THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

JUDGMENT

ON BEHALF OF THE REPUBLIC OF LATVIA

Riga, 19 April 2010

in Case No. 2009-77-01

The Constitutional Court of the Republic of Latvia, composed of the Chairman of the Court hearing Gunārs Kūtris, Justices Kaspars Balodis, Aija Branta, Juris Jelāgins, Kristīne Krūma and Viktors Skudra,

having regard to an application of the President of the State of Latvia Valdis Zatlers,

according to Article 85 of the Satversme (Constitution) of the Republic of Latvia, Article 16 1st indent, Article 17 (1) and Article 28.[1] of the Constitutional Court Law,

on 19 March 2010 in writing examined the case

"On Compliance of Section 83.[2] and Para 12 of the Transitional Provisions of the Law on Public Procurement Law with Article 1 and Article 92 of the Satversme of the Republic of Latvia"

The Facts

1. On 6 April 2009, the Saeima (Parliament) of the Republic of Latvia (hereinafter – the Saeima) adopted the Public Procurement Law. It came into effect on 1 May 2006. The purpose of the Law is to ensure openness of the procurement

procedure, free competition of suppliers, as well as equal and fair attitude thereto, as well as effective use of State and local government funds. The Public Procurement Law transposed the Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (hereinafter – Directive 2004/18/EC).

2. Pursuant to the Public Procurement Law, 26 October 2004 Cabinet of Ministers Regulation No. 893 "Regulations regarding the Procurement Monitoring Bureau", and other normative acts, the State administration functions in monitoring procurement procedure shall be implemented by a direct institution of State administration – the Procurement Monitoring Bureau [*Iepirkumu uzraudzības birojs*] (hereinafter – the Bureau).

Section XII of the Public Procurement Law establishes procedures for examination of violations of the procurement procedure. Applications on violations in provisions of candidate or applicant selection, technical specifications and other requirements regarding a particular procurement procedure, as well as violations in activities of a commissioning party or a procurement commission during the procurement procedure shall be submitted, within the term established in the Law, to the Bureau.

3. Up to the moment of coming into effect of the Law "Amendments to the Public Procurement Law" adopted on 16 July 2009 and 25 August 2009 Cabinet of Ministers Regulation No. 968 "Regulations Regarding the Amount of Security of a Complaint Regarding Violations of Procurement Procedure, the Procedures for Payment and Reimbursement Thereof and the Procedures for Exemption from Payment of Security" (hereinafter – Regulation No. 968) adopted pursuant to the authorization included in Section 50 of this Law, the Bureau accepted and examined, without payment of security, all applications regarding possible violations in procurement documentation or the procedure of procurement procedure.

Section 46 of the 16 July 2009 Law "Amendments to the Public Procurement Law" supplements the Public Procurement Law by Section 83.[2] "Security of Complaints" (hereinafter – Contested Section):

"(1) The submitter of a complaint shall pay security of the complaint to the Procurement Monitoring Bureau for the submission of the complaint. Security of the complaint shall not be paid if the complaint is submitted to the Procurement Monitoring Bureau regarding the justification for the suspension of a procurement procedure or in the cases referred to in Section 83, Paragraph four of this Law, if half of the deadline for the submission of a tender or a longer period of time has passed.

(2) A document confirming payment of the security of a complaint in full amount shall be submitted to the Procurement Monitoring Bureau concurrently with the complaint.

(3) Security of a complaint shall be repaid to the submitter of the complaint, if:

1) the submitter of the complaint has, in writing, revoked his or her complaint by the date of the meeting dedicated to examination of the complaint in accordance with Section 83, Paragraph eight of this Law;

2) the commissioning party has entered into the procurement contract until receipt of the complaint;

3) the Procurement Monitoring Bureau has not accepted the complaint for examination;

4) the commission has recognised the complaint as justified or partly justified.

(4) The amount of the security of a complaint, which is expressed as a fixed amount of money depending on the procurement contract price in the relevant part of procurement and on the applicable procurement procedure, as well as the procedures for payment and reimbursement thereof and the procedures for application of exemption from payment of the security shall be determined by the Cabinet."

Section 50 of the Law "Amendments to the Public Procurement Law" supplements Transitional Provisions of the Public Procurement Law by Para 12 that provides: "The amendment to this Law regarding the supplementation thereof with Section 83.[2] shall come into force on 1 September 2009. Until the day of the coming

into force of this amendment the Cabinet shall issue the regulations referred to in Section 83.^{2}, Paragraph four" (hereinafter – the Contested Para; the Contested Section and the Contested Para, both together hereinafter referred to as – the Contested Norms).

4. On 18 June 2009, the Saeima supplemented the Public Procurement Law by the Contested Norms by adopting the Law "Amendments to the Public Procurement Law" in the third reading.

On 26 June 2009, based on Article 71 of the Satversme of the Republic of Latvia (hereinafter – Satversme), the President of the Latvian State forwarded the Law "Amendments to the Public Procurement Law" for the second reviewing.

On 16 July 2009, the Saeima, having reviewed the law for the second time, did not introduce any amendments thereto. The Law was proclaimed on 30 July 2009 and came into effect in 13 August 2009.

5. The applicant – **the President of the Latvian State** (hereinafter – the Applicant) asks to recognize Section 46 in the part that supplements the Public Procurement Law by Section 83.^{2}, and Section 50 in the part that supplements Transitional Provisions of the Public Procurement Law by Para 12 as non-compliant with Article 1 and Article 92 of the Satversme and declare them as null and void as from the date of adoption of the Law.

