Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

14 July 2016*

(Reference for a preliminary ruling — Directive 2004/18/EC — Public works contracts — Regularity of the obligation imposed on tenderers to perform a certain percentage of the contract without using subcontractors — Regulation (EC) No 1083/2006 — General provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund — Obligation for the Member States to carry out a financial correction in relation to the irregularities identified — Concept of 'irregularity' — Need for a financial correction in the event of infringement of EU law on public procurement)

In Case C-406/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Wojewódzki Sąd Administracyjny w Warszawie (Regional Administrative Court, Warsaw, Poland), made by decision of 3 June 2014, received at the Court on 27 August 2014, in the proceedings

**Wrocław — Miasto na prawach powiatu**

v

**Minister Infrastruktury i Rozwoju,**

THE COURT (Third Chamber),

composed of L. Bay Larsen, President of the Chamber, D. Šváby (Rapporteur), J. Malenovský, M. Safjan and M. Vilaras, Judges,

Advocate General: E. Sharpston,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— the Wrocław — Miasto na prawach powiatu, by W. Szuster, radca prawny,

— the Polish Government, by B. Majczyna, acting as Agent,

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

— the European Commission, by B.-R. Killmann and A. Tokár and by M. Owsiany-Hornung, acting as Agents,

* Language of the case: Polish.

after hearing the Opinion of the Advocate General at the sitting on 17 November 2015,

gives the following

## Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 25 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, corrigendum OJ 2004 L 351, p. 44), as amended by Commission Regulation (EC) No 2083/2005 of 19 December 2005 (OJ 2005 L 333, p. 28) ('Directive 2004/18'), and of Article 98 of Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999 (OJ 2006 L 210, p. 25).

2 The request has been made in proceedings between the Wrocław — Miasto na prawach powiatu (City of Wrocław, Poland) and the Minister Infrastruktury i Rozwoju (Minister for Infrastructure and Development) concerning a decision imposing on the former a financial correction as a result of the alleged infringement of Directive 2004/18 in the context of the award of a public works contract relating to works co-financed by European Union funds.

### Legal context

*EU law*

Directive 2004/18

3 In accordance with Article 7(c) of Directive 2004/18, it was applicable, at the time of the facts at issue in the main proceedings, to public works contracts which are not excluded and which have a value exclusive of value-added tax (VAT) estimated to be equal to or greater than EUR 5 278 000.

4 The possibility for a tenderer to subcontract a share of the contract to third parties is envisaged, in particular, in Article 25 of that directive in the following terms:

'In the contract documents, the contracting authority may ask or may be required by a Member State to ask the tenderer to indicate in his tender any share of the contract he may intend to subcontract to third parties and any proposed subcontractors.

This indication shall be without prejudice to the question of the principal economic operator's liability.'

5 Article 26 of Directive 2004/18, entitled 'Conditions for performance of contracts' provides:

'Contracting authorities may lay down special conditions relating to the performance of a contract, provided that these are compatible with Community law and are indicated in the contract notice or in the specifications. The conditions governing the performance of a contract may, in particular, concern social and environmental considerations.'

6 That provision is explained by recital 33 to that directive, which states that the contract performance conditions are compatible with that directive 'provided that they are not directly or indirectly discriminatory and are indicated in the contract notice or in the contract documents. They may, in particular, be intended to favour on-site vocational training, the employment of people experiencing

particular difficulty in achieving integration, the fight against unemployment or the protection of the environment. For instance, mention may be made, amongst other things, of the conditions — applicable during performance of the contract — to recruit long-term job-seekers or to implement training measures for the unemployed or young persons, to comply in substance with the provisions of the basic International Labour Organisation (ILO) Conventions, assuming that such provisions have not been implemented in national law, and to recruit more handicapped persons than are required under national legislation'.

7 Directive 2004/18 also sets out qualitative selection criteria which make it possible to determine the candidates admitted to participate in the procedure for the award of a public contract. Article 48 of that directive, relating to technical and professional abilities, is worded as follows:

'…

(2) Evidence of the economic operators' technical abilities may be furnished by one or more of the following means according to the nature, quantity or importance, and use of the works, supplies or services:

…

(b) an indication of the technicians or technical bodies involved, whether or not belonging directly to the economic operator's undertaking, especially those responsible for quality control and, in the case of public works contracts, those upon whom the contractor can call in order to carry out the work;

…

(i) an indication of the proportion of the contract which the services provider intends possibly to subcontract;

…

(3) An economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. It must in that case prove to the contracting authority that it will have at its disposal the resources necessary for the execution of the contract, for example, by producing an undertaking by those entities to place the necessary resources at the disposal of the economic operator.

