Reports of Cases

JUDGMENT OF THE COURT (Ninth Chamber)

24 October 2024*

(Reference for a preliminary ruling – Procedures for the award of public works contracts, public supply contracts and public service contracts – Directive 2014/24/EU – Public works contracts – Article 42(3)(b) – Technical specifications – Words 'or equivalent' – Reference to technical standards – Regulation (EU) No 305/2011 – Directive 2014/35/EU)

In Case C-513/23,

REQUEST for a preliminary ruling under Article 267 TFEU from the Administrativen sad Pleven (Administrative Court, Pleven, Bulgaria), made by decision of 28 July 2023, received at the Court on 9 August 2023, in the proceedings

Obshtina Pleven

v

Rakovoditel na Upravlyavashtia organ na Operativna programa 'Regioni v rastezh' 2014-2020,

THE COURT (Ninth Chamber),

composed of C. Lycourgos (Rapporteur), President of the Third Chamber, acting as President of the Ninth Chamber, S. Rodin and O. Spineanu-Matei, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Obshtina Pleven, by M. Manolova-Naydenova, advokat,

– the Austrian Government, by A. Posch and J. Schmoll, acting as Agents,

– the European Commission, by A. Spina, G. Wils and I. Zaloguin, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

* Language of the case: Bulgarian.

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 42(3)(b) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65), as amended by Commission Delegated Regulation (EU) 2019/1828 of 30 October 2019 (OJ 2019 L 279, p. 25) ('Directive 2014/24'), read in conjunction with point 2 of Annex VII to that directive.

2 The request has been made in proceedings between Obshtina Pleven (Municipality of Pleven, Bulgaria) and the rakovoditel na Upravlyavashtia organ na Operativna programa 'Regioni v rastezh' 2014-2020 (Head of the Management Authority of the operational programme 'Regions in Growth' 2014-2020, Bulgaria) concerning a decision by which it imposed on that municipality a financial correction of the expenditure eligible for financing a project concerning sustainable urban environment by that operational programme, on account of an alleged infringement of public procurement rules.

Legal context

European Union law

Directive 98/34/EC

3 Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations (OJ 1998 L 204, p. 37), which was no longer in force at the time of the facts in the main proceedings, is relevant in the light of the applicable EU legislation. Annex I to that directive, entitled 'European standardisation bodies' included the following list:

'CEN

European Committee for Standardisation

Cenelec

European Committee for Electrotechnical Standardisation

ETSI

European Telecommunications Standards Institute'.

4 Article 6(3) of that directive provided that the European Commission may request the European standards institutions to draw up a European standard within a given time limit.

Regulation (EU) No 305/2011

5 Article 2 of Regulation (EU) No 305/2011 of the European Parliament and of the Council of 9 March 2011 laying down harmonised conditions for the marketing of construction products and repealing Council Directive 89/106/EEC (OJ 2011 L 88, p. 5), sets out:

'For the purposes of this Regulation the following definitions shall apply:

…

11. "harmonised standard" means a standard adopted by one of the European standardisation bodies listed in Annex I to Directive 98/34/EC, on the basis of a request issued by the Commission, in accordance with Article 6 of that Directive;

…'

6 Article 17(5) of that regulation provides:

'The Commission shall assess the conformity of harmonised standards established by the European standardisation bodies with the relevant mandates.

The Commission shall publish in the *Official Journal of the European Union* the list of references of harmonised standards which are in conformity with the relevant mandates.

The following shall be indicated for each harmonised standard in the list:

(a) references of superseded harmonised technical specifications, if any;

(b) date of the beginning of the coexistence period;

(c) date of the end of the coexistence period.

The Commission shall publish any updates to that list.

From the date of the beginning of the coexistence period it shall be possible to use a harmonised standard to make a declaration of performance for a construction product covered by it. National standardisation bodies are under the obligation to transpose the harmonised standards in conformity with Directive 98/34/EC.

Without prejudice to Articles 36 to 38 [establishing simplified procedures], from the date of the end of the coexistence period, the harmonised standard shall be the only means used for drawing up a declaration of performance for a construction product covered by it.

