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BODZÁSI BALÁZS, JAKAB ÉVA, TÓTH J. ZOLTÁN, TRÓCSÁNYI LÁSZLÓ

FŐSZERKESZTŐ

JAKAB ÉVA ÉS BODZÁSI BALÁZS

OLVASÓ SZERKESZTŐ

GIOVANNINI MÁTÉ

SZERKESZTŐBIZOTTSÁG TAGJAI

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Székhely: 1042 Budapest, Viola utca 2-4

Felelős Kiadó: TÓTH J. ZOLTÁN

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E-mail: doktori.ajk@kre.hu

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ADDITIONAL EXPERIENCE AND WARRANTY AS QUALITY ASSESSMENT CRITERIA

SZABOLCS SZÖLLŐSI-BARÁTH¹

ABSTRACT ■ In several cases, the authorities controlling public procurement procedures object to the use of an additional criterion for the evaluation of the excess warranty in the award criteria. The present study seeks to answer the question of whether this jurisprudence is correct.

KEYWORDS: public procurement, excess warranty, additional experience

1. PROBLEM STATEMENT

According to Recital 89 of Directive 2014/24/EU, the best value for money is the most appropriate criterion for selecting the most economically advantageous offer.² With this provision, the legislator intended to seek to achieve various environmental, social, and other objectives through public procurement procedures, for which it considered the methods of awarding the contract to be the most appropriate.

The award of the contract, or in other words the selection of the successful tenderer, may be based on several criteria, which, according to the current public procurement law, are the lowest price, the lowest cost, and the best value for money. The latter evaluation criterion, in which quality as an element is included in the specific provisions.³ The notion of quality is not defined in the legislation, which seeks to fill in the meaning of the term using a list of examples. However, it is the application of the law and, in particular, the control practices of the bodies responsible for monitoring that determines the criteria currently used by contracting authorities in the award of contracts financed by the Community.

Most of the time, the requirements of the control bodies are not reflected in public audit reports or legal opinions, which makes referencing difficult.

¹ PhD student, Károli Gáspár University of Reformed Church in Hungary.

² Directive 2014/24/EU of the European Parliament and the Council on public procurement and repealing Directive 2004/18/EC.

³ See § 76 of the Public Procurement Act (referred to as PPA).

However, the Guide of the Public Procurement Authority (25.03.2020) specifically highlights two aspects to be avoided.⁴ These two aspects are the imposition of excess warranties and indemnities.

The present study examines the application of quality evaluation criteria in public works tendering procedures, comparing the experience of professionals and the use of additional warranties as a condition for quality. The study is based on the current practice that the use of additional warranties in community-funded tenders has met with marked resistance from the control bodies, which significantly limits the room for manoeuvre of contracting authorities. An interesting aspect of this practice is that audit risks are invoked in the control process, even though, according to the European Commission, the public procurement directives give contracting authorities considerable flexibility to make their purchases on the basis of cost-effectiveness and quality criteria.⁵ This effectively limits the selection process to the additional experience of quality professionals (in addition to price) as the basis for evaluation.

In the performance of contracts awarded under public procurement procedures, the contracting authority has a particular responsibility to verify the fulfilment of the contractual obligations which it has taken into account in the evaluation of the procedure. The obligation to do so is set out in the specific provisions and principles of the current public procurement law⁶. The importance of the above thought is underlined by the fact that the subheading of Part Five, Chapter XX of the Tender Act is: 'Application of the principle of sound management of public funds in the performance of the contract'. Without provisions of a warranty nature, the regulation of the evaluation criteria in addition to price, and the evaluation criteria themselves, would become void, leading to a conceptual crisis.

The question is how much more effectively the control of the surplus experience of professionals in the delivery of services, in its current form, ensures quality and thus the principle of responsible management of public funds, than the much stronger warranty of a statutory warranty.

The paper gives a sketch of the criteria for awarding a contract (a detailed analysis would be beyond the scope of this paper) and then tries to clarify the concept of quality. It then compares the criteria used (professional) with those that the study considers to be less risky (warranty, liquidated damages) and

⁴ Guide of the Public Procurement Authority on the application of the evaluation criteria for the selection of the winning bidder (OJ No 60 of 2020; 25 March 2020) 10.

⁵ https://commission.europa.eu/system/files/2019-11/2019.3911_hu_03.pdf

⁶ See §142 (1) and § 2 (4) of the PPA.

concludes with several conclusions which may provide effective criteria for the application of the law.

