. On the other hand, the more extraordinary and innovative procurement (from the perspective of the subject matter of the public contract) will be organized, the more chances there will be to secure the content of the tenderers' bid.

It has to be noted that the Supreme Court in *KRS* case did not omit the litigation in the court stage and also instructed the courts that they are prevented

from declaration of the information as a confidential and must disclose it to all the parties to the civil case, including the claimant. The Court ruled that in case the courts wish to protect any sensitive data, which is obtained during the procurement procedure, they are entitled to use other procedural means which are allowed under the law and may help attain the same result. For example, the Court suggested that any lower court can arrange the closed hearings of the case so that the confidential information was protected from the public.

In the light of the reasoning engaged by the Supreme Court towards the transparency and effectiveness of the remedies in public procurement, it is noteworthy that such approach to the transparency may lead to the dark corners of it. The terminology of "*excessive transparency*" is being used more often. Thus, the question is why are there any alarming bells at all and how can transparency be excessive? Isn't it a core of the public procurement?

Firstly, the discussed situations trigger the aspect of discretion of the contracting authority. On the one end, seeing it from the very practical point of view, it is a very troublesome task for any public buyer and its' staff when things turn to the open question, such as the one at issue, whether the information is a commercial secret or not. The owner of the information will always contend that it is, meanwhile, the interested party shall argue the opposite. The contracting authority is not a business owner, usually neither an expert, therefore, there are many doubts if it managed to qualify correctly whether the data is a commercial secret or not. This leads to the automatic openness when contracting authority may not bother doing the analytics and apply the *quasi* business judgement rule, meaning that it will not hold itself responsible for the disclosure of information, unless there is a gross negligence or lack of fairness, which must be proven in any case. On the other end, contracting authorities, as A.S. Graells puts it, "will have a dangerous incentive to disclose very detailed and precise information".[15] In other words, the cases of excessive transparency may lead to some degree of misuse of authority and power, vested to the contracting authorities by the law.

Secondly, as it is mentioned earlier in the article, the international organizations (OECD) as well as legal scholars contend that the unlimited access to the information provided in the bid of the tenderer may directly lead to distortion of competition, collusion and bid rigging in public procurement procedures.[16] Thinking paradoxically, there may even occur situations when contracting authority might be used as a "legal" form of exchange of information, which is forbidden under the provisions of the competition law. In such cases an economic operator

[15] Sanchez Graells, Albert,*'The difficult balance between transparency and competition in public procurement: Some recent trends in the case law of the European Courts and a look at the new Directives'*, University of Leicester School of Law Research Paper No. 13—11, 2013. Accessed at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2353005

[16] *Ibid.*

may simple request for the information which is submitted in the form of the procurement bid and afterwards use it for its' own business purposes, knowing that the counterpart market player knows the fact of awareness and plans its' own actions accordingly.

Thirdly, the almost unlimited openness during the procurement procedures may incentivise the tenderers to use the remedies system only for gaining the information about the competitor. In other words, the judicial review in some cases may become a part of tactics for gathering of information about the business of the competitor, even if it is at the cost of litigation expenses.

Therefore, according to A. Sanchez Graells "this is an area where strengthening of the rights of information (generally) and the mandatory disclosure of very detailed aspects of the winning tenders (including the name of the awardee of the public contract) needs to be counterbalanced by a careful exercise of administrative discretion by contracting authorities in order to avoid an excessive degree of transparency".[17] Additionally, it is noteworthy that each time when the contracting authority searches for the right balance between confidentiality and transparency, it must look through the lenses of the effective protection of rights of the supplier in a particular public procurement procedure. The author believes that one of the main and most important tasks for the contracting authority is to understand and sense if the requesting party wishes to gather the information or if it is a robust attempt to prepare for the procurement dispute. This approach would help the contracting authority to define the scope of the information which should (or must) be given to the requesting tenderer.

