Reports of Cases

ORDER OF THE COURT (Ninth Chamber)

25 May 2020*

(Reference for a preliminary ruling – Article 53(2) of the Rules of Procedure of the Court of Justice – Directive 2014/24/EU – Public procurement – Directive 2014/23/EU – Services concessions – Absence of factual or legal material necessary to give a useful answer to the questions referred – Inadmissibility)

In Case C-643/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal Central Administrativo Norte (Northern Central Administrative Court, Portugal), made by decision of 26 July 2019, received at the Court on 30 August 2019, in the proceedings

Resopre – Sociedade Revendedora de Aparelhos de Precisão SA

v

Município de Peso da Régua,

also present:

Datarede – Sistemas de Dados e Comunicações SA,

Alexandre Barbosa Borges SA,

Fernando L. Gaspar – Sinalização e Equipamentos Rodoviários SA,

THE COURT (Ninth Chamber),

composed of S. Rodin, President of the Chamber, D. Šváby (Rapporteur) and K. Jürimäe, Judges,

Advocate General: M. Szpunar,

Registrar: A. Calot Escobar,

having decided, after hearing the Advocate General, to give a decision by reasoned order, pursuant to Article 53(2) of the Rules of Procedure of the Court of Justice,

makes the following

* Language of the case: Portuguese.

Order

1 This request for a preliminary ruling concerns the interpretation of Article 56(1) and Article 60(4) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65), as amended by Commission Delegated Regulation (EU) 2017/2365 of 18 December 2017 (OJ 2017 L 337, p. 19; 'Directive 2014/24'), and of the principle of competition.

2 This request has been made in proceedings between Resopre – Sociedade Revendedora de Aparelhos de Precisão SA ('Resopre') and the Município de Peso da Régua (Municipality of Peso da Régua, Portugal) concerning the award of a contract concluded by that municipality for the exploitation of plots of land by the installation and operation of parking meters.

Legal context

Directive 2014/23

3 According to Article 1(1) of Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ 2014 L 94, p. 1), as amended by Commission Delegated Regulation (EU) 2017/2366 of 18 December 2017 (OJ 2017 L 337, p. 21; 'Directive 2014/23'):

'This Directive establishes rules on the procedures for procurement by contracting authorities and contracting entities by means of a concession, whose value is estimated to be not less than the threshold laid down in Article 8.'

4 Article 5 of Directive 2014/23, headed 'Definitions', provides:

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

(1) "concessions" means works or services concessions, as defined in points (a) and (b):

…

(b) "services concession" means a contract for pecuniary interest concluded in writing by means of which one or more contracting authorities or contracting entities entrust the provision and the management of services other than the execution of works referred to in point (a) to one or more economic operators, the consideration of which consists either solely in the right to exploit the services that are the subject of the contract or in that right together with payment.'

5 Article 8 of that directive, which sets out the threshold and methods for calculating the estimated value of concessions, provides, in paragraphs 1 and 2:

'1. This Directive shall apply to concessions the value of which is equal to or greater than EUR 5 548 000.

2. The value of a concession shall be the total turnover of the concessionaire generated over the duration of the contract, net of VAT, as estimated by the contracting authority or the contracting

entity, in consideration for the works and services being the object of the concession, as well as for the supplies incidental to such works and services.'

Directive 2014/24

6 Article 1(1) of Directive 2014/24 reads as follows:

'This Directive establishes rules on the procedures for procurement by contracting authorities with respect to public contracts as well as design contests, whose value is estimated to be not less than the thresholds laid down in Article 4.'

7 Article 2 of that directive, entitled 'Definitions', provides, in paragraph 1:

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

…

5. "public contracts" means contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services;

…'

8 The third subparagraph of Article 3(4) of that directive states:

'In the case of mixed contracts containing elements of supply, works and service contracts and of concessions, the mixed contract shall be awarded in accordance with this Directive, provided that the estimated value of the part of the contract which constitutes a contract covered by this Directive, calculated in accordance with Article 5, is equal to or greater than the relevant threshold set out in Article 4.'

9 Article 4 of that directive is worded as follows:

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

…

(c) EUR 221 000 for public supply and service contracts awarded by sub-central contracting authorities and design contests organised by such authorities; …

…'

10 Article 56(1) of Directive 2014/24 reads as follows:

'Contracts shall be awarded on the basis of criteria laid down in accordance with Articles 67 to 69, provided that the contracting authority has verified in accordance with Articles 59 to 61 that all of the following conditions are fulfilled:

(a) the tender complies with the requirements, conditions and criteria set out in the contract notice or the invitation to confirm interest and in the procurement documents, taking into account, where applicable, Article 45;

(b) the tender comes from a tenderer that is not excluded in accordance with Article 57 and that meets the selection criteria set out by the contracting authority in accordance with Article 58 and, where applicable, the non-discriminatory rules and criteria referred to in Article 65.

Contracting authorities may decide not to award a contract to the tenderer submitting the most economically advantageous tender where they have established that the tender does not comply with the applicable obligations referred to in Article 18(2).'

11 Article 60(4) that directive provides:

'Evidence of the economic operators' technical abilities may be provided by one or more of the means listed in Annex XII Part II, in accordance with the nature, quantity or importance, and use of the works, supplies or services.'

