



Reciprocal excluding actions in the course of a tender

Judgment of the European Court of Justice of 3 September 2019, Lombardi Srl v Comune di Auletta and others, Case C-333/18

Background

On the one hand, a Company which placed third in the final ranking of a public tender brought proceedings disputing the admission to the tendering procedure of the successful tenderer (“the Main Claim”). On the other hand, the successful tenderer requested the dismissal of the Main Claim and filed a counterclaim contending that the Company should have been excluded from the public procurement procedure (the “Counterclaim”).

The Italian Administrative Court gave priority to examining the Counterclaim filed by the successful tenderer and granted that claim. Also, because of the grant of such Counterclaim, the Italian Court decided to reject as inadmissible the Main Claim.

The Company brought further appeal as it considered that irrespective of the Court’s ruling on the Counterclaim, the substance of the Main Claim should have been examined.

The Italian case law is not clear about the possibility to resolve a principal claim (such as the Main Claim) once a related incidental claim (such as the Counterclaim) has been granted.

Judgment of the Court of Justice

Under these circumstances, a preliminary ruling was referred to the Court of Justice.

The Court of Justice declared that when two tenderers bring actions seeking their reciprocal exclusion (as occurs in the present case with the Main Claim and the Counterclaim), the objective of both tenderers is to obtain the award of the relevant contract. This objective may be achieved if the requested exclusion of a tenderer is granted and the appellant becomes directly awarded; or if the result of the claim is the calling of a new procurement procedure in which the appellant has again the chance to participate and be awarded with the contract.

The interests pursued with the filing of reciprocal excluding actions are equivalent. Therefore, national courts shall not be allowed to reject as inadmissible a claim (such as the Main Claim) on the basis that national procedural rules give priority to incidental counterclaims (such as the Counterclaim). The grant of an incidental claim cannot be an obstacle for a national court to examine the substance of the corresponding main claim and, if such main claim is finally granted, annul the public procurement and call for a new one.

Finally, it is important to note that this doctrine is only applicable to reciprocal excluding actions and it is not contrary to the Court of Justice case law regarding the inadmissibility of an appeal brought by a tenderer whose exclusion has become final.