2. EVALUATION OF TENDERS AND AWARD CRITERIA

The process of evaluating tenders and drawing conclusions from the findings of the evaluation is a culmination of the procurement process. During this procedural step the contracting authority determines which of the tenders should be submitted on the basis of which one is the most advantageous and awards the contract to the contractor mostly.⁷ The present study cannot deal with the award procedure in detail but can only highlight the main principles.

The criteria for selecting the most economically (i.e. overall) advantageous offer fall into three categories: lowest price, lowest cost, and best value for money.⁸ It is essential to define the criteria in such a way as to warrant an objective assessment, in relation to the subject of the contract and taking into account the principle of non-discrimination (in particular to ensure equal treatment) and transparency.⁹ In addition, 'the award criteria chosen must not confer unrestricted freedom of choice on the contracting authority and must ensure effective and fair competition and be accompanied by rules allowing effective control of the information submitted by tenderers. Contracting authorities must be able to verify the accuracy of the information and evidence submitted by tenderers in case of doubt.'¹⁰

To facilitate the correct and effective application of the evaluation criteria system, the Public Procurement Authority has issued a guide on the methods and the evaluation of tenders under Article 76(9)(d) of the Public Procurement Procedure Act (hereinafter referred to as the "Guide") and Article 76(12) of the Public Procurement Procedure Act. The Guide stipulates that the system of conditions for the verification of commitments under the evaluation criteria must be designed in such a way as to ensure that the commitments are complied with beyond the evaluation stage and during the performance of the contract concluded under the procurement procedure. Such conditions are typically included in the contractual provisions.

⁷ SUE ARROWSMITH: *The Law of Public and Utilities Procurement*. 2nd Edition, London, Sweet and Maxwell, 2005. 489.

⁸ See § 76 of the PPA.

⁹ ARROWSMITH 2005, Ibid.

¹⁰ See Article 67(4) of Directive 2014/24/EU of the European Parliament and of the Council.

The Court of Justice of the European Union has made it clear that the public procurement procedure is not a mere process but that each procedural step is aimed at ensuring that the parties conclude a contract which fully complies with the principles of public procurement and the specific legislation. ‘Where a contracting authority sets award criteria for which it does not intend, nor is it able, to verify the accuracy of the information provided by tenderers, it infringes the principle of equal treatment, since such criteria do not ensure the transparency and objectivity of the tendering procedure. Therefore, award criteria that impose requirements which do not allow for effective verification of the information provided by tenderers are contrary to the principles of Community public procurement law’.¹¹

The rules set out in Article 142 (1) of the Public Procurement Act shall ensure the enforcement of the provisions of Article 76 of the Public Procurement Act during the performance of the contract. The obligation to provide documentation under that section was not included in the previous public procurement legislation. These are important provisions, as they contain both the principle of the liability of contracting authorities (as referred to in the title of the Chapter 1 problem statement) and the possibility for control bodies to intervene under public law in what is essentially a private contractual relationship.¹² On this basis, the Public Procurement Authority may verify the performance of the contract in question, during which the contracting parties are obliged to cooperate with the monitoring bodies.¹³ Under Article 142 (1) of the Public Procurement Act, ‘the contracting authority shall document the data relating to the performance of the contract, including the verification and documentation of the performance of the contractual obligations taken into account in the evaluation of the public procurement procedure, as well as any non-performance of the contract, the reasons for such non-performance and, where appropriate, the enforcement of claims for breach of contract’. As indicated, the verification of the performance of the obligations taken into account in the evaluation is not a problem in most cases. One reason for this is that the current audit practice, by being over-active, has significantly limited the scope for evaluation.¹⁴ It can be said that, in a very high percentage of public works contracts, the additional experience of the

¹¹ See the judgment of the Court of Justice (Sixth Chamber) of 4 December 2003. EVN AG and Wienstrom GmbH v Republic of Austria. Case C-448/01.

¹² ATTILA DEZSŐ (ed.): *Nagykommentár a közbeszerzésekről szóló 2015. évi CXLI. törvényhez*. Budapest, Wolters Kluwer Hungary, 2021. 30.

¹³ See Article 187 (2) (j) of the PPA.