5.1. The Applicant indicates that the Contested Norms restrict the right of persons to demand examining, in a fair court, lawfulness of the use of public and municipal resources, as well as they infringe the principle of separation of powers in relation to the legislator and the executive power. Measures selected by the legislator are not appropriate for reaching the legitimate objective because restrictions are established for everyone in the result of certain cases when ungrounded complaints are submitted. Moreover, this regulation leads to restriction of the right of a person to own property for an extended period of time.

The right to contest procurement procedures before a special institution, the Bureau, serve as a substantial mechanism to prevent the possibility to unduly use State

and local government financial resources, as well as prevent corruption risks in the use of budget resources. A person can defend his or her rights or prevent violations in a procurement procedure only by addressing the Bureau, i.e. in accordance with the extrajudicial dispute settlement procedure. Moreover, addressing a court after a procurement agreement is concluded would not allow amending the decision on its merit and only theoretical recovery of losses would be enabled. If a person is not ensured with effective enough rights to address the Bureau, the right of a person to a fair court is restricted.

When adopting the Law, the Saeima has also supported a range of propositions that improve the legal regulation with the purpose to prevent ungrounded hampering of public procurement procedures.

5.2. The Applicant holds that the wording of the stipulated authorization to the Cabinet of Ministers to determine the amount of security to be paid for submitting an application (hereinafter –Security), as well as the procedure of payment of it and the procedure of exemption from payment Security is so broad that it gives the Cabinet of Ministers an unlimited freedom of action when deciding on restriction of the fundamental rights of a person. It can neither be clearly concluded whether the amount of Security should be proportional with the State duty on appeal of a decision of an institution before an administrative court or the established payment can be greater.

According to the Applicant, one of the objectives why the Saeima decided to authorize the Cabinet of Ministers to establish the amount of Security rather than to provide for a precise amount of it was the failure of the members of the parliament to come to an agreement during the discussions. By means of the Contested Norms, the legislator has forwarded an issue falling within its cope of competence and dealing with elaboration of a material norm, namely, establishment of the amount of Security, to the executive power, which breaches the principle of separation of powers, although such substantial restriction of the rights of a person should necessarily be based on a decision of the Saeima as a legislative power elected by the people.

6. The institution that adopted the Contested Norms, **the Saeima** has indicated in the reply that the Norms do comply with Article 1 and Article 92 of the Satversme.

6.1. The Saeima maintains that the authorization to the Cabinet of Ministers included in the Contested Section fully complies with the principle of separation of powers and the second sentence of Section 31 (1) (1) of the Law on the Structure of the Cabinet of Ministers that provides that an authorization shall contain the main guidelines for the content, as well as criteria established in the case-law of the Cabinet of Ministers.

The Saeima has decided on the most important issue, namely, it has provided in section 83.[2] of the Public Procurement Law that the submitter of a complaint shall pay Security of the complaint to the Procurement Monitoring Bureau for the submission of the complaint, Moreover, the Saeima has provided for cases when persons are exempted from payment for Security and cases when Security is repaid to the submitter of the complaint.

The Saeima holds that concern of the Applicant regarding the possible amount of Security and its proportionality with State duties for appealing against a decision of an institution before an administrative court. The Cabinet of Ministers, like the Saeima, has the duty to observe the principle of proportionality, equality and justice, as well as other legal principles. The fact that the Saeima has authorized the cabinet of Ministers to decide on the amount of Security does not mean that the Cabinet of Ministers can establish the amount arbitrarily and without assessing proportionality of restriction of the fundamental rights. The assumption that the responsible institution to determine the amount of all payments is the Saeima is evidently ungrounded. Such requirement would render the procedure of establishing and amending payment amounts too complicated and time-consuming, and it would not ensure efficiency of the legal regulation and reaching of its objective.

According to the Saeima, Regulation No. 968 fully complies with the above mentioned authorization. Regulation No. 968 does not include norms that could not be regarded as aid for implementation of the legal norm. Regulation No. 968 has clear enough wording for the addressee to understand his or her rights and duties.

The Saeima does not agree with the statement that exercise only of procedural legal norms, rather than that of material legal norms, fall within the scope of competence of the Cabinet of Ministers.

6.2. The Saeima indicates that the first sentence of Article 92 of the Satversme guarantees the right to defend one's rights and legal interests before a court, and it cannot be applied to the institute of administrative procedure. The rights to a fair court guaranteed in international documents of human rights can neither be applied to any procedure related with State administration. Consequently, compliance of the Contested Norms with Article 92 of the Satversme should be assessed only insofar as they restrict access of a person to a court.

The Saeima admits that the duty to pay security established in the Contested Section restricts the right of a person to a fair court. This norm restricts one of the elements of the right to a fair court, which is the right to address a court. However, this restriction has been established with the purpose to speed up a procurement procedure and to increase its efficiency by thus improving business environment, ensuring fair competition and execution of measures important for the society, which thus would permit protecting the constitutional value of Article 116 of the Satversme – welfare of the society.

The measure selected by the legislator is proportional. It is appropriate for reaching the legitimate objective. It is proven by the experience of other Member States of the European Union that have similar payments (state duty or security) not only in court proceedings but also extrajudicial procedures. The restriction is indispensible because the legitimate objective of the norms cannot be reached by other measures. It is appropriate, namely, the Public Procurement law ensures a fair balance between interests of the society when reaching the legitimate objective and the right of a person to access a court when appealing a public procurement procedure.