3 Confidentiality and the file of the procurement procedure

The problem of confidentiality is not related only to situations among the economic operators and their bids, *i.e.* among the competitors or, in other words, on the *horizontal level*. It is also frequent on the *vertical level*, *i.e.* in cases when the tenderers need to know information not related to competitors' bid, but rather the information on *how* and *why* contracting authority evaluated either the interested parties' bid or the competitors' commercial proposal. The discussed legal issue became especially relevant after the EU 2014 public procurement legislation came into force, enabling the most economically advantageous tender as a single award criterion and fostering the price / quality criterion as the dominating method of evaluation of bids in procurement procedures. At the moment the topic of *price versus quality* has reached the highest peak during the whole

[17] *Ibid.*

existence of the procurement regulation and practice,[18] emphasizing the quality, innovations, social considerations as prevailing aspects of purchase over the price of the particular object.

It is noteworthy that most procurement disputes also arise from the situations when tenderers are disappointed with the evaluation of their bids done by the contracting authority and its' evaluation committee. As a rule, they often claim that their personal bids were disproportionately devalued as well as the whole evaluation is unfounded. Such claims usually involve statements that the concrete feature of their bid (quality, speed, project management, etc.) must have received the higher score and the contrary situation shows the negative bias or material mistake of the contracting authority regarding the suppliers' bid. Or, on the other end, the bid of the competitor was overestimated, and the scores given to the latters' bid show the unfairness of the procurement procedure. All of these situations have one common stigma – the request of explanations from the contracting authority *how* and *why*, as mentioned earlier, such situation happened. Besides, the interested parties require to show the materials of the procurement file which is in possession of the contracting authority. If the particular scores were given on the basis of the in-house or outside expert opinion, the disappointed bidders want to find out who were the experts, what exactly were their evaluations regarding the each of the bid feature and what were the findings and motives of the expert, which influenced their decisions. Thus, the contracting authorities again face the question whether to let the tenderer enter the procurement file held by the contracting authority and to pass this information to the supplier or to keep it secret.

Art. 55(3) of the Directive regulates that *contracting authorities may decide to withhold certain information referred to in paragraphs 1 and 2, regarding the contract award, the conclusion of framework agreements or admittance to a dynamic purchasing system, where the release of such information would impede law enforcement or would otherwise be contrary to the public interest, would prejudice the legitimate commercial interests of a particular economic operator, whether public or private, or might prejudice fair competition between economic operators*. Lithuanian version of the latter is stricter. Art. 58(5) of the LPP states that only the members of the evaluation committee and the other very closed circle of persons (representatives of the Public procurement office, law enforcement agencies, etc.) may have access to the file of the procurement procedures, *i.e.* the above-mentioned information and alike. Therefore, the prevailing practice is that each time the tenderer needs to find out very important and sensitive information which may substantially change the

[18] See European Commission 3rd October, 2017 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 'Making Public Procurement work in and for Europe', COM(2017) 572 final.

outcome of the procurement (and even the awardee of the public contract) (e.g. data from the competitors bid which received allegedly and artificially increased score, etc.) the public purchaser rejects this request by making a reference to Art. 58(5) of the LPP. Therefore, the natural question, which may be raised, having in the background the national and European trend of idolizing the transparency over the confidentiality, is the following: do similar rules as the ones, elaborated in *KRS* case, apply on the equal grounds regarding the information contained in the procurement file and held by the contracting authority?

Before providing any insights, it has to be noted that European courts have already gave some hints related to the mentioned enquiry. In one of the *Evropaiki Dynamiki* cases[19] the CJEU repeatedly held that the contracting authority is required to give its' reasoning and motivation regarding the made decisions during the procurement procedure. However, "*the contracting authority is not under an obligation to provide an unsuccessful tenderer, upon written request from it, with a full copy of the evaluation report*"[20]. It seems that the Court was more protective of the contracting authority and was cautious about letting the bidders to require a free flow with information from the contracting authority with a very detailed scrutiny. The Courts' main worry was "*avoiding the imposition of excessively burdensome disclosure obligations on the contracting authorities*"[21]. The similar approach was demonstrated by the General Court in *Cosepuri* case[22] where it held that "*the requirement of preserving the confidentiality of the tenders and the need to avoid, in principle, contact between the contracting authority and the tenderers"* is compatible with the principle of sound administration, meanwhile, the principle of transparency "*must be reconciled with those requirements*"[23]. Again, the latter line of reasoning directly promotes the confidentiality and allows the wider discretion of the contracting authority to decide regarding the disclosure of information in case of the request by the interested tenderer.

