



## Technical requirements and the exclusion of market progress

### Specifying technical requirements in procurement documents and obtaining the best result

Public Procurement regulation can be seen to make it difficult for public bodies to buy the most up-to-date equipment – particularly in areas where the technology is rapidly evolving. By including a specific computing processor speed in its ITN, a Romanian public authority was recently found to have prevented itself from later requiring the (higher) market standard available at the date of award - Case C 278/14, *SC Enterprise Focused Solutions SRL v Spitalul Judetean de Urgenta Alba Iulia*.

The lesson for procuring authorities is to design their requirements flexibly. That, however, can be difficult when bidders are entitled to require clear standards against which to bid. This creates a tension.

### Background

On 20 November 2013, Spitalul Judetean de Urgenta Alba Iulia (the Alba Iulia District Emergency Hospital, Romania) launched an online call for the supply of computing systems and equipment. The tender required a processor corresponding “at least” to an “Intel Core i5 3.2 GHz or equivalent” processor (Core i5-650). During the procurement process the processor market moved on and at the time of tender evaluation, the manufacturer no longer supported that type of processor and was producing a substantially faster product.

SC Enterprise Focused Solutions SRL (“EFS”) submitted a tender which included AMD Quad Core A8-5600k central units. This was superior to the processor specified in the ITN but inferior to the new processor in production by the manufacturer at the time of evaluation.

The hospital rejected EFS’s bid because it was not up to current market standards. EFS responded that its solution was better than that required by the ITN so it could not be excluded. The European Court supported EFS i.e. confirmed that where an authority specifies a certain standard it must abide by that and not exclude offers which were superior to that standard.

### The decision

On one level, many authorities will not be surprised with this result. The hospital had run the process on the basis of a particular standard. It had not notified any change to its requirements and the bidder exceeded them. Most authorities would accept it is unfair to exclude a bidder who had satisfied the terms of the ITN in this way.

However, the case highlights a more fundamental point. There is a tension in the procurement process between the bidder’s desire to have a clear requirement against which to bid (at the beginning of the process) and the authority’s legitimate preference for flexibility to obtain the best market standard product (at the time of award). After all, isn’t regulated procurement intended to ensure that public money is spent on getting the best available result? Private entities can require up-to-date products – why should public authorities not be able to do the same?

In most cases the answer lies in a carefully and intelligently designed procurement process and the selection of the best process for identifying current market standards and going forward to procure on that basis. Procurement documents can be and are regularly designed this way. Nonetheless, there is inevitably some lag and many well designed processes in which new developments come to light before award.

In such circumstances authorities can be faced with notifying the bidders of a change in requirement (potentially amounting to a material change of scope which would invalidate the process, or give rise to a challenge) and delaying the process while the bidders revise their proposals and potentially the limitation period for claims expires. Alternatively, the whole process may have to be withdrawn and reissued (adding cost as well as time).

The lesson from the above case is that, ‘doing nothing’ and proceeding without changing the requirements is highly risky. Not only will this raise the risk of challenge for material change of requirement (or transparency/ fairness in evaluation), but may also mean that the authority does not receive the best bids.

Excluding bidders who might have made better bids had they been asked may well leave authorities accepting a weaker bid.

### The Treaty and the regulations

The value of the contract in the above case was below the normal procurement thresholds. Consequently it was not subject to the local Romanian regulations or Directive 2004/18/EC (now replaced by 2014/24). Nonetheless, the Court determined the contract to be subject to the fundamental rules and the general principles of the TFEU. This is a clear reminder that all procurement by public bodies must be fair and transparent – not just those which are directly subject to the regulations.

### Practical implications

As this case demonstrates, authorities should be very careful when including particular technical requirements in tender documentation. If the market moves on during the tender process, the authority will be tied to evaluate the tenders upon the basis set out in the tender documentation and an evaluation of tenders which takes market progress into account would likely be open to challenge as a material change.

Procurement processes which require particular technical specifications should be intelligently designed in such a way as to enable the contracting authority to take advantage of technological advances during the procurement process and to ensure that it is not bound to accept legacy performance. This takes creativity and forethought.

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### Case C 278/14, SC Enterprise Focused Solutions SRL v Spitalul Judetean de Urgenta Alba Iulia

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