Reports of Cases

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 10 March 2016*

Case C-6/15

TNS Dimarso NV
v
Vlaams Gewest(Request for a preliminary ruling

from the Raad van State van België (Belgian Council of State))

(Reference for a preliminary ruling — Directive 2004/18/EC — Article 53 — Criteria for the award of contracts — Tenderers — Equal treatment — Most economically advantageous tender — Evaluation of tenders))

I – Introduction

1. By the present reference for a preliminary ruling, the Raad van State van België (Belgian Council of State) seeks, in essence, to ascertain whether Article 53(2) 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,** read in the light of the principles of equal treatment and transparency, requires that a contracting authority should always, or, if not, in certain circumstances, make known in advance, in the contract notice or the contract documents, the method of evaluation or weighting rules used to assess tenderers' bids.

2. That request was made in the context of a dispute between TNS Dimarso NV ('Dimarso') and Vlaams Gewest (Flemish Government Housing Agency, 'the Housing Agency') concerning the lawfulness of the method used to evaluate bids submitted by tenderers in a procedure for the award of a public service contract organised by the Housing Agency.

3. In summary, it is clear from the order for reference that, through a call for tenders published in the *Official Journal of the European Union* of 31 January 2012, the Housing Agency launched a procedure for the award of a service contract for the performance of a large-scale survey of housing and housing consumers in Flanders. The estimated value of that contract was EUR 1 400 000, including VAT.

4. The contract documents relating to that procedure referred to the following two award criteria:

'1 Quality of the tender (50/100)

* Original language: French.

** OJ 2004 L 134, p. 114. Directive as modified by Commission Regulation (EU) No 1251/2011 of 30 November 2011 amending Directives 2004/17/EC and 2009/81/EC of the European Parliament and of the Council in respect of their application thresholds for the procedures for the awards of contract (OJ 2011 L 319, p. 43, 'Directive 2004/18').

Quality of the preparation, organisation and execution of the work on the ground, and of the encryption and initial data processing. The services proposed must be described in as much detail as possible. It must be clear from the tender that the tenderer is capable of taking on the whole contract (minimum 7 000 samples / maximum 10 000 samples) within the prescribed 12-month delivery deadline.

2 Price (50/100)

Cost of delivering the contract in relation to the basic sample (7 000 samples) and cost per additional batch of 500 addresses supplied (amounts inclusive of VAT).'

5. Four tenderers submitted tenders, which, according to the evaluation committee's report on the qualitative selection, met the minimum requirements in regard to technical competence. The method used to evaluate the tenders was set out as follows in the evaluation committee's award report of 23 March 2012:

'The committee then evaluated the tenders.

The four tenders were evaluated and compared with each other on the basis of the criteria set out above. First, the tenders were examined and evaluated on the basis of the "quality" criterion. For this, each tender was unanimously assigned a given score (high — satisfactory — low). Then, the price criterion was applied.

On the basis of those scores, a final ranking was established.'

6. It is clear from the award report that, as regards the first criterion, namely the quality of the tenders, Dimarso and two other tenderers were rated 'high', while the fourth tenderer was assessed as 'low'. As regards the second criterion, namely price, while the fourth tenderer's offer was lowest, Dimarso's was highest.

7. On 11 April 2012, the contract was finally awarded to one of the tenderers which had been rated 'high' and whose price offer was lower than Dimarso's.

8. In support of its action for annulment of the contract award decision, Dimarso submits before the referring court that the evaluation committee appears to have evaluated the tenders on the basis of the 'high — satisfactory — low' scale, not referred to in the contract documents, in relation to the tender quality criterion, whereas, according to Dimarso, it is clear from the contract documents that a score of 0 to 50 points should have been allocated to each tender. As regards the price criterion, the evaluation committee also failed to carry out an adequate examination, comparison and final assessment of the tenders taking into account the award criteria as set out in the contract documents, including the "50/100" weighting given to each of the award criteria in the call for tenders.

9. The referring court notes first of all, in rejecting the first part of the action brought before it by Dimarso, that it is not unreasonable to interpret the '50/100' weighting, given to each of the award criteria in the contract documents, as meaning that it seeks only to indicate that each of the two criteria must be regarded as having the same value and that each of them will therefore determine half of the ranking of the tenders.