…

(5) In procedures for awarding public contracts having as their object supplies requiring siting or installation work, the provision of services and/or the execution of works, the ability of economic operators to provide the service or to execute the installation or the work may be evaluated in particular with regard to their skills, efficiency, experience and reliability.

(6) The contracting authority shall specify, in the notice or in the invitation to tender, which references under paragraph 2 it wishes to receive.'

Regulation No 1083/2006

8 Recital 66 to Regulation No 1083/2006 states:

'The obligations on the Member States as regards management and control systems, the certification of expenditure, and the prevention, detection and correction of irregularities and infringements of Community law should be specified to guarantee the efficient and correct implementation of operational programmes. …'

9 Article 1 of that regulation provides:

'This Regulation lays down the general rules governing the European Regional Development Fund (ERDF), the European Social Fund (ESF) (hereinafter referred to as the Structural Funds) and the Cohesion Fund …

…

To this end, this Regulation lays down the principles and rules on partnership, programming, evaluation, management, including financial management, monitoring and control on the basis of responsibilities shared between the Member States and the Commission.'

10 Article 2(7) of that regulation defines 'irregularity' as 'any infringement of a provision of Community law resulting from an act or omission by an economic operator which has, or would have, the effect of prejudicing the general budget of the European Union by charging an unjustified item of expenditure to the general budget'.

11 In accordance with Article 9(5) of Regulation No 1083/2006, operations financed by the Structural Funds or the Cohesion Fund must be compatible in particular with the provisions of secondary legislation.

12 Article 98 of that regulation, entitled 'Financial corrections by Member States' provides:

'(1) The Member States shall in the first instance bear the responsibility for investigating irregularities, acting upon evidence of any major change affecting the nature or the conditions for the implementation or control of operations or operational programmes and making the financial corrections required.

(2) The Member State shall make the financial corrections required in connection with the individual or systemic irregularities detected in operations or operational programmes. The corrections made by a Member State shall consist of cancelling all or part of the public contribution to the operational programme. The Member State shall take into account the nature and gravity of the irregularities and the financial loss to the Fund.

…'

*Polish law*

13 It follows from the order for reference that Article 36(5) of the ustawa z dnia 29 stycznia 2004 r.– Prawo zamówień publicznych (Law on public contracts), of 29 January 2004 ('the p.z.p.'), in the version applicable at the time of the facts in the main proceedings, was drafted as follows:

'The contracting authority may specify in the tender specifications which share of the contract cannot be subcontracted.'

14 That provision was subsequently amended so that an economic operator may subcontract performance of a public contract which was awarded to him, other than where, on account of the specific nature of the object of the contract, the contracting authority stipulates in the tender specifications that that contract, in whole or in part, cannot be subcontracted.

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

15 On 18 May 2007, the competent department of the City of Wrocław initiated a restricted procedure for the award of a public contract relating to the partial construction of a bypass. That project, the cost of which was approximately EUR 65 million, benefited from Union financial support in accordance with the operational programme of Community support for the Republic of Poland relating to infrastructure and the environment, in the context of the 'Convergence' objective, co-financed by the Cohesion Fund and the ERDF.

16 Out of the seven operators who applied to participate in that procedure, five were invited to submit a tender. The tender specifications sent to those five operators contained a stipulation worded as follows:

'The economic operator is obliged to perform at least 25% of the works covered by the contract using its own resources.'

17 On 1 August 2008, the City of Wrocław concluded a public contract with the operator it had selected.

18 Following an administrative procedure subsequent to the performance of that contract, brought by the national authorities responsible for monitoring the lawfulness of certain actions co-financed by the Union, the City of Wrocław was subject to a claim for a financial correction of 8600473.38 Polish zlotys (PLN) (approximately, EUR 1 960 000) in principal, corresponding to 5% of the amount of costs borne by public funds, as a result of the alleged irregularity of that stipulation in the light of Directive 2004/18, applicable to the contract at issue given the value thereof.

19 According to the order for reference, at the final stage of that administrative procedure, the competent authority justified that financial correction, first, by the fact that the contested stipulation limited the use of subcontractors without respecting Article 36(5) of the p.z.p. The objective of that provision is to ensure that the parts of a contract requiring specific knowledge and skills, and the quality of performance of which depends therefore on the specific skills of the performer, are effectively carried out by the economic operator whose skills were evaluated in the context of the procurement procedure. That objective is particularly important since the provisions of national law applicable on the date of the facts in the main proceedings do not allow economic operators to rely on the capacities of third parties in order to show that they satisfy the capacity criteria so as to participate in the procedure for the award of a public contract.

