Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

16 April 2015*

(Reference for a preliminary ruling — Public procurement — Supply — Technical specifications — Principles of equal treatment and of non-discrimination — Obligation of transparency — Reference to a product of a particular brand — Assessment of the equivalence of the product offered by a tenderer — Reference product no longer in production)

In Case C-278/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Curtea de Apel Alba Iulia (Romania), made by decision of 21 March 2014, received at the Court on 6 June 2014, in the proceedings

SC Enterprise Focused Solutions SRL

v

Spitalul Județean de Urgență Alba Iulia,

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Chamber, C. Vajda, A. Rosas, E. Juhász and D. Šváby (Rapporteur), Judges,

Advocate General: M. Szpunar,

Registrar: A. Calot Escobar,

after considering the observations submitted on behalf of:

— the Austrian Government, by M. Fruhmann, acting as Agent,

— the European Commission, by L. Nicolae and A. Tokár, acting as Agents,

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

gives the following

* Language of the case: Romanian.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 23(8) of 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 (OJ 2004 L 134, p. 114, and corrigendum OJ 2004 L 351, p. 44), as amended by Commission Regulation (EU) No 1251/2011 of 30 November 2011 (OJ 2011 L 319, p. 43; 'Directive 2004/18').

2 The request has been made in proceedings between SC Enterprise Focused Solutions SRL ('EFS') and Spitalul Județean de Urgență Alba Iulia (Alba Iulia District Emergency Hospital) concerning the latter's decision rejecting the tender submitted by EFS in the context of a procedure for the award of a public contract.

Legal context

3 Recital 2 in the preamble to Directive 2004/18 is worded as follows:

'The award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law entities, is subject to the respect of the principles of the Treaty and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency. However, for public contracts above a certain value, it is advisable to draw up provisions of Community coordination of national procedures for the award of such contracts which are based on these principles so as to ensure the effects of them and to guarantee the opening-up of public procurement to competition. These coordinating provisions should therefore be interpreted in accordance with both the aforementioned rules and principles and other rules of the Treaty.'

4 Article 2 of Directive 2004/18, entitled 'Principles of awarding contracts', provides:

'Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.'

5 In accordance with the first indent of Article 7(b) of Directive 2004/18, the directive is, inter alia, applicable to public supply contracts which have a value, exclusive of value added tax ('VAT'), equal to or greater than EUR 200 000 in the case of contracts awarded by contracting authorities other than the central government authorities listed in Annex IV to that directive.

6 'Technical specifications' are defined as follows in point 1(b) of Annex VI to Directive 2004/18:

'"technical specification", in the case of public supply or service contracts, means a specification in a document defining the required characteristics of a product or a service, such as quality levels, environmental performance levels, design for all requirements (including accessibility for disabled persons) and conformity assessment, performance, use of the product, safety or dimensions, including requirements relevant to the product as regards the name under which the product is sold, terminology, symbols, testing and test methods, packaging, marking and labelling, user instructions, production processes and methods and conformity assessment procedures.'

7 According to Article 23 of that directive:

'…

2. Technical specifications shall afford equal access for tenderers and 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 Community law, the technical specifications shall be formulated:

(a) either by reference to technical specifications defined in Annex VI and, in order of preference, to national standards transposing European standards, European technical approvals, common technical specifications, international standards, other technical reference systems established by the European standardisation bodies or — when these do not exist — to national standards, national technical approvals or national technical specifications relating to the design, calculation and execution of the works and use of the products. Each reference shall be accompanied by the words "or equivalent";

(b) or in terms of performance or functional requirements; the latter may include environmental characteristics. However, such parameters must be sufficiently precise to allow tenderers to determine the subject-matter of the contract and to allow contracting authorities to award the contract;

(c) or in terms of performance or functional requirements as mentioned in subparagraph (b), with reference to the specifications mentioned in subparagraph (a) as a means of presuming conformity with such performance or functional requirements;

(d) or by referring to the specifications mentioned in subparagraph (a) for certain characteristics, and by referring to the performance or functional requirements mentioned in subparagraph (b) for other characteristics.

…

8. Unless justified by the subject-matter of the contract, technical specifications shall not refer to a specific make or source, or a particular process, or to trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products. Such reference shall be permitted on an exceptional basis, where a sufficiently precise and intelligible description of the subject-matter of the contract pursuant to paragraphs 3 and 4 is not possible; such reference shall be accompanied by the words "or equivalent".'

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

8 On 20 November 2013, Spitalul Județean de Urgență Alba Iulia launched an online call for tenders for the conclusion of a contract for the supply of computing systems and equipment. The estimated value of the contract was RON 259 750, excluding VAT. That figure corresponds to approximately EUR 58 600.

9 As regards the central unit of the computing system, the tender documentation stated that the processor was required to correspond 'at least' to an 'Intel Core i5 3.2 GHz or equivalent' processor.