10. It notes next that both recital 46 and Article 53(2) of Directive 2004/18 refer only to the 'criteria' and the 'relative weighting' given to each of them, the method of evaluation and weighting rules not being expressly mentioned anywhere. The national court states that the method of evaluation is not neutral but may, on the contrary, play a decisive role in the outcome of the evaluation of the tenders on the basis of the award criteria. It cites the example of the price award criterion, in connection with

which the contracting authority may, inter alia, opt to apply the principle of proportionality, award the maximum score to the lowest-priced tender or a zero score to the highest-priced, applying a linear interpolation to the intermediate tenders, or look most favourably on the tender with the median price.

11. The national court points out, lastly, that neither the judgment in *Lianakis and Others* (C-532/06, EU:C:2008:40, paragraphs 38, 44 and 45), which was concerned with the interpretation of Article 36(2) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts,*** the content of which is, in essence, the same as that of Article 53(2) of Directive 2004/18, nor the judgment in *Evropaïki Dynamiki* v *EMSA* (C-252/10 P, EU:C:2011:512), provide an answer, or at least not a decisive answer, to the question arising in the case in the main proceedings, that is to say whether the method of evaluation, that is to say the specific method to be used by the contracting authority to score the tenders, must be made known to tenderers in advance, like the award criteria and sub-criteria and the 'weighting factors'.

12. In the light of those considerations, the Raad van State van België (Belgian Council of State) decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

'Must Article 53(2) of Directive 2004/18/EC …, both in isolation and in conjunction with the scope of the principles laid down by European law concerning equality and transparency in the field of public procurement, be interpreted as meaning that, if the contract is awarded to the tenderer who submits the most economically advantageous tender from the point of view of the contracting authority, the contracting authority is always required to establish in advance, and indicate in the contract notice or contract documents, the method of assessment or the weighting rules, irrespective of their scope, predictability or commonness, in the light of which the tenders will be assessed in accordance with the award criteria or sub-criteria,

or, if no such general obligation exists, that there are circumstances, such as, inter alia, the scope, unpredictability or uncommonness of these weighting rules, in which this obligation does apply?'

13. That question was the subject of written observations submitted by Dimarso, the Belgian and Italian Governments and the European Commission. Those parties also presented oral argument at the hearing on 13 January 2016, with the exception of the Italian Government, which was not represented.

II – Analysis

14. By the question referred to it in the present case, the Court is asked to define the scope of Article 53(2) of Directive 2004/18. More specifically, the Court is asked whether, in the light of the principles of equal treatment and transparency, that provision requires the contracting authority, when awarding a service contract to the most economically advantageous tender, to inform tenderers, in the contract notice or the contract documents, of the method of evaluation used to assess tenderers' bids.

15. As a preliminary point, it is important to say that it is common ground that the service contract at issue in the case in the main proceedings falls squarely within the scope of Directive 2004/18 and that, in particular, Article 53 of that directive is fully applicable to that contract.

*** OJ 1992 L 209, p. 1.

16. First, under Article 20 of Directive 2004/18, contracts which have as their object services listed in Annex II A to that directive, which include, in Category 10, contracts relating to 'Market research and public opinion polling services', are awarded in accordance with the provisions of Articles 23 to 55 of that directive. Secondly, the service contract in the case in the main proceedings significantly exceeded the threshold of EUR 200 000, referred to in Article 7(b) of Directive 2004/18, applicable at the time when the contract notice was published by the Housing Agency.

17. In accordance with Article 53 of Directive 2004/18, entitled 'Contract award criteria', public contracts are awarded either to the tender which proposes 'the lowest price', or to the 'tender most economically advantageous from the point of view of the contracting authority', that is to say, as the third sentence of recital 46 of that directive states, and as the Court has further noted, the tender which 'offers the best value for money' from the point of view of the contracting authority.[****]

18. Where the latter option is selected, as it was in the case of the service contract at issue in the case in the main proceedings, Article 53(1)(a) of Directive 2004/18 establishes a non-exhaustive list of criteria linked to the subject matter of the public contract in question which the contracting authority is entitled to take into account.[*****] Those criteria include quality and price, which, as the contract documents in the case in the main proceedings indicate, are the only two criteria that were taken into account by the Housing Agency when awarding the contract at issue in the main proceedings.

19. In the aforementioned situation of a contract awarded to the most economically advantageous tender, the first subparagraph of Article 53(2) of Directive 2004/18 provides that the contracting authority is to specify in the contract notice or the contract documents 'the relative weighting which it gives to each of the criteria chosen to determine [that] tender'. The second subparagraph of the same provision states that that weighting can be expressed by providing for a range with an appropriate maximum spread. According to the third subparagraph of that provision, where, in the opinion of the contracting authority, weighting is not possible for demonstrable reasons, the latter is to indicate in the contract notice or contract documents the criteria in descending order of importance.