20 According to that authority, the contracting authority pursuant to Article 36(5) of the p.z.p. was therefore required to state specifically which parts of the contract at issue must be performed personally by the contractor. A stipulation such as that at issue in the main proceedings, which merely implicitly laid down a percentage of the works corresponding to a part thereof which must be performed by the contractor, does not allow it to be determined, in infringement of the objective of Article 36(5) of the p.z.p., whether the restriction on the use of subcontractors concerns works which require specific skills. That infringement of national law amounts also to an infringement of Article 25 of Directive 2004/18, that authority referring, in that regard, to the judgment of 18 March 2004 in *Siemens and ARGE Telekom* (C-314/01, EU:C:2004:159).

21 Secondly, despite the fact that the alleged infringement of EU law has no effect on the award of the contract at issue in the main proceedings, the limitation on the use of subcontractors has a detrimental effect on the general budget of the Union. That limitation created a potential disturbance

of the competitive balance capable of resulting in an increase of the prices offered in the tenders, such a risk sufficing to constitute an irregularity within the meaning of Article 2(7) of Regulation No 1083/2006.

22 It is apparent from the elements of the file before the Court that the rate of the financial correction applied in this case was calculated by means of a scale used by the competent authority.

23 The City of Wrocław brought an action against the decision imposing the financial correction before the referring court, contesting the merits of the two grounds on which that decision is based. As regards the lawfulness of the contested stipulation of the tender specifications, it claims that Article 36(5) of the p.z.p., in the version in force at the time of the facts in the main proceedings, contained the principle that the contractor must perform the contract itself, the use of subcontractors constituting an exception, and it is on that basis that the contracting authority could authorise it to do so, but it is not required to do so. The referring court appears to agree with that interpretation of the provision at issue.

24 The latter considers that it is necessary for the determination of the dispute before it to receive from the Court the interpretation, first, of Article 25 of Directive 2004/18, in particular the terms 'share of the contract', in order to determine whether that provision precludes a contracting authority from fixing a maximum percentage of the share of the contract that the future contractor will be able to subcontract. That court also questions whether such a limitation could be affected by Article 26 of that directive, as a condition for performance within the meaning of that provision.

25 That court considers that it follows from the judgment of 18 March 2004 in *Siemens and ARGE Telekom* (C-314/01, EU:C:2004:159), that Directive 2004/18 allows the use of subcontractors for the performance of public contracts to be limited on condition that that did not prevent economic operators who wish to rely on the technical and economic capacities of subcontractors from participating in a tender procedure. However, that judgment does not address the question whether a contracting authority is authorised to express as a percentage the volume of works which the contractor must perform personally.

26 Moreover, the referring court questions whether a stipulation such as that at issue in the main proceedings, by restricting the possibility for small- and medium-sized enterprises (SMEs) to participate in the performance of works in the context of a public contract, is not capable of infringing the principle of the opening of public contracts to undistorted competition, since that opening concerns all enterprises, whatever their size, it seeming that particular attention should be paid in that regard to SMEs. That court refers, in that regard, to the Court's case-law, in particular to the judgment of 10 October 2013 in *Swm Costruzioni 2 and Mannocchi Luigino* (C-94/12, EU:C:2013:646, paragraph 33).

27 Secondly, that court considers that it is also necessary to receive clarification regarding the concept of 'irregularity' within the meaning of Regulation No 1083/2006, so that it can determine whether, in the light of the circumstances of the case before it, the importance of the potential infringement of EU law which affected the procurement procedure at issue requires a financial correction.

28 In that regard, it questions whether all infringements of EU law in the field of public contracts constitute such an irregularity which must result in a financial correction or whether it is necessary to take into account the specific circumstances of each case, in particular the effects of a possible infringement of that law. As regards those specific circumstances, it notes, in this case, that the applicable law was interpreted as not excluding a stipulation such as that at issue in the main proceedings, that that stipulation nevertheless authorised the use of subcontractors for 75% of the works subject to the contract, that it was uncontested and that the call for tenders led to a high level of competition.

29 In that context, the Wojewódzki Sąd Administracyjny w Warszawie (Regional Administrative Court, Warsaw, Poland) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) In the light of Article 25 of Directive 2004/18 ... is the contracting authority allowed to stipulate in the tender specifications that the economic operator is required to perform at least 25% of the works covered by the contract using its own resources?

(2) If the answer to the first question is in the negative, does the application of the requirement described in that question in a procedure for the award of a public contract result in an infringement of provisions of EU law which justifies the need to make a financial correction pursuant to Article 98 of Regulation No 1083/2006?'