At the end of the coexistence period, conflicting national standards shall be withdrawn and Member States shall terminate the validity of all conflicting national provisions.'

Regulation (EU) No 1025/2012

7 Under Article 2 of Regulation (EU) No 1025/2012 of the European Parliament and of the Council of 25 October 2012 on European standardisation, amending Council Directives 89/686/EEC and 93/15/EEC and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/23/EC and 2009/105/EC of the European Parliament and of the Council and repealing Council Decision 87/95/EEC and Decision No 1673/2006/EC of the European Parliament and of the Council (OJ 2012 L 316, p. 12):

'For the purposes of this Regulation, the following definitions shall apply:

(1) "standard" means a technical specification, adopted by a recognised standardisation body, for repeated or continuous application, with which compliance is not compulsory, and which is one of the following:
   (a) "international standard" means a standard adopted by an international standardisation body;
   (b) "European standard" means a standard adopted by a European standardisation organisation;
   (c) "harmonised standard" means a European standard adopted on the basis of a request made by the Commission for the application of Union harmonisation legislation;
   (d) "national standard" means a standard adopted by a national standardisation body;

…'

Directive 2014/24

8 Recital 74 of Directive 2014/24 is worded as follows:

'The technical specifications drawn up by public purchasers need to allow public procurement to be open to competition as well as to achieve objectives of sustainability. To that end, it should be possible to submit tenders that reflect the diversity of technical solutions standards and technical specifications in the marketplace, including those drawn up on the basis of performance criteria linked to the life cycle and the sustainability of the production process of the works, supplies and services.

Consequently, technical specifications should be drafted in such a way as to avoid artificially narrowing down competition through requirements that favour a specific economic operator by mirroring key characteristics of the supplies, services or works habitually offered by that economic operator. Drawing up the technical specifications in terms of functional and performance requirements generally allows that objective to be achieved in the best way possible. Functional and performance-related requirements are also appropriate means to favour innovation in public procurement and should be used as widely as possible. Where reference is made to a European standard or, in the absence thereof, to a national standard, tenders based on equivalent arrangements should be considered by contracting authorities. It should be the responsibility of the economic operator to prove equivalence with the requested label.

To prove equivalence, it should be possible to require tenderers to provide third-party verified evidence. However, other appropriate means of proof such as a technical dossier of the manufacturer should also be allowed where the economic operator concerned has no access to such certificates or test reports, or no possibility of obtaining them within the relevant time

limits, provided that the economic operator concerned thereby proves that the works, supplies or services meet the requirements or criteria set out in the technical specifications, the award criteria or the contract performance conditions.'

9 Article 4 of that directive provides:

'This Directive shall apply to procurements with a value net of value-added tax (VAT) estimated to be equal to or greater than the following thresholds:

(a) EUR 5 350 000 for public works contracts;

…'

10 Article 42 of that directive provides:

'…

2. Technical specifications shall afford equal access of economic operators to the procurement procedure and shall not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.

3. Without prejudice to mandatory national technical rules, to the extent that they are compatible with Union law, the technical specifications shall be formulated in one of the following ways:

…

(b) by reference to technical specifications and, in order of preference, to national standards transposing European standards, European Technical Assessments, common technical specifications, international standards, other technical reference systems established by the European standardisation bodies or – when any of those do not exist – national standards, national technical approvals or national technical specifications relating to the design, calculation and execution of the works and use of the supplies; each reference shall be accompanied by the words "or equivalent";

…

5. Where a contracting authority uses the option of referring to the technical specifications referred to in point (b) of paragraph 3, it shall not reject a tender on the grounds that the works, supplies or services tendered for do not comply with the technical specifications to which it has referred, once the tenderer proves in its tender by any appropriate means, including the means of proof referred to in Article 44, that the solutions proposed satisfy in an equivalent manner the requirements defined by the technical specifications.

…'

11 Under Article 44 of that directive:

'1. Contracting authorities may require that economic operators provide a test report from a conformity assessment body or a certificate issued by such a body as means of proof of

conformity with requirements or criteria set out in the technical specifications, the award criteria or the contract performance conditions.