7. The summoned person, **Ombudsman of the Republic of Latvia** (hereinafter – the Ombudsman) indicates that the right to a free access to a court can be restricted if the restriction has been established by a law adopted according to proper proceedings, if the restriction has a legitimate objective, and if the restriction is proportional. The Ombudsman emphasizes that the amount of Security should be grounded and proportional with the restriction to a natural person established by Security, namely,

such payment should not prevent a person from contesting lawfulness of a procurement procedure on reasonable grounds.

The right to contest procurement procedure before a special institution, the Bureau, is a substantial mechanism to prevent ungrounded use of State and local government financial resources, as well as to prevent corruption risks in the use of budget resources. Moreover, it is the only effective measure to contest decisions and activities of the commissioning party, therefore this procedure should not be burdened by non-proportional financial obstacles.

The Ombudsman holds that the restriction established in the Contested Norm has a legitimate objective. However, along with experience of the Member States of the European Union regarding application of security payment, it should also be taken into consideration that it considerably restricts access to courts.

The Ombudsman shares the opinion of the Applicant that the authorization by the legislator to the Cabinet of Minister is too broad and it does not comply with the principle of a democratic state included in Article 1 of the Satversme.

Although the measure selected by the legislator is appropriate for reaching the legitimate objective, namely, ensuring of function of the Bureau, there still exist other more lenient measures to reach the legitimate objective. When adopting the Contested Norms, the legislator has not observed the principle of proportionality.

8. The summoned person, **the Ministry of Justice of the Republic of Latvia** (hereinafter – the Ministry of Justice) informs that it has not assessed lawfulness and constitutionality of the Contested Norms, neither their compliance with the entire legal system because they were included into the draft law "Amendments to the Public Procurement Law" by the Ministry of Finance based on an initiative of the Prime Minister, and the draft law was not coordinated with the Ministry of Justice.

The Ministry of Justice indicates that the Legal Affairs Department of the State Chancellery has drawn attention to the necessity to stipulate mechanism for calculating the amount of Security. The draft law, however, was not supplemented by such regulation.

9. The summoned person – **State Audit Office of the Republic of Latvia** (hereinafter – the State Audit Office) informs that it has not assessed, in the frameworks of audits, the right of persons to submit an application to the Bureau regarding effective and economic use of financial resources. It has neither analysed influence of the restriction established in the Public Procurement Law on the reasonable use of financial resources.

The State Audit Office holds that violations in the procedure of public procurements are often made in procurements that can be contested before the Bureau, as well as in those that cannot be contested.

10. The Cabinet of Ministers of the Republic of Latvia (hereinafter- the cabinet of ministers) indicate that security as such serves as a preventive measure to influence activities of a person by thus deterring a person from submission of knowingly ungrounded applications before the Bureau. It is possible to meet the interest of the society into high quality and timely services only if procurement procedures are timely executed and are not hampered without reason. In administrative procedure of Latvia, security as a measure preventing persons from submitting knowingly ungrounded applications has not yet been applied. Therefore it was not able to rely on any experience and assess whether the amount of Security is proportional in the context of other legal norms.

11. The Ministry of Finance of the Republic of Latvia (hereinafter – the Ministry of Finance) indicates that the Cabinet of Ministers, when elaborating regulatory framework on Security, has decided to double its amount because "in the result of discussions, members of the Cabinet of Ministers concluded that the amount of Security to be paid for submitting an application has been established in a too careful manner, in the result of which it is possible to fail reaching the aim of Security.

When establishing Security, the responsible persons tried to establish such legal regulatory framework that would not cause any non-proportional restrictions to natural persons. Such amount of Security that would make it problematic for merchants to have the possibility to obtain the necessary sum and thus would prevent them from

addressing an application to the Bureau should be regarded as an undue restriction. When assessing the amount of Security, the Ministry of Finance relied on an assumption that applications contesting procurement procedures are mainly submitted by legal persons.

In administrative procedure of Latvia, Security to be paid for submitting an application as a measure to prevent persons from submitting knowingly ungrounded applications has never been applied. Therefore it is not possible to make a reference to any similar effective legal regulation in Latvia; however foreign experience has been assessed. In the Member States of the European Union, there exist payments for contesting procurement procedures. The institute of security is also applied.

According to the Ministry of Finance, neither the amount of Security, nor legal regulatory framework regarding application causes any non-proportional consequences to persons addressing an application to the Bureau. Consequently, introduction of Security is a proportional measure.

12. The Procurement Monitoring Bureau informs that as the number of applications examined and sent back to participants of the case later than within the term of one month and three working days established in the Law increase as the total number of applications increase. In 2007, 91 percent out of all applications were timely examined, in 2008 – 46 percent, whilst in the first ten months of 2009 – only 37 percent.

Data provided by the Bureau show that the number of procurements in 2009 has reduced if compared to 2008. However, the number of applications has remained unchanged, whilst the number of ungrounded applications has increased by five percent (in 2008 – 37.1 percent, in the first ten months of 2009 – 42.2 percent). Within two months after coming into effect of the Contested Norms, 30 percent of applications have been recognized as inadmissible.

The Bureau indicates that, when elaborating the draft law, the way how workload of the application examination committee of the Bureau could be impacted by the increase of the "threshold" established in the Law and to be applied to procurement procedures was not directly prognosticated. However, it was

prognosticated that the total number of procurements, regarding which persons could submit applications to the Bureau, could reduce by about 55 percent. Consequently, it was expected that the number of applications would be influenced.