10 The tender submitted by EFS included a Quad Core A8-5600k type processor of the AMD brand with six cores, a standard speed of 3.6 GHz and a 'turbo' frequency of 3.9 GHz.

11 That tender was rejected on the ground that it did not comply with the technical specifications of the contract. The contracting authority reached that conclusion after establishing, having consulted the Intel website, that first and second-generation Core i5 processors with a speed of 3.2 GHz (Core i5-650) were no longer in production or supported by that manufacturer, albeit still commercially

available, and that the same type of processor now being produced by that manufacturer and having a speed of at least 3.2 GHz was the third-generation processor. It was by reference to that third-generation processor, whose performance is superior to that of the processor offered by EFS, that EFS was declared not to have complied with the technical specifications of the contract.

12 EFS filed a complaint before the Consiliul Național de Soluționare a Contestațiilor (National Council for the Settlement of Complaints) against the decision rejecting its tender, claiming that the performance of the processor offered in that tender is superior to that of the processor specified in the technical specifications of the contract, the Intel Core i5-650 3.2 GHz. It is common ground that the processor offered by EFS is indeed superior to the Core i5-650 type processor of the Intel brand. Since the complaint was rejected by decision of 11 February 2014, the applicant in the main proceedings lodged an appeal against that decision with the Curtea de Apel Alba Iulia (Alba Iulia Court of Appeal).

13 In those circumstances, the Curtea de Apel Alba Iulia decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘May Article 23(8) of Directive 2004/18… be interpreted as meaning that, when a contracting authority defines the technical specifications of the product which is the subject of a procurement contract by reference to a particular brand, the characteristics of the “equivalent” product offered [by a tenderer and presented as such] must be established solely by reference to the [characteristics] of products [of the manufacturer whose product served as a reference for the technical specification concerned that are] still in production, or may they be established by reference to products [of that manufacturer] which are on the market but no longer in production?’

The question referred for a preliminary ruling

14 As a preliminary point, it should be noted that the referring court is proceeding on the basis that Directive 2004/18 is applicable in the context of the dispute in the main proceedings, without, however, providing information from which the applicability of that act of secondary legislation might be inferred.

15 It must be noted that the strict special procedures prescribed by the EU directives coordinating public procurement procedures apply only to contracts whose value exceeds a threshold expressly laid down in each of those directives. Accordingly, the rules in those directives do not apply to contracts with a value below the threshold set by those directives (judgment in *SECAP and Santorso*, C-147/06 and C-148/06, EU:C:2008:277, paragraph 19 and the case-law cited). Consequently, Article 23(8) of Directive 2004/18, which the Court has been asked to interpret, is not applicable in the context of the dispute in the main proceedings. The value, exclusive of VAT, of the public contract concerned is in the order of EUR 58 600, whereas the relevant threshold for the application of that directive set by Article 7(b) thereof is EUR 200 000.

16 It should be noted, however, that the award of contracts which, in view of their value, do not fall within the scope of that directive is none the less subject to the fundamental rules and the general principles of the FEU Treaty, in particular the principles of equal treatment and of non-discrimination on grounds of nationality and the consequent obligation of transparency, provided that those contracts have a certain cross-border interest in the light of certain objective criteria (see, to that effect, judgment in *Ordine degli Ingegneri della Provincia di Lecce and Others*, C-159/11, EU:C:2012:817, paragraph 23 and the case-law cited).

17 Although the referring court does not refer directly to the fundamental rules and general principles of EU law in the order for reference, it is settled case-law that in order to provide a useful answer to a national court which has referred a question to it, the Court may deem it necessary to consider rules of EU law to which the national court has not referred in its request for a preliminary ruling (see, to that effect, judgment in *Medipac — Kazantzidis*, C-6/05, EU:C:2007:337, paragraph 34).

18 It should be noted in that regard that the referring court has not established the findings necessary for the Court to ascertain whether, in the case in the main proceedings, there is certain cross-border interest. It must be borne in mind that, as is clear from Article 94 of the Rules of Procedure of the Court of Justice, the Court must be able to find in a request for a preliminary ruling a summary of the facts on which the questions are based and the connection, inter alia, between those facts and the questions. Therefore, the findings necessary to verify the existence of certain cross-border interest, and more generally all the findings to be made by the national courts and on which the applicability of an act of secondary and primary legislation of the European Union depends, must be made before the questions are referred to the Court (see judgment in *Azienda sanitaria locale n. 5 'Spezzino' and Others*, C-113/13, EU:C:2014:2440, paragraph 47).

19 However, because of the spirit of cooperation in relations between the national courts and the Court of Justice in the context of the preliminary ruling procedure, the lack of such preliminary findings by the referring court relating to the existence of certain cross-border interest does not necessarily lead to the request being inadmissible if the Court, having regard to the information available from the file, considers that it is in a position to give a useful answer to the referring court. That is the case, in particular, where the order for reference contains sufficient relevant information for the existence of such an interest to be determined. Nevertheless, the Court's answer is given subject to the proviso that, on the basis of a detailed assessment of all the relevant facts in the case in the main proceedings, certain cross-border interest in the case in the main proceedings is established by the referring court (see, to that effect, judgment in *Azienda sanitaria locale n. 5 'Spezzino' and Others*, C-113/13, EU:C:2014:2440, paragraph 48 and the case-law cited).

