CASE NOTE: GREECE

CASE NAME:
Court Decision No. 3279/2004
[ΣτΕ 3279/2004 (StE 3279/2004)]

NAME AND LEVEL OF COURT:
Council of State[1]
(Supreme Administrative Court of Greece),
(2nd Circuit – 5 member Panel)

PRESIDENT OF COURT:
F. Stergiopoulos

COUNSEL:
S. Karalis, N. Sklias

MEMBERS:
S. Vitali, I. Symplis

LAWYERS:
P. Bernitsas, K. Tzavaras

DATE OF DECISION:
17 November 2004

Summary

State procurement. According to article 18 paragraph 3 of the Presidential Decree 394/1996, it must be proved that the statutory declaration, which is directed to a Public Authority and refers to procurement of public interest, arises from the person that makes it and binds this legal person, if the declaration that carries the signature or an indication by a mechanic means, such as a seal or stamp, and if this is allowed by the law of the seat of the foreign legal person, is not valid. Submission of the case to the seven members' panel.

Facts

Declaration Nr. 20/02/31.12.2001 of the State Procurement Committee of the Ministry of Development called for the supply of 25,000 units of waterproof raincoats (mackintosh) for the needs of the General Army Staff by a sealed tender. The plaintiff also participated in the competition, which was held on 23.12.2002. The plaintiff was requested to participate with the Nr. 2/1522/22.4.2002 bid. The plaintiff was ruled out of the competition by a decision of the Deputy Minister of Development (Nr. 2/7026/25.6.2003), because it was claimed that the plaintiff's offer was unacceptable, in that some of the supporting documents that were submitted with the bid did not meet the provisions set out by articles 6 and 18 § 3 of Presidential Decree 394/1996. The plaintiff filed a petition for recourse on 30.6.2003, which was dismissed; thereafter, the plaintiff filed a petition for injunctive measures, which was granted. In the meantime, the Deputy Minister of Development dismissed the (initial) petition for recourse with his further decision (2/11032/5.8.2003).

According to article 11 of the Civil Code (Contract Form)

"The contract is valid in relation to its form if it is in conformity with the law that rules its content, with the law of the place where it is conducted or with the law of the citizenship of all the parties".

This provision of the Civil Code, because of its generality, applies to every declaration of intention that causes legal effects.[2]

Furthermore, article 159(1) of the Civil Code (Written Form) defines that

"If the form that law requires for a contract is not kept, this contract, if the opposite is not provided, is invalid".

In addition, according to article 160(1) of the Civil Code:

"If law or the contractual parties have specified the written form regarding a contract, this document must carry the handwritten signature of the drawer",

and in article 163 (Signature by mechanical means) it is

[1] *The Council of State (Symvoulio tis Epikrateias) is the supreme administrative court. This obviously means that no case with an administrative dispute can go any higher. However, it is possible that a legal issue can be re-examined by the Supreme Special Court of last resort, but only under special prerequisites. This happens only if the Supreme Civil Court rules a totally different meaning in a legal issue that was defined by the Supreme Administrative Court in a different way. So, a case can be examined by the Supreme Special Court of last resort, only if there is a legal dispute (the essence of the case will not be re-considered) between the supreme civil court and the supreme administrative court.*

[2] *See also article 9 of the Rome Convention/19.6.1980, to which Republic of Greece adhered through the agreement that was concluded in Luxembourg on 10.4.1984 and was implemented in Greece by Act 1792/1988, A 142, that defines in paragraph 4 that: "The one-sided contract that is related to the agreement that has been concluded or will be concluded is valid in relation to its form if it satisfies the formal provisions of law, which according to the present agreement rules or would rule its substance, or the formal provisions of law of the country where this contract was conducted".*

defined that

"Signature that is affixed by a mechanical means is in force as a handwritten signature, only if it is about securities to bearer that are issued in large numbers".

Finally, according to article 33 of the Civil Code (Reservation of Public Order):

"Provisions of foreign law do not apply, if this application contravenes to good morals or to public order in general".[3]

The Presidential Decree 394/1994 "Regulation of the Procurement of the State" defines, in article 18, (titled: origin of the supplied material) among others:

"1. The participants are obliged to mention in their offers the country of origin of the supplied materials.
2. The participants are obliged to mention in their offers the factory that will produce the supplied material and its establishment.
3. If the participants do not manufacture the supplied materials in their own factory, they should attach in their offer a statutory declaration of the legal representative of the factory, where they will clearly state that they will accept the procurement (...)".

In addition, in the declaration of the disputed competition, it was also mentioned that the offer must be accompanied by the necessary supporting documents, and that the offer must include the name of the factory and its establishment. According to article 18 of the Presidential Decree 394/1996, any offer that does not meet the above-mentioned requirements will be rejected as inadmissible. Finally, in the invitation that was sent to the plaintiff on 22.4.2002 in order to submit its offer, it was clearly mentioned that in case that a participant is not the manufacturer of the supplied materials, he must produce all the necessary supporting documents attached to his offer.