If the above-mentioned conclusion is correct, then the *KRS* developments would be in a opposite pole if the contracting authority had to decide whether it is caught by the requirements of transparency in terms of the provision of the information directly related to its' judgement and decision making during the evaluation process. It seems that the mentioned case-law of the European courts leaves the room for a strict interpretation of the Art. 58(5) of the LPP and public purchasers must be only vigilant in motivation of their decisions but less open

[19] Judgment of 4 October 2012, Case C-629/11, *Evropaïki Dynamiki v Commission (ESP-ISEP),* ECLI:EU:C:2012:617.

[20] *Ibid.*

[21] *Ibid,* p. 15.

[22] Judgment of 29 January 2013, Joined Cases T-339/10 and T-532/10, *Cosepuri v EFSA (EFSA),* ECLI:EU:T:2013:38.

[23] *Ibid.*

in *showing the materials* or *evidence* which led to the particular decision, the tenderer is not satisfied with. In authors view such approach has its' flaws. The problem with the reasoning provided by the CJEU or the General Court in their above-mentioned case-law is that the courts mainly addressed the question *if* the contracting authority must disclose its' motives and reasoning for the decision made but not *what* information should be disclosed and in *what cases or circumstances* it should be done. The guideline contracting authorities should follow is the actual possibility to defend one's subjective rights during the procurement procedure. In authors view, the emphasis should not be on whether the contracting authority will have a heavy burden of administration while answering the enquiries of the bidders, but *what* information is requested from the contracting authority and *how* the provision of such data would enable the disappointed supplier to prove the breach of the public procurement principles. If there are serious allegations regarding the flawed judgement of the evaluation committee, the conflicts of interest, manifest error in a judgement made, etc., it is irrelevant what kind of information is requested – minutes of evaluation committee, expert nominees, their findings, reasons of scoring, etc., this information must be given to the interested party, so that it (he / she) could effectively remedy the situation.

4 Conclusions

The line between the transparency and the confidentiality in a public procurement is blur. At the supranational (European) level it seems that confidentiality has its' base. The CJEU and General Court acknowledges the confidentiality in both horizontal and vertical levels. However, there is a lack of the set of criteria, which would enable the practicing professionals to easier qualify whether the information should be regarded as confidential or if the transparency should have a free flow. In case of such a mist, naturally, it is easier for the contracting authorities, at least in cases which are caught by Art. 55(3) of the Directive and 58(5) of the LPP, to reject any request to provide the information to the tenderers, which is related to the "kitchen" of the decision making during the procurement procedure.

On the other hand, Lithuanian case-law shows the emerge of the completely different approach as much as it is related to the horizontal level, *i.e.* when the issue is related to the confidentiality of the competitors' bid and not the data on decision making by the contracting authority during the procurement procedure. We may observe the clear signs of excessive transparency, which becomes a trendy approach elsewhere or even the legal requirement under the Lithuanian case-law.

However, it is not clear why there have to be two different approaches towards the same legal subject – confidentiality at horizontal and vertical level. In authors view, the present practical approach lacks more unified set of criteria which would ease the decision making for the contracting authority each time it receives the

request to provide the particular information. To authors' mind, the starting point should be the availability of the effective remedy for the dissatisfied economic operator. The information, which is trusted to the contracting authority or generated within, should be given to the interested party as much as the latter may effectively test the decisions made by the contracting authority and challenge ones in case of the breach of the procurement principles. In other words, the author suggests that the algorithm of the decision making whether to disclose the information or not should be based on the possibility to review the public purchasers' decision made during the procurement procedure. This approach may simplify the procedure and prevent the excessive transparency or super secrecy in the procurement, which is at the end of the day is public.