¹⁴ On the control, see Government Decree 272/2014 (5.XI.) and Government Decree 256/2021 (18.V.).

professionals involved in the execution of the works is the main quality criterion that contracting authorities assess, in addition to the net lump sum tender price.¹⁵ The participation of professionals in the performance of the contract can be easily verified and the method of verification can be simply set out in the contract. The question in this context is to what extent the additional, otherwise uncontrollable, experience of the professionally presented warranties – in an objective manner – the quality of the performance.

2.1 On the issue of quality

According to Philip B. Crosby, quality is nothing more than meeting requirements.¹⁶ Since requirements may vary from service to service, a single concept can only be given at the level of a generic clause.¹⁷ The Civil Code defines the intended purpose as a measure of quality, which may be derived from the needs of the rightsholder, from the characteristics of services intended for a similar purpose or from legal requirements.¹⁸ In regulating defective performance, the Civil Code stipulates that performance is defective (the debtor performs defectively) if the service does not meet the quality requirements laid down by contract or by law at the time of performance.¹⁹ The legal consequences of non-conformity include, inter alia, the warranty of performance, the warranties and the liquidated damages for non-conformity. Exemption from such remedies may be granted by employing a proof or faultless performance.

From the point of view of the subject, the warranty requires special emphasis, the reason for which is the provision of Article 6:187 (2) of the Civil Code, according to which the rightful claimant may not assert a warranty claim in addition to the liquidated damages for defective performance. In such a case, it is up to the parties to agree on the legal consequence of the defective performance in their contract. This cannot apply without limitation to public works contracts.

¹⁵ The question is to what extent this empties the institution of the qualitative evaluation criterion. The offer of additional experience of professionals is not verifiable in the least, and therefore in many cases, the lump sum bid price is the decisive factor in the procedure. This runs counter to the directive's efforts to ensure that contracting authorities seek to select quality (rather than price as the sole criterion).

¹⁶ Cited in BILL CREECH: *The Five Pillars of TQM: How to Make Total Quality Management Work for You*. New York, Truman Talley Books, 1994. 478.

¹⁷ GYÖRGY BÍRÓ et al.: *Az új Ptk. Magyarázata V/VI.: Kötelmi jog, első és második rész*. Budapest, HVG-ORAC, 2014. 283.

¹⁸ See § 6:123 § (1) of the Hungarian Civil Code.

¹⁹ See 6:157 § (1) of the Hungarian Civil Code.

In the case of public works contracts, the warranty claims are for repair or replacement. If the holder of the public contract decides to claim liquidated damages instead of a warranty claim, the repair of the defect must be carried out by a third party. This circumstance leads to an insoluble problem, in the light of the provision of the Tender Regulation prohibiting the dismantling of the contract into parts.²⁰ In practice, this would mean that the part affected by the repair would have to be subject to the same procedure and the same contracting regime as the underlying contract. Compared with the average 60-120 (sometimes 180) days for public procurement procedures, a contract for the correction of a defect makes it virtually impossible to perform the underlying contract.

Given the above thoughts, in public works contracts, the liquidated damages for non-performance are not applied by contracting authorities. Therefore, warranty claims can be enforced without limit.²¹ Because of the reversed burden of proof, greater care is required on the side of the debtor, as it is for the debtor to prove that the cause of the defect (duly notified) detected during the warranty period arose after the performance. Given the strict regulation, the link between the warranty obligation and faultless, quality performance is clear. Another important circumstance is that under the current legislation, the basic obligation of the rightsholder is to satisfy himself that the performance is adequate.²²

2.2. Quality aspects in practice

The Guide of the Public Procurement Authority states that ‘...the evaluation criteria relating to liquidated damages, warranties or other warranties, the number of instalments, the amount of the advance requested, are not explicitly considered as quality criteria.’²³ The quoted statement of the Guide is taken over by the Public Procurement Supervision Department of the Deputy State Secretariat for Public Procurement Supervision of the Prime Minister’s Office and, in this respect, requests a review of such evaluation criteria in ex ante controlled procedures and a detailed justification in ex post controlled procedures.

²⁰ See § 19 (3) of the PPA.

²¹ Nevertheless, in the case of contracts for the supply of goods and services concluded under framework agreements, it is noticeable that the contract applies both the liquidated damages for non-performance and the warranty claims as a legal remedy. The reason is the practice that was established under the old Civil Code and the complete lack of review of draft contracts.

