

LEGAL UPDATE

Clarification on the dos and don'ts of framework agreements

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At the end of June, the European Court of Justice issued a [new judgment](#) regarding framework agreements. In it, the Court upheld its earlier judgment of 19 December 2018 (case C-216/17) and clarified a number of points.

The case concerned a framework agreement that had been put out for tender by two Danish regions via a public procedure. One of the regions was going to participate "on an optional basis". On that point, the underlying facts of the case differed from the 2018 judgment where the contracting authority had been acting on behalf of public authorities that were not direct parties to the framework agreement. In addition, at the time of the 2018 judgment, the old version of the Public Procurement Directive (Directive 2004/18) was still in force and not the current Directive (2014/24). According to the latest judgment, these circumstances make no difference to the rules on framework agreements. The Court also held in this case that the principles of equal treatment and transparency regarding the estimated and maximum quantity and/or value of the contract *as a whole* had to be disclosed. Once the stated maximum had been reached, no further individual contracts could be awarded under the framework agreement as the framework agreement would then be "full".

This judgment brings up two interesting new points. Firstly, it clarifies the fact that non-substantive changes are still allowed while work is being carried out. In the Netherlands, this means that Section 2.163 a-g of the Dutch Procurement Act (*Aanbestedingswet*) are (or could be) applicable, i.e. regardless of the "maximum value". Secondly, it also clarifies the fact that the maximum quantity/value may be included in the contract notice as well as in the tender documents. The fact is that the latter have to be made available at the same time as the contract notice anyway.

Accordingly, the tenderer Simonsen & Weel had rightly pointed out to the contracting authorities in this case that the contract notice had (incorrectly) not provided any information on the estimated value of the contract nor on the maximum value of the framework agreement or the estimated or maximum quantity of the products that could be purchased under the framework agreement. But then what is the sanction for the contracting authority in that case?

According to the Court, the sanction in any case is *not* that the framework agreement must then be declared to be non-binding. That would only be the case for the most serious violations of Union law and it would have been disproportionate in the matter at hand. But the Court did not make it clear what the sanction actually was. Nevertheless, it is advisable for contracting authorities to state the estimated quantity and/or value and the maximum quantity and/or value of a contract. That would be useful to tenderers. It would help them submit appropriate and realistic tenders. And that would, in turn, benefit contracting authorities too. Tenderers would be well advised to complain on time if the requisite information is lacking.

We will keep track of whether new judgments provide further clarification on this point and we will keep you informed.

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