

The most recent case law of the Court of Justice of the European Union (Obshtina Razgrad)

Partner, Attorney-at-Law Dr Deividas Soloveičik, LL.M
Head of Public Procurement practice at COBALT Lithuania

September 2024

JOINED CASES

C-441/22 and C-443/22: Obshtina Razgrad and Others

CŌBALT



Merits of the case

(C-441/22, whereas C-443/22 by analogy)

- In order to implement activities financed by European Structural and Investment Funds (**ESI funds**), on July 3, 2018, Obshtina Razgrad (**Razgrad Municipality**, Bulgaria) initiated an open public procurement procedure for the construction of a sports hall at a vocational school.
- While the contract was still ongoing, **the parties agreed to change the initial completion date** from November 30, 2019, **to January 30, 2020**, citing unforeseen circumstances.
- The contract was executed for 264 days, taking into account the suspension periods.
- No justifications were provided for the **delay from January 30 to February 24, 2020**, and **the contracting authority did not impose any penalties for it**.
- The head of the administrative institution applied a **25% financial correction** to the Razgrad Municipality, applicable to expenses eligible for financing with ESI funds, due to the violation of the Public Procurement Law, manifested as an unlawful change of the contract terms.
- **The Razgrad Administrative Court concluded** that a public contract can only be amended by written agreement, which was not the case in this instance, thus **it did not constitute a change in the terms of the public contract**.

Question No 1

- How should Article 72(1)(e) of Directive 2014/24, linked to points (a) and (b) of paragraph 4 of this article, be interpreted in order to determine **whether a substantial modification of a public contract**, as understood by these provisions, **can only be established if the parties have concluded a written agreement on this matter, or whether such a modification can also be established based on their actions?**

In other words:

- Does the absence of a written agreement to change the deadline for the completion of works specified in the original public contract mean that the actual extension of this deadline due to delays in completing the works cannot be considered as a "substantial" modification of the relevant contract?

The Court's interpretation.

Substantial modifications are not always formalized in writing

- Directive 2014/24 clarifies that a public contract is a **written agreement** between economic operators and contracting authorities, with **"written" defined broadly** to include any form of expression that can be read, reproduced, and transmitted, including electronically.
- While certain elements of procurement procedures should always be in writing, communication with economic operators **can also be verbal**, provided that the content is sufficiently documented.
- On the other hand, regarding modifications of public contracts during their validity period, **the Directive does not stipulate that such modifications can only be considered "substantial" if they are formalized in writing.**

The Court's ruling.

Substantial modification without written agreement

- Article 72(1)(e) and 72(4) of Directive 2014/24 must be interpreted in such a way that **for a modification of a public contract to be considered "substantial", the parties to the contract are not required to have signed a written agreement formalizing this modification**, as their **mutual consent** to make such a modification **can be confirmed**, among other things, **by other written information** available to these parties.

Question No 2

- Can Directive 2014/24 Article 72(1)(c) subparagraph i, in conjunction with its recital 109, be interpreted in a way that **the diligence the contracting authority must demonstrate** to rely on this provision **means that**, when preparing for the conclusion of the relevant public contract, **the contracting authority must take into account foreseeable suspension reasons for meeting the contract completion deadline**, such as regular weather conditions and bans on work imposed by legislation applicable during certain periods falling within the contract execution period?

The Court's interpretation.

Regular weather conditions as unforeseen circumstances?

- The Directive 2014/24, as evident from its recital 109, defines **unforeseen circumstances as external factors that couldn't have been predicted**, despite the contracting authority **prudently** preparing for the conclusion of the contract, taking into account all available means, the specific nature and characteristics of the project, good practices in the relevant field.
- Thus, the provisions linking Article 72(1)(c) with recital 109 imply that **regular weather conditions** and pre-announced legislative bans on work during the contract execution period **cannot be considered unforeseeable circumstances**.
- Consequently, such weather conditions and legislative bans **cannot justify exceeding the clear deadline** set in the tender documents and the initial public contract.
- **N.B:** Directive 2014/24 allows contracting authorities to **foresee and establish review provisions in procurement documents**, ensuring fair conditions for economic operators, even in foreseeable circumstances, thus avoiding the need for a new procurement procedure.

The Court's ruling.

Regular weather conditions cannot be unforeseeable

- Article 72(1)(c) of Directive 2014/24 must be interpreted in a way that the **diligence** required by the contracting authority to rely on this provision **means considering risks during the preparation of the contract, including foreseeable causes of work stoppages such as regular weather conditions and pre-announced bans on work during certain periods of the contract execution, as stipulated in legislation.** Such weather conditions and legislative bans, if not foreseen in the tender documents, cannot justify exceeding the deadline set in these documents and in the initial public contract.

THANK YOU FOR YOUR ATTENTION!

ANY QUESTIONS?



Estonia

Kawe Plaza, Pärnu mnt 15
10141 Tallinn
Tel +372 665 1888
tallinn@cobalt.legal

Latvia

Marijas iela 13 k-2
LV-1050 Riga
Tel +371 6720 1800
riga@cobalt.legal

Lithuania

Lvivo 25
LT-09320 Vilnius
Tel +370 5250 0800
vilnius@cobalt.legal

www.cobalt.legal