20. It should be observed here and now that the obligation to indicate not only the award criteria but also, since the adoption of Directive 2004/18, the relative weighting given to each of those criteria, except where there are good reasons why weighting is not possible, at the time of publication of the contract notice or contract documents, as laid down in Article 53(2) of that directive, serves to fulfil the requirement of compliance with the principle of equal treatment and the associated obligation of transparency.[******]

21. As regards the need to disclose the weightings given to the award criteria, it is important to note that Article 53(2) of Directive 2004/18 marks a notable change from the former legal regime applicable to the award of public service contracts.

[****] See judgment in *Ambisig* (C-601/13, EU:C:2015:204, paragraph 29).

[*****] The non-restrictive nature of those criteria has regularly been recalled by the Court: see, recently, the judgments in *eVigilo* (C-538/13, EU:C:2015:166, paragraph 61) and *Ambisig* (C-601/13, EU:C:2015:204, paragraph 30).

[******] See, to that effect, the judgment in *Commission* v *Ireland* (C-226/09, EU:C:2010:697, paragraph 43). I would recall, to the extent necessary, that it is settled case-law that, under the principle of equal treatment between tenderers, the aim of which is to promote the development of healthy and effective competition between undertakings taking part in a public procurement procedure, all tenderers must be afforded equality of opportunity when formulating their tenders, which therefore implies that the tenders of all competitors must be subject to the same conditions [see, to that effect, in particular, the judgments in *Cartiera dell'Adda* (C-42/13, EU:C:2014:2345, paragraph 44) and *eVigilo* (C-538/13, EU:C:2015:166, paragraph 33)]. The Court has also stated that the obligation of transparency is essentially intended to preclude any risk of favouritism or arbitrariness on the part of the contracting authority with respect to certain tenderers or certain tenders [see, in that regard, the judgments in *Cartiera dell'Adda* (C-42/13, EU:C:2014:2345, paragraph 44) and *eVigilo* (C-538/13, EU:C:2015:166, paragraph 34)].

22. After all, under the legal regime in place before the entry into force of that act, Article 36(2) of Council Directive 92/50 required the contracting authorities only to indicate, in the contract documents or the contract notice, the award criteria which they intended to apply, 'where possible in descending order of importance'.

23. Now, however, the contracting authorities have an obligation to indicate the weightings of the award criteria in the contract notice or the contract documents. It is only in the event that this proves impossible, for demonstrable reasons, that those entities may opt to prioritise those criteria, which prioritisation must in any event be adequately disclosed in the contract notice or the contract documents.

24. As I shall say when I come back to this point later, that change has some bearing on the resolution of the case in the main proceedings.

25. At this stage, it should be observed that, in the case in the main proceedings, it is common ground that the contract documents referred to '50/100' in connection with each of the two criteria used by the contracting authority. The referring court held that that reference could reasonably be interpreted as meaning that each of the two criteria was to be regarded as having the same value and each therefore determined half of the ranking of the tenders.

26. It is important to note that that assessment is final. It is after all unambiguously clear from the request for a preliminary ruling, and was confirmed by Dimarso at the hearing before the Court, that the referring court rejected the first part of the action brought before it by Dimarso, to the effect, in essence, that the '50/100' reference should have been interpreted as meaning that the 'quality' criterion should have been evaluated by awarding each tender a score from 0 to 50 points. The referring court therefore accepted, in essence, that the weighted value of each of those two contract award criteria, as given in the contract documents, was identical, namely 50%, a fact which reasonably well-informed and normally diligent tenderers were able to interpret in the same way.*******

27. It is therefore common ground that the award criteria for the public contract in question and the relative weighting given to each of those criteria were communicated to the tenderers in the contract documents and, therefore, in advance of the award of the contract, in accordance, prima facie, with Article 53(2) of Directive 2004/18.

28. The referring court wishes to ascertain, however, whether the latter provision, read in the light of the principle of equal treatment and the obligation of transparency, requires the contracting authority, either systematically or, at the very least, in certain circumstances, to inform tenderers in advance of the method to be used to evaluate tenders against the award criteria, in particular, so far as concerns the case in the main proceedings, the method used to assess compliance with the 'quality' criterion published by the Housing Agency, that is to say a ranking scale of three ratings or scores ('low — medium — high').