In accordance with the meaning of the regulations set out above, in respect of the public interest, as specified in Article 33 of the Civil Code, the declaration that is mentioned in Article 18(3) of the Presidential Decree 394/1996, where it is addressed to a public authority (or to a legal person or to a state legal entity) and is related to a procurement of public interest, it must be confirmed that it originates from the same person as the declarant and that it legally binds that person, if this declaration is made by his or her legal representative, so as the supply of the goods regarding the time, the quality and the quantity necessary for the preservation of public interest to be definite and assured.

Where the declaration does not bear the manuscript signature of its author, but a signature made with mechanical means, for example a stamp, cannot be considered valid under the proceedings and the regulation of the procurement of the Greek State, even though it may be legally valid under the law of the legal person's state. This is because there is no certainty that the declaration comes from a person that legally binds the legal entity and not from a third – unauthorized – party that only holds temporarily or by accident the legal person's stamp (or any other mechanical representation of its signature).

The hearing of the case established that the plaintiff submitted an offer on 23 December 2002. In that offer, the company clearly mentioned that it would obtain the goods supplied either from a company specifically named, which would have undertaken and be responsible for the texture, finish and plasticization of the fabric, while the cut, the stitch and the package would be undertaken by a subsidiary company, or from another named company, which would undertake the final stage of the process. In addition, three other companies, all based in France, undertook the texture, finish and the plasticization respectively.

The Deputy Minister of Development held (in decision 2/7026/25.6.2003) that the plaintiff's offer was inadmissible in both parts. The plaintiff appealed against the above decision; however this appeal was also disallowed after the subsequent decision 2/11032/5.8.2003 of the Deputy Minister of Development. This decision was based on a

[3] *Article 3(1) of the Presidential Decree 150/2001 that implemented Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures defines that: "The advanced electronic signature, which is based on an authenticated certificate and is created by a secure provision of creation of signature, bears the legal effects of a handwritten signature both in substantive law and in procedural law' . Additionally, Article 1(2) of the same Presidential Decree defines that: ' The provisions of the present Presidential decree do not oppose to provisions that, in relation to the conclusion and the validity of contracts or the creation of legal obligations, impose the compliance to solemn form nor provisions that are related to probatory or other use of documents or to provisions according to which it is prohibited to transport and render common to all documents of certain categories and personal data".*

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consultation made by the State Procurement Committee. The recommendation mentioned, among other things, that although the supporting documents of the Chinese companies were submitted in due time according to the provisions of the competition's declaration, however "they were not signed by the above-mentioned companies". It is also mentioned in the same recommendation that the plaintiff forwarded a formal letter (dated 7 March 2003) and a named companys document, where it is "confirmed that all documents submitted by this company do not need to be signed, as long as they are sealed with its stamp". However it was made clear by the Committee that "all documents submitted with each offer should be signed". Therefore, the recommendation published on 24.7.2003 suggested that the plaintiff's offer should be rejected and disallowed, because all "the attached documents are unsigned".

It is alleged that the appealed decision, which denied the plaintiff's petition, in relation to the part of the petition that was referring to the part of the offer concerning the supply of goods by the companies seated in Republic of China, was not valid, because the disputed declarations did not carry the manuscript signature of the legal representatives of the Chinese companies. It was pointed out that they were valid according to the law of the Republic of China as implemented under article 11 of the Civil Code,[4] because they carried the official stamp of these companies. According to the opinion of the Circuit, this ground of annulment should be dismissed as invalid. One Judicial deputy dissented. This was because the judgment of Public Administration failed to investigate whether the declarations were correctly submitted in accordance with the laws of the Republic of China. The failure to investigate this point is intensified by the fact that the plaintiff, within its recommendation towards the State Procurement Committee on 16.7.2003, submitted to Public Administration, through its letter sent on 7.3.2003, a document that was drawn up by Chinese Authorities and affirmed that: "all the documents that are drawn up by this company do not need signature, since they are sealed with the company's stamp". Because of the paramount importance of this issue, the Circuit judged that this case should be submitted to the Plenary of the Supreme Court according to article 14(2)(b) of the Presidential decree 18/1989 and assigned Counsel as instructing Commissioner before the Supreme Court in order to cite the opinion of the 2nd Circuit.

Commentary

Unfortunately, some Greek judges lack the proper technological scientific education in order to rule in a case that is already very common in the digital age. The Greek law in certain transactions, and certainly when it comes to state procurements, demands a manuscript signature in addition to a seal or stamp. Although the Presidential Decree relating to electronic signatures clearly points out that an electronic signature is legally equivalent to a manuscript signature, however the court (and the declaration that called for participations) seem to ignore that an offer can (and definitely will, in the near future) be submitted electronically as well. In that case, according to the Presidential Decree, the electronic signature could not be ignored and an offer submitted this way would be valid. There seems to be a legal gap in this part of Greek legislation at the moment.

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[3] *Article 11 of the Greek Civil Code: Type of Contracts. "A judicial act is valid if the type followed for its formation is accordant either to the law that rules its content or the law of the place where the contract is concluded or the law of the nationality of the contractual parties."*