20 As regards the objective criteria that may indicate the existence of certain cross-border interest, the Court has already held that such criteria may be, in particular, that the contract in question is for a significant amount, in conjunction with the place where the work is to be carried out or the technical characteristics of the contract. The referring court may, in its overall assessment of the existence of certain cross-border interest also take account of the existence of complaints brought by operators situated in other Member States, provided that it is determined that those complaints are real and not fictitious (see judgment in *Azienda sanitaria locale n. 5 'Spezzino' and Others*, C-113/13, EU:C:2014:2440, paragraph 49 and the case-law cited).

21 In the present case, despite the low value of the contract and the lack of any explanation by the referring court, it must be held that the contract at issue in the main proceedings could have certain cross-border interest in the light of the facts of the case in the main proceedings, particularly the fact that that case concerns the supply of computing systems and equipment with the reference processor being that of an international brand.

22 It is therefore for the referring court to make a detailed assessment, taking into account all the relevant information characterising the context of the case brought before it, as to whether the contract at issue in the main proceedings does indeed have certain cross-border interest. The following considerations are subject to that reservation.

23 The question referred must accordingly be understood as relating — in the context of a contract that is not subject to Directive 2004/18 but which has certain cross-border interest — to the implications of the fundamental rules and general principles of the Treaty and, in particular, of the principles of equal treatment and of non-discrimination and of the consequent obligation of transparency.

24 It should also be pointed out that, in the case in the main proceedings, the fact that the product is no longer in production but continues to be available on the market applies not to the product put forward by a tenderer but to the product referred to in the technical specification at issue. Consequently, the relevant question is not whether, in addition to any detailed information in that respect in the tender documentation at issue in the main proceedings, the contracting authority can require that the product offered by a tenderer be one that is still in production, but whether a contracting authority which has defined a technical specification by reference to a product of a particular brand may, where that product is no longer in production, modify that specification by referring to a comparable product of the same brand which is now in production but which has different characteristics.

25 As regards the principles of equal treatment and of non-discrimination and the obligation of transparency, the Member States must be recognised as having a certain amount of discretion for the purpose of adopting measures intended to ensure compliance with those principles, which are binding on contracting authorities in any procedure for the award of a public contract (see judgment in *Serrantoni and Consorzio stabile edili*, C-376/08, EU:C:2009:808, paragraphs 31 and 32).

26 The obligation of transparency is in particular intended to preclude any risk of arbitrariness on the part of the contracting authority (see, with regard to Article 2 of Directive 2004/18, judgment in *SAG ELV Slovensko and Others*, C-599/10, EU:C:2012:191, paragraph 25 and the case-law cited).

27 That objective would not be achieved if the contracting authority were able to disregard the conditions it had itself imposed. Accordingly, it is prohibited from amending the award criteria during the award procedure. The principles of equal treatment and of non-discrimination and the obligation of transparency have the same effect in that respect with regard to the technical specifications.

28 Consequently, the principle of equal treatment and the obligation of transparency prohibit the contracting authority from rejecting a tender which satisfies the requirements of the invitation to tender on grounds which are not set out in the tender specifications (judgment in *Medipac — Kazantzidis*, C-6/05, EU:C:2007:337, paragraph 54).

29 The contracting authority cannot, therefore, after publication of a contract notice, amend the technical specification in respect of an element of the contract in breach of the principles of equal treatment and of non-discrimination and the obligation of transparency. It is irrelevant, in that regard, whether or not the element to which that specification refers is still in production or available on the market.

30 The answer to the question referred is, therefore, that Article 23(8) of Directive 2004/18 is not applicable to a public contract with a value below the threshold for application laid down by that directive. In the context of a public contract not subject to that directive but which has certain cross-border interest, which it is for the referring court to ascertain, the fundamental rules and general principles of the FEU Treaty, in particular the principles of equal treatment and of non-discrimination and the consequent obligation of transparency, must be interpreted as meaning that the contracting authority cannot reject a tender which satisfies the requirements of the contract notice on grounds which are not set out in that notice.

Costs

31 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national 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 (Fifth Chamber) hereby rules:

Article 23(8) of 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, as amended by Commission Regulation (EU) No 1251/2011 of 30 November 2011, is not applicable to a public contract with a value below the threshold for application laid down by that directive. In the context of a public contract not subject to that directive but which has certain cross-border interest, which it is for the referring court to ascertain, the fundamental rules and general principles of the FEU Treaty, in particular the principles of equal treatment and of non-discrimination and the consequent obligation of transparency, must be interpreted as meaning that the contracting authority cannot reject a tender which satisfies the requirements of the contract notice on grounds which are not set out in that notice.

[Signatures]