29. That question must be understood in the context of Dimarso's argument that, in essence, the method of evaluation used ('low — medium — high') was so vague that it prompted the contracting authority to downgrade the assessment of the 'quality' criterion relative to that of the 'price' criterion, since the second criterion alone was actually capable of eliminating three of the four tenders submitted. In reality, therefore, Dimarso contends, the price criterion benefited from a higher relative weighting than the 50% previously announced in the contract documents. In other words, Dimarso submits that, if the method of evaluation had been made known to tenderers in advance, at the stage when the contract documents were published, it would inevitably have had an effect on the preparation of the tenders.

******* The standard of the reasonably well-informed and normally diligent tenderer stems from the Court's case-law: see, in that regard, the judgments in *SIAC Construction* (C-19/00, EU:C:2001:553, paragraph 42) and *eVigilo* (C-538/13, EU:C:2015:166, paragraph 54).

30. I am by no means insensitive to that argument. It is important, however, to think it through in stages.

31. First of all, as I have already pointed out, Article 53(2) of Directive 2004/18 requires the contracting authority to make known to tenderers, either in the contract notice or the contract documents, the award criteria it intends to use and the relative weightings attached to them.

32. However, there would be no point in scouring the wording of Article 53(2) of Directive 2004/18 for a general obligation requiring the contracting authority to set out in the contract notice or the contract documents the method to be used to evaluate tenders in the light of the award criteria and their relative weightings, that is to say all of the rules and processes in accordance with which a contracting authority or a pared-down version of one, such as an evaluation committee, will attribute a given score or rating to the various tenders depending on the extent to which those tenders meet one of the criteria (and/or, where appropriate, sub-criteria) for the award of a public contract.

33. Article 53(2) of Directive 2004/18 does not therefore require that the use of such a method, by an evaluation committee, for analysing tenders in the light of the criteria for the award of a public contract and their relative weightings should, in principle, be communicated to tenderers in advance in the contract notice or the contract documents.

34. The Court's case-law also confirms that principle.

35. First, it should be recalled that the Court has on several occasions recognised as lawful the conduct of a contracting authority which had weighted the subheadings of an award criterion *after* tenders were submitted but *before* they were opened, which necessarily implies that the contracting authority is not systematically required to make known in advance the weightings thus given to the award sub-criteria in the contract notice or the contract documents.********

36. That assessment may, *a fortiori*, be extended to the adoption of a method for evaluating tenders in the light of award criteria and their relative weightings.

37. Secondly, in the judgment in *Evropaïki Dynamiki* v *EMSA* (C-252/10 P, EU:C:2011:512, paragraph 35), the Court accepted — in the context of applying the rules for the award of public service contracts by the institutions of the European Union,********* very similar to the context of applying the provisions of Directive 2004/18, and in the course of considering which information need not be communicated in advance by the contracting authority to tenderers — that an evaluation committee must be able to have some leeway in carrying out its task and to structure its own work of examining and analysing the submitted tenders.**********

38. In all of those cases, the Court nonetheless stated that the leeway enjoyed by the contracting authority is subject to compliance with certain conditions.

39. Those conditions do not, however, appear to be entirely uniform.

******** See the judgments in *ATI EAC e Viaggi di Maio and Others* (C-331/04, EU:C:2005:718, paragraph 32); *Lianakis and Others* (C-532/06, EU:C:2008:40, paragraph 43); and *Evropaïki Dynamiki* v *EMSA* (C-252/10 P, EU:C:2011:512, paragraphs 32 and 33).

********* The case in question concerned the interpretation of Article 97 of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1) and Article 138 of Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Regulation No 1605/2002 (OJ 2002 L 357, p. 1).

********** See also, in the same legal context, the judgment in *bpost* v *Commission* (T-514/09, EU:T:2011:689, paragraph 86).

40. Thus, in cases where a contracting authority has determined weighting factors for award sub-criteria after tenders have been submitted, the Court has held, as the referring court rightly pointed out, that such ex post determination is lawful provided that it meets three conditions, namely:

— that it does not alter the criteria for the award of the contract set out in the contract documents or the contract notice,

— that it does not contain elements which, if they had been known at the time the tenders were prepared, could have affected that preparation, and

— that it was not adopted taking into account matters likely to give rise to discrimination against one of the tenderers.**********

41. If one of those conditions is not met, that case-law supports the inference that determining the weighting of sub-criteria after publication of the contract notice or the contract documents renders the procedure for awarding the contract unlawful. In other words, the contracting authority should have determined the weighting of the sub-criteria relating to the contract award criteria in advance and should have ensured that that weighting had been communicated to tenderers in the contract notice or the contract documents.