## Consideration of the questions referred

### *The first question*

30 By its first question, the referring court asks, in essence, whether Directive 2004/18 must be interpreted as meaning that a contracting authority is authorised to require, by means of a stipulation in the contract documents for a public works contract, that the future successful tenderer for that contract perform using its own resources a certain percentage of the works under that contract.

31 Pursuant to the first paragraph of Article 25 of Directive 2004/18, the contracting authority may ask or may be required by a Member State to ask the tenderer to indicate in his tender any share of the contract he may intend to subcontract to third parties and any proposed subcontractors.

32 As the Court stated in paragraph 31 of the judgment of 10 October 2013 in *Swm Costruzioni 2 and Mannocchi Luigino* (C-94/12, EU:C:2013:646), by that article, Directive 2004/18 provides for the use of subcontractors without imposing any limit in that regard.

33 On the contrary, to the extent that Article 48(3) of that directive provides for the possibility, for tenderers, to prove that they meet the minimum levels of technical and professional capacities fixed by the contracting authority by relying on the capacities of third party entities, in so far as they establish that they indeed have the necessary means for the performance of the contract which they do not themselves own if that contract is awarded to them, establishes the possibility, for tenderers, to use subcontractors for the performance of a contract, and that in a way which is, in principle, unlimited.

34 Nevertheless, where the procurement documents require tenderers to indicate, in their tenders, the share of the contract they may intend to subcontract and the proposed subcontractors, in accordance with the first paragraph of Article 25 of Directive 2004/18, the contracting authority is entitled to prohibit use of subcontractors whose capacities could not be verified at the level of examination of tenders and selection of the contractor, for the performance of essential parts of the contract (see, to that effect, judgment of 18 March 2004 in *Siemens and ARGE Telekom*, C-314/01, EU:C:2004:159, paragraph 45).

35 Such is not however the effect of a stipulation such as that at issue in the main proceeding, which imposes limitations on the use of subcontractors for a share of the contract fixed in abstract terms as a certain percentage of that contract, and that irrespective of the possibility of verifying the capacities of potential subcontractors and without any mention of the essential character of the tasks which would be concerned. In all those respects, such a stipulation is incompatible with Directive 2004/18, which is relevant in the context of the main proceedings.

36 Moreover, as the Advocate General stated in point 41 of her Opinion, such a stipulation, assuming it constitutes a condition for the performance of the contract for the purposes of Article 26 of Directive 2004/18, cannot be accepted under that article, by reason of the very terms thereof, since it is contrary to Article 48(3) of that directive, and thus is contrary to EU law.

37 Therefore, the answer to the first question is that Directive 2004/18 must be interpreted as meaning that a contracting authority is not authorised to require, by a stipulation in the tender specifications of a public works contract, that the future contractor of that contract perform with its own resources a certain percentage of the works covered by that contract.

*The second question*

38 By its second question, the referring court asks, in essence, whether Article 98 of Regulation No 1083/2006, read in conjunction with Article 2(7) of that regulation, must be interpreted as meaning that the fact that a contracting authority imposed a requirement, in the context of a public works contract relating to a project receiving EU financial aid, that the future contractor perform by means of its own resources at least 25% of those works, in infringement of Directive 2004/18, constitutes in circumstances such as those at issue in the main proceedings, an 'irregularity' within the meaning of Article 2(7) of that regulation, justifying the need to apply a financial correction under Article 98 thereof.

39 Concerning the specific circumstances of this case, the referring court notes that the applicable national law was interpreted as not precluding a stipulation such as that at issue in the main proceedings, that that stipulation nevertheless authorised the use of subcontracting for 75% of the works covered by the contract, that it did not elicit any challenge on the part of candidates who were invited to submit a tender, and who were the only parties to have knowledge of that fact, and that the call for tenders led to a high level of competition.

40 The question referred has therefore two aspects, the first relating to the concept of 'irregularity' within the meaning of Article 2(7) of Regulation No 1083/2006 and, the second, to the financial correction mechanism to be implemented by the national authorities in the event of irregularity, in accordance with Article 98 of that regulation.

41 In the first place, that concept of 'irregularity' covers, in accordance with Article 2(7) of Regulation No 1083/2006, any infringement of a provision of EU law resulting from an act or omission of an economic operator which has, or would have, the effect of prejudicing the general budget of the Union by charging an unjustified item of expenditure to the budget.

42 It should be noted that it is the last part of that definition which gives rise to doubts on the part of the referring court, given that, in this case, the stipulation which must be considered to be contrary to EU law in the light of the answer to the first question appears to that court not to have had a material consequence.