13. The Corruption Prevention and Combating Bureau (*Korupcijas novēršanas un apkarošanas birojs*) (hereinafter –KNAB) indicates that the field of public procurements is one of the fields with a particularly high corruption risk. KNAB holds that submission of an application to the Bureau is not only a way who persons can defend his or her rights. By indicating violations of procurement procedure and by thus facilitating prevention of such violations, in fact, the person ensures the rights of other tenderers to participate in a lawful and open procedure.

KNAB emphasizes that the restriction for submitting applications established in the Public Procurement Law would, in fact, increase corruption risk because persons would cease reporting on possible violations of procurement procedure since this requires financial resources to pay Security. KNAB also indicates that a substantial remedy to ensure lawfulness and reduce corruption risks in the procurement field is plaid by execution of the control function and administrative liability; however these two elements are not being implemented at present. It is not possible to apply liability established in the Latvian Administrative Violations Code for violations in the field of public procurements.

KNAB holds that the particular amendments to the Public Procurement Law would increase corruption risk and number of violations of procurement procedure, which would lead to increase of cases of unreasonable and non-effective use of State financial resources.

14. Edgars Zalāns, Minister of Regional Development and Local Government of the Republic of Latvia informs that his suggestion to establish Security at the amount of 5 percent of the contractual price of the procurement was not supported at the meeting of 4 June 2009 of the Saeima. At the meeting of 18 June 2009, Mr. E. Zalāns suggested establishing Security at the amount of one percent of a particular contractual price. This proposition was partially supported.

The number of complaints addressed to the Bureau served as the basis for the above mentioned suggestions. This means that "almost in a half of all cases execution of functions important for the society are being hampered".

Mr. E. Zalāns holds that "procurement procedures last for years. This does not allow local governments to plan their budgets and, in some cases, loose State funding".

The Constitutional Court has established:

15. The Applicant has contested Section 83.^{2} of the Public Procurement Law. The Contested Section consists of four indents. This Section, in fact, forms a new legal institute – Security to be paid for submitting applications, and it provides for cases when Security shall not be paid, as well as for cases when it is repaid to a submitter of an application. The Contested Section provides for the following authorization to the Cabinet of Ministers: "The amount of the security of a complaint, which is expressed as a fixed amount of money depending on the procurement contract price in the relevant part of procurement and on the applicable procurement procedure, as well as the procedures for payment and reimbursement thereof and the procedures for application of exemption from payment of the security shall be determined by the Cabinet". However, Para 12 of the Transitional Provisions of the Law establishes the date of coming into effect of the regulatory framework established in the Contested Norm and the term, within which the Cabinet of Ministers has the duty to adopt provisions mentioned in the Contested Norm.

16. It follows from the application that the Constitutional Court is asked to assess the following:

1) whether Security included in the Contested Section complies with the first sentence of Article 92 of the Satversme that guarantees the right of each person to defend his or her rights and legal interests in a fair court;

2) whether the authorization to the Cabinet of Ministers established in the Contested Norm requires that the Cabinet of Ministers establishes the amount of

Security complies with the principle of separation of powers enshrined in Article 1 of the Satversme.

Consequently, first it is necessary to assess whether the legal institute established in the Law, i.e. Security to be paid for submitting an application established in Section 83.^{2} of the Public Procurement Law complies with Article 92 of the Satversme.

17. The first sentence of Article 92 of the Satversme provides: "Everyone has the right to defend his or her rights and lawful interests in a fair court." The above mentioned sentence includes both the institutional aspect – the court shall be fair, and the procedural aspect – everybody has the right to free access to court. Both aspects are inseparably connected: fairness of the court would be of no importance, if access to court were not ensured; and vice versa – access to the court would be unnecessary, if fairness of the court were not ensured (*see: Judgment of 14 March 2004 by the Constitutional Court in the case No. 2005-18-01, Para 8*).

18. The Contested Norm includes the requirement to pay Security for submitting an application to the Bureau. This is a precondition for the right of a person to address the Bureau with the purpose to contest violations of procurement procedure. According to the Public Procurement Law, after concluding a procurement agreement, a submitter of an application shall have the right to contest decisions made by the commissioning party only before a court. However, if no application is submitted to the Bureau, such applications shall not be accepted, as established by Section 191 (1) (5) of the Administrative Procedure Law because extrajudicial dispute settlement procedure has not been observed. Consequently, the rights of a person to a fair court can be implemented only if he or she has dealt with the dispute according to extrajudicial procedure.

The Constitutional Court has already established that introduction of different payments restrict the fundamental right to a free access to the court (*see: Judgment of 4 January 2005 by the Constitutional Court in the case No. 2004-16-01, Para 7.2,*

Judgment of 14 March 2006 in the case No. 2005-18-01, Para 9, and Judgment of 20 November 2008 in the case No. 2008-07-01, Para 6).

It has been reasonably indicated in the reply of the Saeima and opinions of the summoned persons that the Contested Section restricts the right of persons to a free access to the court. The requirement to pay Security for submitting an application to the Bureau restricts the right of a person to address a court later.

Consequently, the Contested Section restricts the rights of a person to a fair court.

19. Although Article 116 of the Satversme does not mention Article 92, it does not mean though that the fundamental rights established in this Article cannot be imposed any restrictions. The Constitutional Court has also recognized that the fundamental rights mentioned in Article 116 of the Satversme can be restricted with the purpose to protect other constitutional values (*see: Judgment of 22 October 2002 by the Constitutional Court in the case No. 2002-04-03, Para 2 of the Concluding Part*).