42. Furthermore, as regards an evaluation committee's leeway in structuring its own work of analysing and examining the submitted tenders, the Court stated, in paragraph 35 of the judgment in *Evropaïki Dynamiki* v *EMSA* (C-252/10 P, EU:C:2011:512), that such leeway must not prompt the contracting authority to 'amend[…] the contract award criteria set out in the contract documents or the contract notice'.

43. By confining itself to referring only to compliance with one (the first) of the three conditions listed in point 40 of this Opinion, the Court appears to wish to confer a broader discretion on the contracting authority in the ex post determination of a method for analysing or evaluating tenders only in cases where the contracting authority decides to determine weighting factors for the sub-criteria corresponding to award criteria that were made known to tenderers in advance.

44. Although the case in the main proceedings called for the strict application of the clarification made in paragraph 35 of the judgment in *Evropaïki Dynamiki* v *EMSA* (C-252/10 P, EU:C:2011:512), there is nothing in the information provided at this stage by the referring court that would support the view that the method of evaluation adopted by the evaluation committee to assess the 'quality' criterion could have altered that criterion or, *a fortiori*, the second award criterion, both of which had been made known to tenderers in advance in the contract notice.

45. I doubt, however, that, by the clarification it gave in paragraph 35 of the judgment in *Evropaïki Dynamiki* v *EMSA* (C-252/10 P, EU:C:2011:512), in the form, moreover, of an *obiter dictum*, the Court meant to confine that restriction to the leeway enjoyed by the contracting authority in determining a method for evaluating the tenders submitted. After all, other than in the event of any particularly serious errors, it is difficult to imagine how such a method of evaluation would be capable of altering the criteria for awarding a public contract themselves or how an unsuccessful tenderer would be able to furnish so much as *indicia*, let alone actual proof, of such an effect on the award criteria.

********** See the judgments in *ATI EAC e Viaggi di Maio and Others* (C-331/04, EU:C:2005:718, paragraph 32); *Lianakis and Others* (C-532/06, EU:C:2008:40, paragraph 43); and *Evropaïki Dynamiki* v *EMSA* (C-252/10 P, EU:C:2011:512, paragraph 33).

46. This is one of the reasons why I am more inclined to share the view of the interested parties which submitted, in particular at the hearing, that it is not inconceivable that a method of evaluation may have an effect not so much on the award criteria themselves as on the weighting of those criteria and, as such, may contain elements which would have been capable of influencing the preparation of tenders if that method had been made known to tenderers in advance, within the meaning of the second condition laid down by the Court's case-law as reproduced in point 40 of this Opinion. In that event, the ex post determination of such a method for evaluating tenders by a contracting authority would be unlawful and should, therefore, have been disclosed in advance in the contract notice or the contract documents.

47. I am therefore largely in agreement with the line of argument, put forward in particular by the Commission, that the lawfulness of a method for evaluating tenders which is determined by a contracting authority ex post depends on whether the three conditions established by the Court's case-law and reproduced in point 40 above are met. It would then fall to the referring court to verify whether those conditions have been met in the case in the main proceedings.

48. To my mind, however, the present case also offers the Court an opportunity to refine that case-law, particularly in relation to the scope of the first condition.

49. After all, as I emphasised earlier, since the entry into force of Article 53(2) of Directive 2004/18, both the award criteria and their relative weightings (or, where they cannot be weighted, their prioritisation) must be adequately disclosed in the contract notice or the contract documents.

50. The ex post alteration of either, no matter the means by which it is achieved, must therefore, in my view, be penalised in the same way.

51. Just as there is no reason to accept the proposition that a method for evaluating tenders is capable of altering *a posteriori* award criteria that were communicated to tenderers in advance, the proposition that such a method is capable of altering the weighting of those criteria is equally intolerable. If this is the consequence of the ex post determination of a method for evaluating tenders, that method should have been communicated to tenderers in advance and the tendering procedure at issue is unlawful.

52. Consequently, I suggest that the first condition listed in point 40 of this Opinion, derived from the Court's case-law relating to the legal regime governing the award of public contracts that was in place prior to the adoption of Directive 2004/18, be worded in such a way as also to include the weighting of the award criteria, so as to take into account the change in that regime following the entry into force of Article 53(2) of Directive 2004/18.

53. It will then be for the referring court to examine, in the case in the main proceedings, whether the method for evaluating tenders in the light of the 'quality' criterion, set out in the documents relating to the contested contract, altered ex post the weightings attached to the award criteria for that contract. If it did, that method should have been made known to potential tenderers in advance in the contract notice or the contract documents.