Where contracting authorities require the submission of certificates drawn up by a specific conformity assessment body, certificates from equivalent other conformity assessment bodies shall also be accepted by the contracting authorities.

…

2. Contracting authorities shall accept other appropriate means of proof than those referred to in paragraph 1, such as a technical dossier of the manufacturer where the economic operator concerned had no access to the certificates or test reports referred to in paragraph 1, or no possibility of obtaining them within the relevant time limits, provided that the lack of access is not attributable to the economic operator concerned and provided that the economic operator concerned thereby proves that the works, supplies or services provided by it meet the requirements or criteria set out in the technical specifications, the award criteria or the contract performance conditions.

3. Member States shall make available to other Member States, upon request, any information related to the evidence and documents submitted in accordance with … paragraphs 1 and 2 of this Article. …'

12 Annex VII to Directive 2014/24 provides:

'For the purposes of this Directive:

…

(2) "standard" means a technical specification, adopted by a recognised standardisation body, for repeated or continuous application, with which compliance is not compulsory, and which is one of the following:
   (a) "international standard" means a standard adopted by an international standardisation organisation and made available to the general public,
   (b) "European standard" means a standard adopted by a European standardisation organisation and made available to the general public,
   (c) "national standard" means a standard adopted by a national standardisation organisation and made available to the general public;

…'

Directive 2014/35/EU

13 Article 2 of Directive 2014/35/EU of the European Parliament and of the Council of 26 February 2014 on the harmonisation of the laws of the Member States relating to the making available on the market of electrical equipment designed for use within certain voltage limits (OJ 2014 L 96, p. 357), sets out:

'For the purposes of this Directive, the following definitions shall apply:

…

(9) “harmonised standard” means harmonised standard as defined in point (c) of point 1 of Article 2 of Regulation (EU) No 1025/2012;

…’

Bulgarian law

14 Under Article 48(2) of the Zakon za obshtestvenite porachki (law on public procurement, DV No 13 of 16 February 2016) in the version applicable to the dispute in the main proceedings (‘the Law on the award of public contracts’), any reference to a standard, a specification, a technical assessment or a technical approval is to be supplemented by the words ‘or equivalent’.

The dispute in the main proceedings and the question referred for a preliminary ruling

15 On 10 July 2020, the Municipality of Pleven entered into an administrative contract with the Ministerstvo na regionalnoto razvitie i blagoustroystvoto (Ministry of Regional Development and Public Works, Bulgaria) with a view to obtaining, in connection with the Operativna programa ‘Regioni v rastezh’ 2014-2020 (operational programme ‘Regions in Growth’ 2014-2020), a grant for the financing of a project contributing to a sustainable urban environment.

16 In that context, that municipality organised a tendering procedure entitled ‘Performance of construction works – renovation of linear objects in an urban environment in Pleven, divided into three separate lots’. The technical specifications of Lot No 1 referred to standards BDS 624:87 (concrete kerbs), BDS EN 1340:2005 (concrete kerbs for paving. Requirements and test methods) and EN 60332-1-2 (Tests on electric and optical fibre cables in the event of fire. Part 1-2. Test of vertical flame propagation on a conductor or an insulated cable. Procedure for 1 kW pre-mixed flame). Those technical specifications did not include the words ‘or equivalent’.

17 On 19 February 2021, a successful tenderer was appointed for each of the public procurement lots. On 23 March 2021, a contract was entered into with the successful tenderer of Lot No 1 amounting to 1 449 180.17 leva (BGN) (approximately EUR 740 000) exclusive of VAT.

18 By a decision of 20 March 2023, the Head of the Management Authority of the operational programme ‘Regions in Growth’ 2014-2020 imposed a financial correction to the expenditure eligible for a grant from the Bulgarian State, corresponding to 25% of the value of the contract. That financial correction was imposed, inter alia, on the ground that the public procurement procedure at issue had not been conducted in accordance with Article 48(2) of the Law on the award of public contracts, which transposes Article 42 of Directive 2014/24 and provides, in particular, that any technical specification of a public contract made by reference to a standard must be supplemented by the words ‘or equivalent’. By omitting those words, the Municipality of Pleven wrongly restricted the possibility for any interested economic operator to participate in that procedure, which has a financial impact, in that it would give rise to a risk of prejudice in respect of the EU budget.

