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Actualia Public real estate and public procurement contracts

In this newsflash we deal with a recent decision of the Council of State of 23 October 2018 that suspends a lease for a yet-to-be-erected building concluded between the Brussels-Capital Region and Ghelamco due to disregard of the public procurement contract regulations.

In addition, we also focus on the views of the Belgian Commission for Public Procurement Contracts concerning the question of whether the public procurement contracts legislation applies to the acquisition or lease of existing buildings where finishing or refurnishing works still have to be performed at the lessee´s request.

COUNCIL OF STATE SUSPENDS LEASE FOR A YET-TO-BE-ERECTED BUILDING FOR THE SERVICES OF THE BRUSSELS-CAPITAL REGION

By decision no. 242.755 of 23 October 2018 on the petition filed by the Fedimmo company, the Council of State ordered suspension of implementation of the Brussels-Capital Region's decision of 6 September 2018 to conclude a lease with the GHELAMCO company for a yet-to-be erected building that would house a large number of the regional administration's personnel.

The Council of State ruled that this transaction could not be qualified as a lease of real property, because in reality it concerned a public procurement contract for the contracting of works. This means that the public procurement contracts legislation did have to be complied with, although in fact that did not happen.

The question raised concerns the qualification of the present transaction, i.e. the lease of a yet-to-be erected building in accordance with the requirements of the party inviting tenders. In accordance with article 10 of Directive 2014/24/EU, as transposed into art. 28 of the Belgian Public Procurement Law of 17 June 2016, the public procurement rules do not apply to public procurement contracts for services concerning the acquisition or lease, regardless of the financial terms thereof, of land, existing buildings or other immovable objects or concerning rights on them. Pure property-law transactions (purchase, rent, long-term lease, etc.) are thus not subject to the public procurement contracts legislation.

In its analysis, the Council of State first examines whether there is a public procurement contract, i.e. an agreement for valuable consideration that is concluded between a party inviting tenders and a contractor (art. 2.17° of the Public Procurement Law). The Council finds that there is a

contractual relationship between the principal Brussels-Capital Region and the contractor Ghelamco. The agreement is therefore one “for valuable consideration” that is entered into in the direct economic interest of the Brussels-Capital Region. After all, the Brussels-Capital Region is obtaining the right to use this building for 18 years in exchange for rental payments to Ghelamco.

Then the Council of State examines whether it involves a contract for the public procurement of works (which thus - in contrast to the services contract concerning the acquisition of an immovable property - is indeed subject to the public procurement contracts legislation). For this the Council recalls the definition of works in art. 2.18° of the Public Procurement Law, providing that it covers (amongst other things) public procurement contracts that relate to securing the performance, by any means whatsoever, of a work meeting the requirements of the party inviting tenders which exercises a decisive influence on the type of work or the design of the work. The Council finds that - given that it involves a non-existent building - the execution of works is the primary object of the contract. The Council of State also finds that this building must satisfy the requirements imposed by the party inviting tenders, concerning e.g. access, appearance, the rooms present, etc. Moreover, the Council also attaches importance to (amongst other things) the fact that the building permit application was filed after the call for expressions of interest ("appel à manifestations d´intérêt") issued by the administration, and to the fact that the party inviting tenders at the end of the works requires that a tour be conducted in order to verify that the building was constructed in accordance with the requirements of the party inviting tenders. The Council believes that there are grounds for concluding that this is a work over which the party inviting tenders exercises a controlling influence and for which the public procurement contract regulations had to be followed.

The Council also found a violation of the principle of equality, non-discrimination and transparency, given that the Brussels-Capital Region was unable to produce the invitations to participate in the negotiations or minutes of the negotiations (which, according to the Brussels-Capital Region, supposedly took place by telephone).

You can find the full decision here.

BELGIAN COMMISSION FOR PUBLIC PROCUREMENT CONTRACTS TRIES TO FORMULATE RESPONSE TO QUESTION OF WHETHER PUBLIC PROCUREMENT CONTRACTS LEGISLATION APPLIES TO LEASE OF EXISTING BUILDING THAT REQUIRES FINISHING

At the request of the European Commission, the Chancellery of the Prime Minister published a supervisory report on public procurement contracts and concessions for Belgium in April 2018. The report contains a chapter in which the Belgian Commission for Public Procurement Contracts explains the most common reasons for misapplication of or legal uncertainty concerning the public procurement contracts legislation. This chapter discusses Article 28 of the Public Procurement Law of 17 June 2016, which provides that the public procurement contracts legislation does not apply to contracts of services concerning the acquisition or lease of existing buildings. The

Commission for Public Procurement Contracts seeks to find an answer to what "existing buildings" are precisely, and what degree of finishing they must have in order not to be qualified as a contract for the public procurement of works and therefore not to fall under the application of the public procurement contract regulations. In practice, after all, sometimes specific but limited-value finishing or refurnishing works are performed (by the lessor) in order to make sure that the leased property corresponds to the use that the party inviting tenders wishes to make of the spaces (e.g. installation of a visitors reception desk, removal of a semi-mobile partition wall, etc.).

The Commission proposes that it must be considered to adopt a threshold value under which finishing or refurnishing works within the framework of leasing an existing building do not have to be regarded as a contract for the public procurement of works. The Commission itself proposes (indicatively) an amount of 10% of the value of the works relative to the total rental value.

This supervisory report and the 10% threshold formulated therein have no legal value, but they can be included as one of the considerations if it must be demonstrated or justified that a public procurement contract of (works or) services is present.

You can find the full report here.

This fascinating problematic will undoubtedly be further explored in the case-law of the Council of State (and the Court of Justice). For more information you can contact Jelena Adriaenssens (author) and Kris Lemmens.

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