The Constitutional Court has reiterated that the right to a fair court is one of the most significant rights of a person; therefore restrictions to this right of a person shall be determined in the most indispensable cases (*see: Judgment of 6 October 2003 by the Constitutional Court in the case No. 2003-08-01, Para 1 of the Concluding Part, Judgment of 14 March 2006 in the case No. 2005-18-01, Para 10, and Judgment of 20 Novembe3r 2008 in the case No. 2008-07-01, Para 8*). The above conclusion is substantiated by the fact that the protection of fundamental rights of a person is one of the most significant obligations of a law-governed state. The State shall ensure efficient protection to any person, whose rights or legitimate interests have been violated (*see: Judgment of 5 December 2001 by the Constitutional Court in the case No. 2001-07-0103, Para 1 of the Concluding Part, and Judgment of 14 March 2006 in the case No. 2005-18-01, Para 10*). Ensuring of the right of a person to a fair court is the most important measure for reaching the aim (*see: Judgment of 4 January 2005 by the Constitutional Case in the case No. 2004-16-01, Para 7.1*).

The right to a free access to the court, like other fundamental rights, can be restricted if such restriction has been conferred by law, has a legitimate aim and the restriction is proportionate to that aim (*see: Judgmetn of 27 June 2003 by the Constitutional Court in the case No. 2003-04-01, Para 1.2 of the Concluding Part*).

20. Access to the court is restricted by the Contested Norm, i.e. Section of $83.^2$ of the Public Procurement Law. In the case under review, there is no dispute whether the Contested Section has been adopted and proclaimed according to the procedure established in the Satversme and the Saeima Rules of Procedure.

Consequently, the restriction of the fundamental rights has been established by law.

21. Circumstances and arguments why it is needed shall be the basis for any restriction of fundamental rights, namely, the restriction is determined because of significant interests – the legitimate aim (*see: Judgment of 22 December 2005 by the Constitutional Court in the case No. 2005-19-01, Para 9, and Judgment of 14 March 2006 in the case No. 2005-18-01, Para 13*).

The Saeima indicates in the reply that the institute of Security has been established with the purpose to speed up a procurement procedure and to increase its efficiency by thus improving business environment, ensuring fair competition and execution of measures important for the society, which thus would permit protecting the constitutional value of Article 116 of the Satversme – welfare of the society.

The Constitutional Court agrees with what has been indicated by the Saeima, namely, that it is in the interests of the society to ensure functioning of institutions by eliminating any shortage of necessary goods, services and buildings. Delay of procurement agreements for the State and local government might result in additional expenses. It is in the interests of the State to ensure fast and effective procurement procedure. Contesting of procurement procedure by addressing ungrounded applications to the Bureau might hamper procurement procedures by extending procurement procedure by the stipulated term of examination of applications and

preparation of a decision by the Bureau, namely, by one month and three working days.

The Saeima has indicated that the restriction of the Contested Norms has been established with the aim to protect winners of procurement procedure against unfair competitors and prevent certain persons from addressing ungrounded complaints to the Bureau, however, this hampers the commissioning party to conclude public agreements. In the result of this, it is possible to ensure an effective and fast procurement procedure only if the number of knowingly ungrounded applications is reduced, the aim of these applications being hampering of procurement procedure and extending the term for concluding a procurement agreement.

Unlike payments in a court proceedings for submitting applications or complaints, which serves not only as a certain obstacle that prevents submitting of ungrounded applications or complaints but also permits to partially cover court maintenance expenses, the aim of Security is neither gaining of profit nor compensation of expenses (*see: Case materials, Vol.1, pp. 203*). This is confirmed by Section 83.^{2} Indent 3 of the Public Procurement Law that provides that Security of a complaint shall be repaid to the submitter of the complaint, if: 1) the submitter of the complaint has, in writing, revoked his or her complaint by the date of the meeting dedicated to examination of the complaint; 2) the commissioning party has entered into the procurement contract until receipt of the complaint; 3) the Procurement Monitoring Bureau has not accepted the complaint for examination; 4) the commission has recognised the complaint as justified or partly justified.

Consequently, the aim of the contested restriction is to speed up and ensure effectiveness of public procurement procedure by reducing the number of knowingly ungrounded applications, namely, the restriction has been established with the purpose to protect the rights of persons.

Consequently, the restriction of the fundamental rights established in the Contested Section has a legitimate objective.

22. To evaluate whether the legal norm, adopted by the legislator, complies with the proportionality principle one has to ascertain:

1) the means, used by the legislator are suitable for achieving the legitimate objective;

2) if it is not possible to attain the objective by other means, which would less limit the rights and legal interests of an individual;

3) if the activity of the legislator is proportionate or adequate, i.e., if the benefit, obtained by the society, is greater than the loss incurred to the rights and lawful interests of an individual.

If, after evaluating the legal norm, it is acknowledged that it does not comply with even one of the above criteria, then it shall be considered as not being in conformity with the principle of proportionality and illegitimate (*see: Judgment of 19 March 2002 by the Constitutional Court in the case No. 2001-12-01, Para 3.1 of the Concluding Part*).

23. In order to assess whether the Contested Section reaches the legitimate objective, it is necessary to investigate whether the measure selected by the legislator, i.e. Security for an application, is appropriate for reaching the legitimate objective. Namely, whether the Security established in the Contested Section does reduce the number of knowingly ungrounded applications, speeds up procurement procedure and makes it more efficient.

