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By PwC Deutschland | 06 June 2024

ECJ: Tenderer to claim damages if unlawfully excluded from procurement procedure

In its judgment today the European Court of Justice held that current EU-law contravenes a national legislation or a national practice which excludes the possibility for a tenderer who has been unlawfully excluded from a procedure for the award of a public contract to be compensated for the loss suffered because of the loss of the opportunity to participate in that procedure with the intention to obtain the contract concerned.

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Background

In 2013, the Slovak Football Association excluded a consortium, which included INGSTEEL, from a public procurement procedure for the reconstruction, modernization, and construction of 16 football stadiums. That consortium had been excluded because it had not met the requirements of the contract notice, regarding its economic and financial standing. In the meantime, the public procurement procedure was closed by the conclusion of a framework agreement with the only tenderer remaining in the competition. In those circumstances, INGSTEEL brought an action for damages before the local court who referred the case to the ECJ for a preliminary ruling.

ECJ decision

The ECJ finds that Directive 89/665/EEC requires the Member States to grant damages to persons harmed by an infringement of EU law on the award of public contracts. However, in the absence of any indication to distinguish different categories of damage, the directive refers to any type of damage suffered by such persons, but also resulting from the loss of the opportunity to participate in the procedure for the award of a contract. In that regard, the ECJ points out that, while damage may result from the failure to obtain, as such, a public contract and result in the loss of profit, it is also possible for a tenderer who has been unlawfully excluded to suffer separate damage, which corresponds to the lost opportunity to participate in the procedure for the award of a public contract concerned in order to obtain that contract.

Reference:

ECJ, judgment of 6 June 2024 C-547/22 *INGSTEEL*. – Press release **No 95/24**.

Keywords

damages, public sector