43 In that regard, it should be noted that, admittedly, as the Advocate General stated in points 53 to 55 of her Opinion, referring in particular to Article 9(5) of Regulation No 1083/2006 and, by analogy, to the judgment of 21 December 2011 in *Chambre de commerce et d'industrie de l'Indre* (C-465/10, EU:C:2011:867, paragraphs 46 and 47), it is the role of the Union to finance, by the Structural Funds or the Cohesion Fund, only actions conducted in complete conformity with EU law.

44 However, it follows from the definition in Article 2(7) of that regulation that an infringement of EU law constitutes an irregularity within the meaning of that provision only if it has, or would have, the effect of prejudicing the general budget of the Union by charging an unjustified item of expenditure to that budget. Therefore, such an infringement must be considered to be an irregularity in so far as

it is capable, as such, to have a budgetary impact. By contrast, there is no requirement that the existence of a specific financial impact be shown (see, by analogy, judgment of 21 December 2011 in *Chambre de commerce et d'industrie de l'Indre*, C-465/10, EU:C:2011:867, paragraph 47).

45 Consequently, it should be considered that a failure to comply with the public procurement rules constitutes an irregularity within the meaning of Article 2(7) of Regulation No 1083/2006 in so far as the possibility cannot be excluded that that failure will have an impact on the budget of the Funds.

46 In the second place, as regards the financial correction mechanism provided for in Article 98 of Regulation No 1083/2006, it should be noted that Article 98(1) and (2) of that regulation requires Member States to make a financial correction where an irregularity has been established.

47 However, the first paragraph of Article 98(2) thereof also requires the competent national authority to calculate the amount of the correction to apply by taking into account three criteria, namely the nature and gravity of the irregularities and the resulting financial loss to the Funds.

48 Where, as in the case at issue in the main proceedings, a specific, and not a systematic, irregularity is at issue, that requirement necessarily involves a case-by-case examination, taking all of the circumstances of each relevant case into account in the light of one of those three criteria.

49 Therefore, although, as the Advocate General pointed out in point 60 of her Opinion, that does not preclude a first approach from being carried out on the basis of a scale which respects the principle of proportionality, the fact remains that the calculation of the final amount of the correction to be applied must take account of all of the characteristics of the irregularity found in relation to the elements taken into consideration for the establishment of that scale, which can justify the application of an increased or, on the contrary, a reduced correction.

50 Therefore, circumstances such as the compliance of a stipulation such as that at issue in the main proceedings with national law, the obligation to perform using its own resources a limited share of the contract and the fact that only a risk, which is possibly weak, of a financial impact has been established are capable of influencing the final amount of the financial correction to be applied.

51 The answer to the second question must therefore be that Article 98 of Regulation No 1083/2006, read in conjunction with Article 2(7) of that regulation, must be interpreted as meaning that the fact that a contracting authority imposed a requirement, in the context of a public works contract relating to a project receiving EU financial aid, that the future contractor perform by means of its own resources at least 25% of those works, in infringement of Directive 2004/18, constitutes an 'irregularity' within the meaning of Article 2(7) of that regulation, justifying the need to apply a financial correction under Article 98 thereof, in so far as it cannot be excluded that that infringement had an impact on the budget of the Fund at issue. The amount of that correction must be calculated by taking into account all of the specific circumstances which are relevant in the light of the criteria referred to in the first paragraph of Article 98(2) of that regulation, namely the nature and gravity of the irregularity and the resulting financial loss to the Fund concerned.

## Costs

52 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 (Third Chamber) hereby rules:

1. **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 (EC) No 2083/2005 of 19 December 2005, must be interpreted as meaning that a contracting authority is not authorised to require, by a stipulation in the tender specifications of a public works contract, that the future contractor of that contract perform with its own resources a certain percentage of the works covered by that contract.**

2. **Article 98 of Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999, read in conjunction with Article 2(7) of that regulation, must be interpreted as meaning that the fact that a contracting authority imposed a requirement, in the context of a public works contract relating to a project receiving EU financial aid, that the future contractor perform by means of its own resources at least 25% of those works, in infringement of Directive 2004/18, constitutes an 'irregularity' within the meaning of Article 2(7) of that regulation, justifying the need to apply a financial correction under Article 98 thereof, in so far as it cannot be excluded that that infringement had an impact on the budget of the Fund at issue. The amount of that correction must be calculated by taking into account all of the specific circumstances which are relevant in the light of the criteria referred to in the first paragraph of Article 98(2) of that regulation, namely the nature and gravity of the irregularity and the resulting financial loss to the Fund concerned.**

[Signatures]