When does the lease of a building by a public authority constitute a public procurement contract?

The Court of Justice reshuffles the deck

Under European public procurement law and its Belgian implementing legislation, the acquisition and lease of existing buildings or other immovable property are in principle excluded from the scope of the public procurement rules.[1]

In recent years, however, discussion has arisen over the concept of "existing buildings", particularly in the context of the lease by public authorities of buildings to be constructed. Does this type of transaction fall outside the scope of public procurement law or should it be regarded as a public works contract, on the ground that it concerns the construction of a building "corresponding to the requirements specified by the contracting authority exercising a decisive influence on the type or design of the work"?[2]

In October 2018, the Belgian Council of State recharacterised as a public procurement contract the lease by the Brussels-Capital Region of the Silver Tower, based on a number of factors indicating decisive influence by the Region on the nature or design of the building to be constructed. The Council of State ruled that this was the case even if the future construction was a "standard" office building, likely to meet the needs of both public and private tenants.[3]

This decision gave rise to ample discussion, and therefore both public authorities and property developers were eagerly awaiting a ruling by the Court of Justice of the European Union on this issue. They need wait no longer. A judgment was handed down on 22 April 2021 in Commission v Austria.[4]

In 2012, the City of Vienna concluded a long-term lease, without a competitive tender, for an office building to be constructed. The Commission launched infringement proceedings against the Austrian government, finding that the transaction constituted a public works contract.

In his opinion,[5] Advocate General Campos Sánchez-Bordona sided with the Commission and concluded that the contract should be reclassified as a procurement contract for several reasons: (i) at the time the contract was concluded, the developer had not begun any construction works and did not even have a building permit; (ii) the architectural plans had undergone significant changes at the request of the city; (iii) the city had appointed its own experts to monitor execution of the project, alongside the owner; (iv) had the contract not been signed, the building would not have been constructed; and (v) the building was to be almost entirely occupied by the city.

Remarkably, the Court of Justice disagreed with the Advocate General.

First, the Court expressed the general principle -– for the first time in its case law – that decisive influence on the design of a building can be found if it can be demonstrated that influence is exercised over the architectural structure of the building, such as its size and external and load-bearing walls. Stipulations concerning interior fittings may be regarded as indicative of decisive influence only if they stand out due to their specificity or scale.

Subsequently, with regard to the building in question, the Court noted the following:

- At the time the lease agreement was negotiated, the architectural design of the building was fully complete.
- With regard to the lack of a building permit, the Court noted that large-scale architectural projects are usually let well before the detailed construction plans are finalised and the application for a permit is filed.
- The long term of the lease is not a relevant criterion
- It is not unusual for a tenant to take steps to ensure that it is possible to move into the premises on the agreed date and to use specialised third parties to exercise control in this regard.
- The building was designed as a conventional office building, without targeting specific tenant groups or needs.
- It is customary for a tenant, whether private or public, seeking to lease an office building to specify certain wishes as to the characteristics the site should have. Such requests are not in themselves sufficient to recharacterise a lease agreement as a works contract.
- The city's requirements did not exceed what a tenant would usually require and did not demonstrate a decisive influence on the design of the building.

It seems to follow from this judgment that a lease may only be reclassified as a public works contract if the requirements imposed by the public authority go beyond what a lessee can usually request with regard to a conventional office building.

The Court has thus provided public tenants with unexpected room for manoeuvre. It should be noted, however, that the Court did not rule here on the general principles of European law (transparency, equality and competition) which require the organisation of a competitive

tendering procedure even for contracts that do not qualify as procurement contracts. It is therefore safe to assume that public real estate transactions will remain on the judicial radar.

[1] Art. 10(a) of Directive 2014/24/EU of 26 February 2014 on public procurement; Art. 28 §1(1) of the Act of 17 June 2016 on public procurement.

[2] Art. 2(1)(6) of Directive 2014/24/EU; Art. 2(18) of the Act of 17 June 2016.

[3]Council of State, 23 October 2018, No. 242.755, Fedimmo.

[4]CJEU, 22 April 2021, C-537/19, Commission v. Austria.

[5] October 22, 2020.

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