19 The Municipality of Pleven brought an action before the Administrativen sad Pleven (Administrative Court, Pleven, Bulgaria), the referring court, seeking the annulment of that decision. It argues that the omission of the words ‘or equivalent’ does not have the effect of dissuading any potential participants to that procedure. Construction products should be in accordance with the essential requirements set out in Regulation No 305/2011. Standards

BDS EN 1340:2005 and EN 60332-1-2 are 'harmonised standards' within the meaning of that regulation. Accordingly, there are no equivalent standards to those and any other standard would be contrary to the applicable legislation.

20 In that respect, according to the explanations contained in a letter from the Balgarski institut po standartizatsia (Bulgarian Institute for Standardisation) submitted before the referring court, in 2005, Bulgarian standard BDS EN 1340:2005, in force at the time that letter was drafted, replaced Bulgarian standard BDS 624:1987. As regards standard BDS EN 60332-1-2:2006, it is the Bulgarian standard introducing the European standard which is identical to international standard IEC 60332-1-2:2004. The concept of equivalence has no meaning in the field of international, European or national standardisation, the principle of which consists precisely in establishing a single standard for each subject matter.

21 Taking account of the fact that the public contract at issue is financed by the EU budget, the referring court observes that, pursuant to point 2 of Annex VII to Directive 2014/24, a 'standard' is a technical specification with which compliance is not compulsory.

22 According to that court, the standards at issue before it are harmonised standards within the meaning of Regulation No 305/2011. In the light of paragraph 40 of the judgment of 27 October 2016, *James Elliott Construction* (C-613/14, EU:C:2016:821), and of paragraphs 65 and 66 of the judgment of 17 December 2020, *Germany* v *Commission* (C-475/19 P and C-688/19 P, EU:C:2020:1036), that court considers that such standards may be regarded as mandatory.

23 On that basis, that court is uncertain whether those standards fall within the scope of Article 42(3)(b) of Directive 2014/24 and whether a contracting authority is obliged or has the right to require an equivalent standard.

24 In those circumstances, the Administrativen sad Pleven (Administrative Court, Pleven) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is Article 42(3)(b) of [Directive 2014/24], together with point 2 of Annex VII thereto, to be interpreted as meaning that national legislation and case-law, according to which the contracting authority is always obliged to include with each reference made in the contract notice to a standard to be complied with the words "or equivalent", even in the case where compliance is required with a harmonised standard which was adopted on the basis of [Regulation No 305/2011], or on the basis of [repealed] Council Directive 89/106/EEC [of 21 December 1988 on the approximation of laws, regulations and administrative provisions of the Member States relating to construction products (OJ 1989 L 40, p. 12)], is admissible?'

Consideration of the question referred

25 By its question, the referring court asks, in essence, whether Article 42(3)(b) of Directive 2014/24 must be interpreted as not precluding national legislation which requires contracting authorities to add the words 'or equivalent' in all cases where technical specifications contained in procurement documents are formulated by reference to national standards transposing European standards, including harmonised standards covered by Regulation No 305/2011.

26 As a preliminary point, it should be noted that the request for a preliminary ruling does not make it possible to establish that the estimated value of the contract at issue is equal to or greater than the threshold of EUR 5 350 000 set by Article 4(a) of Directive 2014/24 as regards public works contracts and, accordingly, that that contract falls within the scope of that directive.

27 In any event, as is clear from the Court's settled case-law, where, in regulating situations outside the scope of the EU measure concerned, national legislation seeks to adopt, directly and unconditionally, the same solutions as those adopted in that measure, it is clearly in the interest of the European Union that provisions taken from that measure should be interpreted uniformly. That makes it possible to forestall future differences of interpretation and to ensure that those situations and situations falling within the scope of those provisions are treated in the same way (judgment of 7 December 2023, *Obshtina Razgrad*, C-441/22 and C-443/22, EU:C:2023:970, paragraph 39 and the case-law cited).