On 1 November 2009, other amendments to the Public Procurement Law also came into force. They provided for changes in limits of contractual prices, according to which procurement procedures are applied, as well as conferred the Bureau the right to dismiss a complaint without examination if the complaint is evidently insufficient to satisfy the requirements of the submitter or the complaint is evidently inadmissible according to substance. The Law also provide for restriction of terms for contesting of procurement procedure before the Bureau. All above mentioned supplements to the Law are, in fact, aimed at rendering of procurement procedure more effective and ensuring lawfulness thereof.

Moreover, when assessing suitability of the restriction for reaching of the legitimate objective, in the case under review, the Constitutional Court shall have the duty to assess the restriction at the extent that is established in the Contested Section,

as well as take into consideration the interests of the Applicant, that of business environment and the society that the restriction can have an impact on.

24. The Contested Section provides that the submitter of a complaint shall pay security of the complaint to the Procurement Monitoring Bureau for the submission of the complaint. Persons are exempted from this payment only in cases established by the Law. Consequently, the Contested Section establishes payment not only to person who submit knowingly ungrounded application with the purpose to hamper procurement procedure, but also to other persons who have noticed violations in procurement procedure and want to prevent them.

Consequently, the Contested Section, insofar as it provides for paying security for submitting a complaint, restricts the rights of submitters of grounded, as well as ungrounded complaints.

25. Pursuant to the first part of Section 83.[1] of the Public Procurement Law, the Bureau has the right to dismiss a complaint without examination if the complaint is evidently insufficient to satisfy the requirements of the submitter or the complaint is evidently inadmissible according to substance. In such case procurement procedure is suspended, and therefore Security for the complaint is repaid to the submitter.

If the Bureau has accepted the application, then it is examined within one month and recognized as grounded, partially grounded or ungrounded. Security is repaid to the submitter of the complaint is regarded as grounded or partially grounded, whilst Security shall not be disbursed if the complaint is found as ungrounded.

According to the previous practice when examining complaints, only a small part of applications recognized as ungrounded are such that are evidently ungrounded or submitted with a view to hamper procurement procedure. Often applications are based on issues related with interpretation of legal norms of the European Union or ambiguous requirements established in documents regarding procurement procedure, which permit questioning quality of procurement documentation elaborated by the commissioning party (*see: Informative report on the possibility to improve normative acts with a view to prevent ungrounded hampering of procurement procedures*

[Informatīvais ziņojums par iespējām pilnveidot normatīvos aktus, lai mazinātu iespējas nepamatoti kavēt valsts iepirkumu procedūra], *http://www.iub.gov.lv/files/upload/ftp/tiesibuakti/Infsudzibas.pdf, consulted on 15 March 2010*).

The data provided by the Bureau show that after introduction of security the proportion of ungrounded applications, if compared to partially grounded and grounded complaints, has not substantially changed (*see: Case materials, vol. 3, pp. 57 – 64, and home page of the Procurement Monitoring Bureau* http://www.iub.gov.lv/). The Ministry of Finance also concludes: "The statement that contesting, before the Procurement Monitoring Bureau, of decisions adopted by the commissioning parties in procurement procedures often hampers, without reason, conclusion procurement agreements, is not grounded" (*see: Informative report on the possibility to improve normative acts with a view to prevent ungrounded hampering of procurement procedures [Informatīvais ziņojums par iespējām pilnveidot normatīvos aktus, lai mazinātu iespējas nepamatoti kavēt valsts iepirkumu procedūra]*, *http://www.iub.gov.lv/files/upload/ftp/tiesibuakti/Infsudzibas.pdf, consulted on 15 March 2010*).

A complaint that has been recognized as ungrounded cannot always be regarded as such that has been submitted with the purpose to hamper procurement procedure. However, Security is neither repaid to persons who have submitted their complaint with a view to prevent violation of normative acts and infringement of rights.

Consequently, the restriction established in the Contested Section applies not only to persons who submit knowingly ungrounded applications to the Bureau, but also to persons who really question lawfulness of procurement procedure.

26. The legislator has indicated that the restriction established in the Contested Section allows speeding up procurement procedure and make it more effective. Therefore it is necessary to investigate whether the requirement to pay Security established in the Contested Section reaches the objective indicated by the legislator, i.e. speeds up procurement procedure and makes it more effective.

27. The Public Procurement law contains legal norms that follow from several directives of the European Union. The aim of procurement procedures regulated in Directive 2004/18/EC is to ensure functioning of the common market (international trade) of the European Union, as well as to ensure economic efficiency; however, as to procurements of lower value, application of requirements of the above mentioned directive might turn out to be less effective due to administrative costs for the procedure. In the Directive, basic principles that should be taken into account in a procurement procedure are established, namely, it is necessary to establish an equal and non-discriminating attitude towards participants of the market; moreover, activities of the commissioning party should be transparent. The Public Procurement Law, however, defines a broader objective, namely, in addition to ensuring openness of the procedure and free competition of suppliers and equal and fair attitude towards them, the regulatory framework of the Law is aimed at ensuring effective use of State and local government resources. Regulation included in the Public Procurement Law is closely related with the requirement included in the Law "On Prevention of Squandering of the Financial Resources and Property of the State and Local Governments" to act with resources and property of the State and local governments in a useful way. The Public Procurement Law includes not only legal norms that follow from directives, but also those, the aim of which is to ensure effective use of State and local government financial resources and thus to protect interests of the entire society.

