

### Restoration of Qualification (Self-Cleaning): Is Exchange of Subcontractor Permissible?

In the decision no. ÚOHS-R0002/2024/VZ dated February 22, 2024, the Chairman of the Office for the Protection of Competition (hereinafter "**the Chairman**" and "**the Office**") confirmed the decision in which the Office annulled the decision of the contracting authority to exclude one of the participants from the award procedure and all subsequent acts.

During the award procedure, the participant demonstrated part of its qualification through a subcontractor for which it submitted an extract from the list of qualified suppliers ("**LQS**") drawn up the day before the deadline for submission of tenders. During evaluation of the bids less than two weeks later, the contracting authority found that the subcontractor in question was no longer listed in the LQS. The participant was asked to clarify its bid in relation to the qualification of its subcontractor. As a reply, an extract from the LQS dated one day after the deadline for submission was supplied. The contracting authority considered this insufficient and therefore excluded the participant from the award procedure for failure to prove its subcontractor's qualification. Moreover, the subcontractor was supposed to prove part of a technical qualification and the contracting authority found the described experience not sufficient.

The participant submitted objections to its exclusion, including evidence to restore its competence (self-cleaning) by submitting qualification documents from another (new) subcontractor. It explicitly stated that if the contracting authority maintained its view that the qualification was not met by the original subcontractor, the contracting authority should consider these documents related to the new subcontractor as an objection to the restoration of competence (self-cleaning). However, the contracting authority refused to deal with the newly submitted documents, since, in its view, the restoration of subcontractor's competence was not possible. Therefore, the contracting authority did not assess whether the measure taken by the participant was sufficient to restore its competence or not and confirmed the decision to exclude the participant.

The participant subsequently initiated proceeding at the Office. In the first instance decision, the Office concluded that the contracting authority unlawfully



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failed to assess the documents submitted to restore participant's competence.

Upon appeal of the contracting authority, the Chairman confirmed the first instance decision. He also added that it is correct that only the basic qualification (section 74 of the Public Procurement Act) can be restored, not the professional qualification or the technical qualification. However, in the present case, the participant sought to remedy its exclusion on the ground of alleged failure to meet the basic qualification by a subcontractor whom it had replaced with another as a part of the self-cleaning procedure. In such case, if a subcontractor is replaced in the context of the restoration of a basic competence, such replacement is possible and concerns the whole of that entity, including its competence and qualifications. The renewal of eligibility will thus involve a new subcontractor entering the tender procedure and bringing with it, in addition to the documents to prove basic eligibility, possibly completely new references to prove part of the technical qualifications.





## Practice Area News

**Estimated Value of the Concession.** In judgment no. 9 As 165/2023 dated March 22, 2024, the **Supreme Administrative Court** ruled that to determine a concession's estimated value, first it has to be clarified which services are included. If a service isn't concessioned, its value usually shouldn't be in the estimated total, even if related or forming a 'functional unit'.

**Chairman Upholds Fine Over Unfair Boat Procurement.** The **Chairman of the Office** confirmed fine for purchase of sports boats in the decision no. ÚOHS-R0118/2023/VZ dated November 6, 2023. The contracting authority had requested the supply of different brands/types of boats as one bid. This may have created barriers to competition, as some suppliers may not have been able to offer all brands/types, but if they could have bid for individual types or brands, they would.

**Fine Over Incorrect Contract Estimation.** In decision No. ÚOHS-R0119/2023/VZ dated November 2, 2023, the **Chairman of the Office** confirmed fine for awarding a contract without proper tendering due to incorrectly determined estimated value. The issue was whether infrastructure, not to be used by the authority, should count in the estimate. The decision clarified that the estimate must cover all contract items, irrespective of the end user.

**Constitutional Court Approves on Certificates of Proper Execution of Construction Work.** In decision No. IV ÚS 2591/23 dated February 28, 2024, the **Constitutional Court** approved the decisions of the lower courts regarding the possible challenge to submitted reference contracts. The Constitutional Court upheld the opinion of the Supreme Administrative Court that in the case of a certificate of proper execution of construction work, it is sufficient if the work was executed satisfactorily - not necessarily completely flawlessly.

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