28 In that respect, the Court has already held that the Law on public procurement, which transposed Directive 2014/24 into Bulgarian law, applies more generally to all public procurement procedures subsidised by European funds, irrespective of the value of the contracts concerned (judgment of 7 December 2023, *Obshtina Razgrad*, C-441/22 and C-443/22, EU:C:2023:970, paragraph 40 and the case-law cited).

29 It follows from the request for a preliminary ruling that the public contract at issue in the main proceedings is financed by the EU budget and that the Law on public procurement transposes into Bulgarian law Article 42(3)(b) of Directive 2014/24, with the result that the rules set out in that provision are applicable to that public contract.

30 In those circumstances, the fact that the estimated value of the contract at issue in the main proceedings is not clear from that request does not preclude the Court from answering the question referred for a preliminary ruling.

31 In the light of those preliminary clarifications, it must be noted that Article 42(3)(b) of Directive 2014/24 provides that technical specifications are to be formulated by reference, inter alia, in order of preference, to national standards transposing European standards, to international standards or to national standards. That provision also provides that 'each reference' is to be accompanied by the words 'or equivalent'.

32 It follows from the wording of that provision that the words 'or equivalent' must always be added where technical specifications are formulated by reference to standards, including national standards transposing European standards. That provision does not provide for any exception as regards harmonised standards within the meaning of point 11 of Article 2 of Regulation No 305/2011.

33 That requirement is also consistent with point 2 of Annex VII to Directive 2014/24, which defines the word 'standard' as corresponding to a technical specification, adopted by a recognised standardisation body, whether it be international, European or national, for the purpose of a repeated or continuous application, with which compliance is not compulsory and which is made available to the general public.

34 Therefore, national legislation cannot be criticised for requiring contracting authorities to add the words 'or equivalent' in all cases where technical specifications are formulated by reference to standards.

35 That interpretation is confirmed by the finding that, in accordance with Article 42(5) of that directive, where the works, supplies or services tendered for do not comply with the technical specifications formulated, pursuant to Article 42(3)(b) of that directive, by reference to standards, the tenderer may prove in its tender that the solutions proposed satisfy in an equivalent manner the requirements defined by those technical specifications.

36 The assessment in paragraph 34 of the present judgment is also supported by the objective of Directive 2014/24 referred to in recital 74 thereof, namely to ensure that technical specifications drawn up by public purchasers allow public procurement to be open to competition and to reflect, inter alia, the diversity of technical solutions in the marketplace.

37 It follows from all the foregoing that, in the present case, it is irrelevant that standard EN 1340:2003, transposed by standard BDS EN 1340:2005 mentioned by the referring court, appears, without having been subsequently replaced or declared obsolete, on the list of harmonised standards contained in the last Commission communication published in the *Official Journal of the European Union* in the framework of the implementation of Regulation No 305/2011 (OJ 2018 C 92, p. 139). Likewise, it is irrelevant that, at the time of the facts which gave rise to the dispute in the main proceedings, standard EN 60332-1-2:2004 was included on the list of harmonised standards published in the *Official Journal of the European Union* by a Commission communication in the framework of the implementation of Directive 2014/35 (OJ 2018 C 326, p. 4).

38 In the light of the foregoing considerations, the answer to the question raised is that Article 42(3)(b) of Directive 2014/24 must be interpreted as not precluding national legislation which requires contracting authorities to add the words ‘or equivalent’ in all cases where technical specifications contained in procurement documents are formulated by reference to national standards transposing European standards, including harmonised standards covered by Regulation No 305/2011.

Costs

39 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Ninth Chamber) hereby rules:

Article 42(3)(b) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, as amended by Commission Delegated Regulation (EU) 2019/1828 of 30 October 2019,

must be interpreted as not precluding national legislation which requires contracting authorities to add the words ‘or equivalent’ in all cases where technical specifications contained in procurement documents are formulated by reference to national standards transposing European standards, including harmonised standards covered by Regulation (EU) No 305/2011 of the European Parliament and of the Council of 9 March 2011 laying down harmonised conditions for the marketing of construction products and repealing Council Directive 89/106/EEC.

[Signatures]