²² GÁBOR TÖRÖK – ÁDÁM BOÓC: *Észrevételek a Ptk. 316. §-a vonatkozásában. Jogtudományi Közlöny*, 9/2012, 331–337.

²³ Guidance 10.

It can be agreed that the level of the liquidated damages, the number of partial performances and the amount of the advance requested are not related to the quality of the performance. At the same time, aspects of competitive tendering procedures other than public procurement are operational and can enhance competition but have no direct relevance. However, the provision of additional warranty requires a different approach, which can be better demonstrated by comparing the additional experience of professionals as an evaluation criterion.

The link between the surplus experience of professionals and quality is reflected in the quality management principles developed by Crosby. According to the 'Do It Right First Time' and 'Zero Defect' programs, if a worker knows what to do and how to do it, and if they care about the work, they will not make a mistake.²⁴ However, quality management principles developed for mass production cannot be directly implemented for all services. The relevant experience of the professionals responsible for quality assurance has an impact on quality. The responsible technical managers can successfully use the knowledge accumulated during the previous performance to reduce the risk of construction errors, thus warranting quality. This statement is true if past performance contributes in a meaningful and positive way to the acquisition of experience. Participation in a defective or delayed execution, based on which the client subsequently claims a warranty, is not necessarily suitable for being cited as a reference.

In public procurement procedures, the proof of additional experience is provided by the professional's declaration, typically a CV, indicating the subject and period of previous performance and the tasks they have carried out.²⁵ A detailed check is often impossible, since the proof of additional experience may include past performance not covered by a public contract. On this basis, the (most) claims made by the professional in his CV can only be refuted in the course of a preliminary dispute resolution or appeal procedure initiated by the non-winning party.²⁶ These calls into question whether the additional experience presented contributes objectively to the quality of the performance.

An interesting situation in this context is the obligation to document under Section 142 (1) of the Public Procurement Act. It is worth returning to the Chapter 1 problem statement on this point. The fact that the professional has the additional experience offered is verified by the contracting authority during the procurement procedure based on the CV. It is possible to check that the professional is involved in the performance of the contract, but it is more

²⁴ PHILIP B. CROSBY: *Quality is Free: The Art of Making Quality Certain. How to Manage Quality – So That It Becomes A Source of Profit for Your Business*, New York, McGraw-Hill, 1979.

²⁵ See Government Decree 321/2015 (X.30.) § 21 (1) (f).

²⁶ See § 80 and § 148 of the PPA.

difficult to check whether his additional experience contributes to quality. This can only be measured afterwards, based on the defects record taken during the acceptance of the handover and the claims reported during the warranty period. The question is whether the performance in this case, which shows many defects, is a 'quality' professional offer, as a contractual obligation, fulfilled by the tenderer. As the Jury has noted, the quality of staff can have a significant impact on the quality of the performance of the contract, it can have a significant impact on the quality of the performance of the contract but setting it above a certain level no longer contributes to improving the quality of the activity, it only distorts competition²⁷. The reason is that tenderers, knowing the above characteristics, can make maximum bids for professionals without any consequences and can win the tender with the lowest price, thus eliminating the quality evaluation criterion.

2.3 Relationship between warranty period and quality

As stated above, the legal concept of warranty is closely linked to the concept of faultless performance, i.e. quality. This is simply because of the length of the period between the taking-over of the goods and the expiry of the warranty period. This period may be determined by the parties or may be laid down by law in the form of mandatory warranty periods.²⁸ Of particular relevance to the present topic is the Government Decree 181/2003 (5/11/2003) on mandatory warranties about housing construction (hereinafter: Government Decree), which covers a large percentage of contracts concluded on public procurement procedures.

From 9 April 2014, the Government Decree applies to the warranty of public buildings in respect of the building structures defined in Annexes 3 and 4 and certain products and materials used in their construction.²⁹ Without claiming to be exhaustive, a public use building is a building whose use is not restricted or cannot be restricted (e.g. parts of buildings for education, health, social, cultural, cultural, sports, financial, commercial, insurance, services, etc.), whose use is mandatory or unavoidable in certain cases (e.g. parts of buildings for public administration, justice, prosecution) and which is defined as public use by law or government decree.³⁰ Warranty periods are set by the Government Decree

²⁷ D.362/16/2019.

²⁸ Government Decree No. 151/2003 (IX. 22.) on the mandatory warranty for certain consumer durables.

²⁹ Government Decree § 1 (3) para.