28. Functions of the State administration in the field of public procurement are implemented by the Procurement Monitoring Bureau. The Bureau monitors compliance of procurement procedures with requirements of normative acts, provides methodological support when organizing procurements, fulfils functions established in other normative acts, and thus works in the interests of the society. Consequently, the Bureau is the very institution of State administration that monitors openness of State administration measures, ensuring unrestricted competition between suppliers, effective use of State and local government resources insofar as it is related with procurements.

29. It has already been concluded in this Judgment that submitting a complaint to the Bureau is an obligatory pre-judicial stage and it serves as a precondition for a person to be able to address a court to defend his or her rights.

There exist two ways of administrative procedure – administrative procedure in institutions and administrative proceedings in court (*see: Judgment of 4 January 2005 by the Constitutional Court in the case No. 2004-16-01, Para 10*). The fundamental duty of an institution in the administrative procedure is – within the competence authorized to it – to ensure legal, effective and accurate application of legal norms, impartial clarification of actual and legal circumstances as well as to take the most conformable decision

Contesting of procurement procedure is a measure that allows a law-governed State to ensure justice and impartiality. Contesting, before the Bureau, of decisions taken and actions made in the frameworks of procurement procedure is a possibility to eliminate mistakes in State administration and ensure an effective revision of decisions, which mainly is in the interests of the State and the society. Thus effective use of budget resources is ensured and distortion of competition is prevented.

When fulfilling the task of an institution of higher functional rank in the field of procurement, the Bureau plays a significant role in ensuring effective use of State and local government financial resources. Submitting an application to the Bureau is the only way how a decision of a commissioning party can be changed according to substance. The Constitutional Court agrees with the Applicant and the Ombudsman that the right to submit an application to the Bureau is the only effective measure to contest decisions and actions of the commissioning party.

30. It has already been concluded in the present Judgment that implementation of projects important for the society and reduction of administrative requires ensuring that a commissioning party concludes a purchase agreement in the shortest time possible and is provided with the necessary goods, services or construction works. Any delay of procurement procedure may have an impact on efficiency of purchases. Effectiveness of procurements, however, are also influenced by validity of decision

taken, effective use of State and local government financial resources, ensuring of an open and fair competition between suppliers, which, in turn, affects business environment and attitude of the society towards lawfulness of State administration measures. Consequently, to ensure interests of the society, only such requirements and restriction that ensure balance between time economy in procurement procedures, on the one hand, and fairness of procedures that include reasonable activities of the commissioning party during procurement procedures and verification of decisions adopted by the commissioning party in order to prevent all possible mistakes in procurement procedure, on the other hand, could guarantee effective procurement procedures.

Elimination of mistakes might cause negative financial consequences for the State. It is indicated in the informative report on the possibility to improve normative acts with a view to prevent ungrounded hampering of procurement procedures (hereinafter – the Informative Report) elaborated by the Ministry of Finance that in the frameworks of projects funded from the European Union Funds, an audit of expenses is performed after execution thereof. During the audit, procurement procedure is also examined. If violations of procurement procedure are established, the question of partial or full denial of costs to the recipient of funding is decided. By means of timely establishment of faults in procurement procedure, it is possible to prevent a situation when expenses for implementation of a particular project must be covered only from the State budget rather than funding provided by the European Union funds (*see: Informative Report, http://www.iub.gov.lv/files/upload/ftp/tiesibuakti/Infsudzibas.pdf, consulted on 15 March 2010*).

KNAB has also drawn attention to corruption risks in the field of procurement. It is possible to prevent these risks by ensuring an effective procedure of challenge, as well as fulfilment of control function and calling to administrative liability of guilty parties (*see: case materials, Vol. 1, pp. 178 – 196*).

Consequently, submitting an application to the Bureau is not only a precondition for ensuring the right of persons to a fair court. It is in the interests of the society to ensure efficient assessment, by the Bureau, of lawfulness of a decision adopted by the commissioning party, which would permit reducing corruption risks,

facilitating better use of resources and eliminating the possibility to lose funding from the European Union funds.

The legislator has indicated that speed and effectiveness of procurement procedure must be facilitated with the purpose to improve business environment, ensure fair competition and fulfilment of measures important for the society. However, it has been emphasized in the Informative Report that "preventing natural persons from submission of grounded complaints to the Procurement Monitoring Bureau regarding violations of procurement procedure would deteriorate business environment, hamper fair competition, as well as trust into lawfulness of activities of institutions" (*see: Informative Report, http://www.iub.gov.lv/files/upload/ftp/tiesibuakti/Infsudzibas.pdf, consulted on 15 March 2010*). Fair competition and favourable business environment in the field of procurement cannot be guaranteed without ensuring effective mechanism for challenging decisions taken by the commissioning party.

Consequently, if possibilities to challenge adopted decisions is unreasonably restricted and the number of applications submitted is reduced, the objective indicated by the legislator is not being reached, the objective being facilitating of effectiveness of procurement procedure.

31. The Constitutional Court admits that addressing the Bureau with the aim to defend one's rights and contest decisions and activities of a commissioning party is a measure meant for unburden workload of courts. Effective functioning of courts is facilitated by such institutions that deal with elimination of mistakes in the field of State administration. There is no doubt that number of applications does influence workload of the Bureau. However, the State, pursuant to the principle of good administration, has the duty to improve procedure of administration and make it function as effectively as possible. Consequently, the duty of the State is to establish such circumstances that would permit the Bureau, as a State administration institution under supervision of the Ministry of Finance that fulfils the function of State administration in the field of public procurement monitoring, to be able to fulfil, at the greatest extent possible, its functions within the terms established in normative acts.