54. I suspect, however, that, in the light of the circumstances and information communicated by the referring court, this may have been the case.

55. Since three of the four tenders, including Dimarso's, were rated 'high' for compliance with the 'quality' criterion, but did not receive scores which would have made it possible to differentiate and rank the tenders according to their inherent qualities, the 'price' criterion was therefore decisive in the award of the contested contract, as all the interested parties agreed at the hearing. In so far as the method chosen by the evaluation committee effectively downgraded the assessment of the 'quality' criterion relative to that of the 'price' criterion, that latter criterion seems therefore to have benefited

from a higher relative weighting in the choice of tenderer than the 50% weighting announced in the contract documents might reasonably have suggested. It is therefore plausible that, if the tenderers had been informed in advance that that was the chosen method for evaluating tenders for compliance with the 'quality' criterion, they would have focused more effort on the price of their services.

56. To illustrate my point more specifically, let us imagine that, of the tenders submitted, one was far superior, in terms of quality, to the other three, including those that were rated 'high'. In other words, one of those tenders could have been ranked 'excellent' in the assessment of the 'quality' criterion. The price proposed by that tenderer would then have reflected the excellence of the quality of the services proposed by it and would therefore in all probability have been higher than the prices offered by the other tenderers. However, since 'excellent' did not feature on the range of scores (low — satisfactory — high) chosen by the evaluation committee, that tender of excellent quality could not but be rated 'high', at the very most, in relation to the 'quality' criterion. Since the price proposed by the tenderer of that bid was higher than those proposed by the others, possibly even by some tens or hundreds of euros, that bid had to be rejected.

57. In short, in that situation, which is not necessarily Dimarso's situation but might just as well have been, the contracting authority might have been deprived of the tender representing the best value for money, contrary to the spirit in which the selection of tenderers on the basis of the most economically advantageous tender takes place.**********

58. Thus, the method of evaluation which the contracting authority chose ex post is, in my view, capable of having altered the weightings attached to the award criteria by lending greater weight to one criterion than to another, whereas the information available to tenderers at the time when they submitted their tenders clearly indicated that those criteria were to be assessed on the basis of the same relative weightings, namely 50% each.

59. Consequently, I consider that, if a method of evaluation adopted after tenders have been submitted is capable of leading to such a result, that method should have been made known to tenderers at the time when the contracting authority published the contract notice or communicated the contract documents.

60. In any event, although the Court held that the first judicial condition referred to in point 40 of this Opinion should not be extended to the weighting of award criteria, the likelihood is, in my opinion, that, if the method for evaluating tenders in the light of the 'quality' criterion, as established by the contracting authority, had been known in advance by the potential tenderers, it would have been capable of affecting the preparation of their tenders within the meaning of the second condition listed in point 40 of this Opinion.

61. After all, as I have already said, if the tenderers had realised, before submitting their tenders, that the second award criterion, namely the 'price' criterion, might be decisive, as all the interested parties conceded at the hearing, in the choice of the economically most advantageous tender, they would certainly have prepared their tenders differently in order to respond more effectively to the guidance thus given by the contracting authority.

********** In the judgment in *Ambisig* (C-601/13, EU:C:2015:204, paragraph 29), the Court pointed out, in essence, that the award of a contract to the most economically advantageous tender, which enables contracting authorities to seek the best value for money, tends to reinforce the importance of quality in the award criteria for public contracts.

62. In general, it is true that such a limit on the leeway enjoyed by the contracting authority in determining a method of evaluation after tenders have been submitted seems to have the ultimate effect of compelling it to identify the method or methods for evaluating award criteria which it intends to choose at a very early stage in all cases, in order to guard against the possibility that those methods will be capable of having an impact on the preparation of the bids of potential tenderers. It will otherwise be bound to conclude that those methods need to be published either in the contract notice or in the contract documents.

63. In short, therefore, that requirement appears to mean that the contracting authority (to which it will fall to ensure that the tendering procedure benefits from maximum legal certainty and to protect itself against actions for the annulment of that procedure) must determine the method or methods to be used to evaluate tenders in the light of the award criteria as early as possible. It would be reasonable to suggest, then, that, if that is the case, there does not appear to be any overriding reason such as to justify a refusal by the contracting authority to make known to potential tenderers the methods of evaluation in question, which it will in any event already have had to determine before the call for tenders.