³⁰ See Act LXXVIII of 1997 on the Shaping and Protection of the Built Environment, § 2, point 9.1.

at three, five and ten years for the building structures listed in the annexe. The Government Decree provides the legal consequence of nullity for a contractual agreement to the detriment of the customer. The parties may of course agree on more favourable terms.

The debtor has an elementary interest in faultless performance, as the consideration for the performance of the warranty obligation is included in the contractor's fee by analogy, i.e. he cannot claim a fee for work performed afterwards.³¹ This means that the cost of the subsequent repairs reduces the result obtained, which was already taxed at that time. The longer the time elapses from the date of taking over, the greater the likelihood of failures due to poor quality of the work. Therefore, any additional offer beyond the warranty periods set out in the Government Regulation requires great caution on the part of the debtor. In practice, the extension of the 36-month warranty period is usually appreciated by extending it by a maximum of 24 months (60 months in total).³² In addition, the assessment of the additional warranty is in line with the requirements set out in the Public Procurement Code. The warranty is directly linked to the subject matter of the contract, is based on factors that can be evaluated based on quantitative (i.e. objective) criteria, is not linked to the ability to perform the contract and is distinguishable from other elements of the tender.³³ The obligation to check and document the warranty under Section 142 (1) of the Public Procurement Act is emphatically fulfilled. This is because the warranty claim is made in writing. In the case of construction contracts, the handover documentation includes, among other things, the warranty certificates issued for the materials, components and accessories installed, through which the claim is enforced.³⁴ In practice, the contracts precisely regulate the process of enforcing the warranty claim.³⁵

³¹ This is also true for flat-rate contracts with itemised billing.

³² The 36-month warranty period applies to the structures in Annexes 1-2 of the Decree, as the legislation provides for a significantly longer warranty period for items in Annexes 3-4. <https://net.jogtar.hu/jogszabaly?docid=a0300181.kor>.

³³ See § 76 (6) of the PPA.

³⁴ Government Decree No. 191/2009 (IX. 15.) § 33 (3) para.

³⁵ For example: 'the Contractor shall, during the warranty period, start the repair within 3 working days of the notification of the defect and continue the work with adequate staff until its completion. The final deadline for rectification of the defect is 10 working days after notification'.

3. CONCLUSIONS

The Directive aims to achieve a high level of quality in the performance of public contracts, which can be ensured by the evaluation criteria used in the award procedure. The Directive and the Tender Regulation provide sufficient flexibility to establish evaluation criteria. This is not necessarily supported by the current practices and needs to be taken into account in the application of the law. Two substantially different qualitative assessment criteria have been presented above. According to current audit practice, the offer of additional experience of professionals is the least risky, and auditors allow the criteria to be used without comment, with a maximum weight of 10 or less. In all cases, the additional experience as an evaluation criterion will require justification.

On the contrary, it can be outlined above that an objectively verifiable obligation (warranty) is contrasted with a commitment containing subjective elements (additional experience), which in some respects contradicts the ambitions of the Directive. The subjective element can be identified in the absence of a set of criteria for what constitutes additional experience that contributes to quality performance, and in the fact that in many cases the offers (CV statements) are not verifiable. In addition, there are no direct consequences if, despite the additional experience offered, the beneficiary is forced to make several claims within the warranty period. The indirect consequence is the correction of defects under the warranty itself, but this is (also) an independent legal consequence, i.e. the situation under Article 142(1) of the Public Procurement Act remains unsanctioned in respect of the offer of additional warranty.³⁶ In light of this, it may be worth considering reviewing inspection practices and allowing the use of objectively verifiable, qualitative criteria for construction works as a general rule, rather than as an exception. The ACPC rightly noted that a longer warranty period is a greater advantage for the contracting authority and that the evaluation of the warranty period meets the requirement of efficient use of public funds. The Jury agreed with the contracting authority's argument that if tenderers bid with lower quality materials rather than the basic warranty period, and instead bid with the higher warranty period for the additional points available, thereby committing to use higher quality products, there is a correlation between quality and warranty.³⁷

³⁶ The contracting authority is required to document the data relating to the performance of the contract, including the verification and documentation of the fulfilment of the contractual obligations taken into account in the evaluation of the procurement procedure, any non-performance of the contract, the reasons for non-performance and, where appropriate, the enforcement of claims for non-performance.

³⁷ D.582/8/2017 point [46].

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