The number of applications received by the Bureau has reduced after introducing amendments to the Public Procurement Law (*see: home page of the Procurement Monitoring Bureau, http://www.iub.gov.lv/*). Several amendments aimed at facilitation of procurement procedure effectiveness, were introduced to the Public Procurement Law. Consequently, it is not possible to precisely determine the amendment that impacted the number of applications and workload of the Bureau.

However, it is possible to establish that after introducing amendments to the Public Procurement Law, a great number of procurements were left without control of the Bureau. The data provided by the Bureau show that after the increase of the "threshold" for application of procurement procedure, about 25 percent of the total sum of procurements are applicable to procurements that do not require application of procurement procedure, and therefore it is not possible to submit an application of violations made therein to the Bureau (*see: Case materials, Vol. 3, pp. 57*). Pursuant to Section 8.[1] (13) of the Public Procurement Law, decisions adopted in relation to these procurements can be challenged before a court according to statutory procedure. Contesting of a decision, however, does not suspend it.

Although, in the present case, the Constitutional Court does not assess effectiveness of all amendments introduced, the above mentioned information shows that workload of courts might increase.

32. Section 83.[2] (3) (1) of the Public Procurement Law provides for repaying Security to the applicant if he or she has revoked, in writing, the application before the date of its examining. Consequently, a person has the right to repeal an application at any time, before the Bureau adopts its decisions regarding the application. If a person is willing to maliciously hamper procurement procedure, it can submit a knowingly ungrounded application, revoke it on the last day before its examination and to regain Security paid.

Consequently, the Contested Regulation does not speed up procurement procedure because it is possible to submit an ungrounded application without losing the sum of Security already paid.

33. Moreover, it is important to observe the fact that any procurement is related with consumption of a certain time period. The Public Procurement Law provides for different terms that must be observed by the commissioning party (a State or local government institution that organizes procurement) during the procurement procedure. It is not reasonable to hold that terms established by the legislator would not ensure a fast and effective execution of procedures. A commissioning party, when planning procurement, must take into account all mandatory terms established by law, which are term for preparation of an application and an offer, the term of publishing reports submitted to the Bureau, the term in which a commissioning party is not allowed to conclude an agreement, the term of examination of an application by the Bureau. All above mentioned terms ensure precise and foreseeable procurement procedure. The Public Procurement Law provides that the Bureau shall examine the application within one month after receipt thereof and forward its decision to participants of the case within three working days.

If the commissioning party plans procurement procedure in a timely and correct way, it is possible to initiate procurement procedure with a precise end-term of the procurement.

The following is also indicated in the Informative Report: "a substantial problem is also related with planning and timely execution of procurements, as well as the length of the procedure, which at great extent increase the negative impact of applications submitted later on timely conclusion of procurement agreements". Consequently, the term of concluding procurement agreement is influenced by a delayed and incorrect planning or procurement procedure rather than an application regarding violations of procurement procedure submitted to the Bureau, which, pursuant to the Law can increase the length of the procedure by one month and three working days.

It is also possible to agree with the statement that the terms established in the Public Procurement Law, including the term for examination of applications, hampers budget planning and use of its resources, as well as serves as the reason for loosing State funding already allocated. If unforeseeable force majeure circumstances lead to a situation when the commissioning party cannot announce an open tender, closed

tender or negotiation procedure by publishing in advance an announcement on an agreement, then the commissioning party, pursuant to Section 63 (1) (3) of the Public Procurement Law, can apply negotiations procedure without publishing an announcement on the agreement. In these cases the commissioning party has the right to conclude an agreement as soon as the decision is adopted, and the person who wants to challenge the decision, has the right to address the court in accordance with Article 83 (2) of the Public Procurement Law.

Consequently, examination of an application by the Bureau cannot be regarded a non-proportional extension of procurement procedure because the term of examination of an application has been established by law, and the commissioning party, when planning procurement, has to take it into account.

34. The Constitutional Court has established that the restriction established in the Contested Section applies not only to persons who submit knowingly ungrounded applications to the Bureau, but also to persons who really question lawfulness of procurement procedure. It was also concluded that examination of an application by the Bureau cannot be regarded a non-proportional extension of procurement procedure because the term of examination of an application has been established by law, and the commissioning party, when planning procurement, has to take it into account.

By non-proportionally restricting the possibilities to challenge decisions adopted and by reducing the number of submitted applications, the objective indicated by the legislator is not reached, the objective being facilitating of effectiveness of procurement procedure and protection of the interests of the entire society. Moreover, the contested regulation does not speed up procurement procedure because there still exist a possibility to submit an ungrounded application without losing Security already paid.

Consequently, the restriction of rights established in the Contested Section is not suitable for reaching the legitimate objective.

Since the Contested Norm does not comply with one of the principles of proportionality, it neither complies with Article 92 of the Satversme.

35. Having established that the legal institute established in the Contested Norm, which is Security for submitting of an application, does not comply with one legal norm of a higher legal force, it shall be recognized as unlawful. Therefore it is not necessary to assess whether the authorization to the Cabinet of Ministers established in the contested norm complies with Article 1 of the Satversme.

The Constitutional Court

Based on Article 30 – 32 of the Satversme of the Republic of Latvia,

h o l d s :

Section 83.^{2} of the Public Procurement Law does not comply with Article 92 of the Satversme and shall be null and void as from the date of coming into force of the Judgment.

The Judgment is final and not subject to appeal.

The Judgment shall come into force on the date of publishing it.

Presiding Judge G. Kūtris