64. Such an approach appears, in practice, to be a reversal of the theoretical 'exception-to-the-rule' principle that stems from the application of the Court's case-law to the effect that the contracting authority is not, in principle, under any obligation to communicate the method to be used to evaluate tenders in advance to potential tenderers, unless, or provided that, that method contains no elements which, had the method been known in advance, could have affected the preparation of tenders.

65. It seems to me, however, that that risk can largely be mitigated if the contracting authorities opt to disclose not only the award criteria and their relative weightings, as required by Directive 2004/18, but also the sub-criteria relating to those criteria and the relative weightings of those sub-criteria, an approach which the Court's case-law is strongly inclined to favour.

66. In other words, the making available to tenderers in the contract notice or the contract documents of clear, comprehensible and detailed information on all the matters mentioned above diminishes the risk, in my view, that the method for analysing tenders chosen by the evaluation committee may be capable of altering the award criteria or sub-criteria and their weightings, or of causing tenderers to be treated unequally. To my mind, avoiding that risk is part and parcel of the 'active role' which Directive 2004/18, as interpreted by the Court, assigns to the contracting authorities in the application of the essential principles governing the award of public contracts, that is to say observance of the transparency of the procedure and equal treatment as between tenderers. **********

67. The further point must be made that, in such circumstances, the tenderers will all have had an opportunity to know in advance the relative weightings of all of the matters taken into consideration by the contracting authority. As a rule, this serves to ensure that the specific method of analysing tenders adopted by the contracting authority does not contain any elements which, had they been known at the time when the tenders were prepared, could have affected their preparation.

68. However, where, as in the case in the main proceedings, the award criteria are weighted equally in the contract documents, any sub-criteria listed in those documents are not weighted and the method of evaluation adopted, after tenders were submitted, for the purposes of assessing whether either of the two award criteria has been met is highly generic and does not allow a sufficiently precise distinction to be drawn between the quality of one tender submitted and another, there is a significantly greater risk that the method of evaluation would have been capable of affecting the preparation of the tenderers' bids if it had been made known to them in the contract notice or the contract documents.

********** See, in that regard, in another context, the judgment in *eVigilo* (C-538/13, EU:C:2015:166, paragraph 42).

69. It is true that the second condition referred to in point 40 of the present Opinion seems to be particularly flexible and easily met, since there would always appear to be scope for arguing that each element taken into account by the contracting authority would have been *capable* of having an effect or impact on the preparation of tenders if it had been communicated to tenderers in advance.

70. It was perhaps its awareness of that flexibility which prompted the Court, in the judgment in *Commission* v *Ireland* (C-226/09, EU:C:2010:697, paragraph 48), to make the existence of such an effect on the preparation of tenders subject to its being 'significant', a condition which enabled it to dismiss in part the action for annulment brought by the Commission.

71. Although paragraph 48 of the judgment in *Commission* v *Ireland* (C-226/09, EU:C:2010:697) claims to be of a piece with the Court's earlier case-law, inasmuch as it refers explicitly to paragraph 32 of the judgment in *ATI EAC e Viaggi di Maio and Others* (C-331/04, EU:C:2005:718), that judgment, like the other later judgments already cited, does not specify that the effect on the preparation of tenders should have been 'significant'. That said, the criterion introduced by the Court in paragraph 48 of the judgment in *Commission* v *Ireland* (C-226/09, EU:C:2010:697) may nonetheless stem, in my view, from the fact that the public service contract in question was not fully governed by the provisions of Directive 2004/18, in particular Article 53(2).

72. If that is indeed the sense to be ascribed to paragraph 48 of the judgment in *Commission* v *Ireland* (C-226/09, EU:C:2010:697), there is, as I see it, no particular reason, in the present case, to adopt the criterion of the 'significance' of the effect on the preparation of tenders contained in that paragraph of the aforementioned judgment, or, therefore, to alter the scope of the second condition laid down in the Court's case-law, referred to in point 40 of this Opinion.

73. In any event, it is my view that the flexibility of that second condition may be greatly mitigated by the obligation incumbent on the unsuccessful tenderer, which bears the burden of proof, to demonstrate, by reference to specific examples in its legal action, the differences (substantive as well as purely formal) which its tender would have exhibited if the elements of the method of evaluation in question or the method itself, which the contracting authority neglected to communicate, had been adequately disclosed before the tenders were prepared.

74. Before concluding, I would add that all of the foregoing considerations are based on the assumption, which follows implicitly from the order for reference, that the method of evaluating tenders in relation to the 'quality' criterion which was used by the evaluation committee in the case in the main proceedings was determined *after* the time limit for the submission of tenders expired but *before* those tenders were opened.

75. In the aforementioned case-law concerning the determination of the weighting of sub-criteria relating to the award criteria, the Court held, in essence, that determining the weighting of such sub-criteria *after the opening of tenders* or expressions of interest, as the case may be, was contrary in particular to the principle of equal treatment and the obligation of transparency.********** Furthermore, the Court censured the alteration which an evaluation committee had made to the weighted values of the award criteria after an initial review of the tenders in a case where Article 53(2) of Directive 2004/18 did not apply to the public service contract in question, and did so, moreover, without requiring that the discriminatory effect of that practice on one of the tenderers should be demonstrated, pointing out further in this regard that it is sufficient that it cannot be ruled out that, at the time the alteration was made, it might have had such an effect.**********

********** See, in particular, the judgment in *Lianakis and Others* (C-532/06, EU:C:2008:40, paragraph 44).
********** Judgment in *Commission* v *Ireland* (C-226/09, EU:C:2010:697, paragraphs 57 to 63).

76. After all, if the contracting authority took note of the identity of the tenderers and of the content of the tenders when altering the weightings of the award criteria and/or sub-criteria, it runs a genuine risk of giving the impression that that alteration seeks to favour one of the tenderers and therefore to breach the equal treatment afforded to them.

77. In such a situation, any alteration made in this way is quite simply unlawful, not least on the ground of being presumed to constitute favouritism. It seems clear that the weighting which was actually applied and which rendered the tendering procedure unlawful should have been made known to the tenderers in the contract documentation. Such a finding, however, is not essential to the resolution of the dispute.

78. In its observations, the Belgian Government mentioned that there are some situations, although it did not say which, where the method of evaluating tenders may be determined only after the tenders have been opened. Consequently, that government submits in essence that the Court's case-law censuring the ex post determination of the weighting of award criteria and determination of the weightings applied to the sub-criteria relating to those award criteria *after* the tenders have been opened should not be extended to the situation in which an evaluation committee adopts a method of evaluating tenders after these have been opened.

79. The question referred by the national court does not relate *stricto sensu* to that situation.

80. However, the information provided by the referring court does not entirely rule out the possibility that the method of evaluation at issue in the case in the main proceedings was established after the tenders were opened.

81. That possibility raises the further question, in my view, of whether the referring court still needs to verify that the three conditions laid down by case-law and listed in point 40 of the present Opinion are satisfied in order to be able to conclude that the contracting authority should have made that method of evaluation known to the tenderers or whether it could simply find that such a practice can to some extent be presumed to constitute favouritism towards one or more tenderers and, as such, render the tendering procedure unlawful.

82. Without taking a general view on the situations alluded to but not specified by the Belgian Government, I doubt that, in the case in the main proceedings, the method for evaluating the 'quality' criterion, given its very basic and highly generic — not to say imprecise — nature, could be determined only after the tenders submitted had been opened.

83. I can see no reason, not least of a technical or financial order, why a contracting authority should not be able either to make known to tenderers a method which simply states that the 'quality' of the tenders will be assessed on the basis of a ranking scale of 'low — satisfactory — high', or to establish that method, at the latest, before the tenders are opened, provided that it complies with the conditions which I have already examined, that is to say, in particular, without altering the contract award criteria or their weightings.

84. I therefore take the view that, if the method of evaluation at issue in the case in the main proceedings was adopted after the tenders were opened, which it would fall to the national court to verify, it would have to be presumed that that method was determined in the light of matters capable of having a discriminatory effect on one or more of the unsuccessful tenderers, which presumption, if appropriate, would have to be rebutted by the contracting authority.

III – Conclusion

85. In the light of all of the foregoing considerations, I propose that the Court's answer to the question referred by the Raad van State van België (Belgian Council of State) should be as follows:

Article 53(2) 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, read in the light of the principle of equal treatment and the obligation of transparency, must be interpreted as meaning that the contracting authority is not required to make known to potential tenderers, in the contract notice or the contract documents, the method to be used to evaluate tenders with a view to assessing whether the award criteria published in advance in the contract notice or the contract documents have been met, provided that such a method, adopted after the time limit for the submission of tenders has expired but before those tenders are opened, (a) does not alter the contract award criteria and the relative weightings of those criteria as set out in the contract notice or the contract documents, (b) contains no elements which, had they been known at the time when the tenders were prepared, could have affected their preparation, and (c) was not adopted in the light of matters capable of having a discriminatory effect on one of the tenderers. It is for the national court to verify whether those conditions are met in the case in the main proceedings.