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

12 It is apparent from the order for reference that the question referred for a preliminary ruling arose in a dispute concerning a contract concluded by the Municipality of Peso da Régua for the exploitation of plots of land by the installation and operation of parking meters. That contract is described by the referring court as a 'public contract relating to a concession for the exploitation of plots of land'.

13 For the purposes of awarding that contract, the tender specifications established a 'technical and functional suitability of the solution' factor comprised of 86 'constituent subfactors'. With a view to assessing the 'technical and functional suitability of the solution', tenderers were invited to participate in a demonstration session. During that session, tenderers presented the software and equipment which were to be supplied in order to demonstrate, first, compliance with the terms and conditions laid down in the tender specifications, and secondly, the characteristics of their tender. If the contracting authority found, during that demonstration session, that the tenderer satisfied the requirements pertaining to one of those 86 subfactors, that tenderer would be awarded ten points in respect of that subfactor. If the tenderer failed to fulfil the requirements or was unable to present the software and equipment which were to be supplied, he would be awarded only one point in respect of that subfactor.

14 Resopre, which did not participate in the demonstration session, was awarded one point for each of the 86 subfactors under the 'technical and functional suitability of the solution' factor. The Municipality of Peso da Régua designated Datarede – Sistemas de Dados e Comunicações SA, which had participated in the demonstration session, as the successful tenderer.

15 Resopre challenged the validity of the contract award criterion before the Tribunal Administrativo e Fiscal de Mirandela (Administrative and Tax Court, Mirandela, Portugal). Resopre submitted, in that regard (i) that the requirement of a demonstration session was equivalent to setting a minimum technical ability requirement, (ii) that the software and equipment demonstration was not designed to identify the most economically advantageous tender and (iii) that the requirement in question infringed the principles of proportionality and competition. Resopre claimed, inter alia, that it would have been burdensome for it to develop a prototype of the parking meter to be supplied. The Tribunal Administrativo e Fiscal de Mirandela (Administrative and Tax Court, Mirandela) considered that the demonstration of the software and equipment in question necessitated an investment of between EUR 9 148 and EUR 9 648 by operators who did not already have that software and equipment and that Resopre's action had to be dismissed. Resopre brought an appeal against the decision dismissing its action to the referring court.

16 Under those circumstances, the Tribunal Central Administrativo Norte (Northern Central Administrative Court) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'In a pre-contractual public procurement procedure relating to a concession for the exploitation of plots of land for the installation and operation of [parking meters] and controlling compliance with the provisions laid down in municipal regulations on short-stay pay-parking zones in force in the municipality, does EU law (in particular, Articles 56(1) and 60(4) of Directive 2014/24 and the principle of competition) allow the tender specifications to provide that tenderers must submit the software and equipment (the parking meter) to be supplied, in order to demonstrate both that the tenderer complies with the terms and conditions in the tender specifications and the characteristics of the tenders, and to establish an award criterion related to the "technical and functional suitability of the solution" factor, to be assessed on the basis of that demonstration (see paragraphs 16 and 17 of the tender specifications)?'

Admissibility of the question referred for a preliminary ruling

17 In accordance with Article 53(2) of its Rules of Procedure, where the reference for a preliminary ruling is manifestly inadmissible, the Court may, after hearing the Advocate General, at any time decide to give a decision by reasoned order without taking further steps in the proceedings.

18 It is appropriate to apply that provision in the present case.

19 According to the Court's settled case-law, questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (order of 7 July 2016, *Sá Machado & Filhos*, C-214/15, not published, EU:C:2016:548, paragraph 28).

20 As is clear from Article 94 of the Rules of Procedure, the Court must be able to find in a request for a preliminary ruling a summary of the facts on which the question referred for a preliminary ruling is based and the connection, inter alia, between those facts and the question. Therefore, the

findings of fact needed to make it possible to ascertain whether an act of secondary or primary EU legislation is applicable must be made before a question is referred to the Court (see, to that effect, order of 7 July 2016, *Sá Machado & Filhos*, C-214/15, not pubilshed, EU:C:2016:548, paragraph 37).

21 In the present case, the order for reference does not contain the factual and legal material necessary to enable the Court to determine whether Directive 2014/24, which it is asked to interpret, is applicable.

22 According to the referring court, the question referred relates to a 'public contract … for the concession for the exploitation of plots of land'. Therefore, it is not clear from the order for reference whether the contract in question must be classified as a 'services concession' or a 'public contract'. On the one hand, the referring court has framed its question in the light of Directive 2014/24, which applies to public contracts only. On the other hand, it would appear from the file before the Court, inter alia, the notice published by the Municipality of Peso da Régua, that the contract in question is a services concession, which is governed by Directive 2014/23.

23 In that regard, it must be pointed out that, according to Article 2(1)(5) of Directive 2014/24, 'public contracts' are defined as contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services.

24 On the other hand, under Article 5(1)(b) of Directive 2014/23, 'services concession' means a contract for pecuniary interest concluded in writing by means of which one or more contracting authorities or contracting entities entrust the provision and the management of services other than the execution of works to one or more economic operators, the consideration of which consists either solely in the right to exploit the services that are the subject of the contract or in that right together with payment.

25 It follows that the award, by a public authority to a service provider, of a contract for the management of a public paying car park, in consideration for which that provider is remunerated by sums paid by third parties for the use of that car park, is a public services concession contract, to which Directive 2014/24 does not apply (see, to that effect, judgment of 13 October 2005, *Parking Brixen*, C-458/03, EU:C:2005:605, paragraph 43).

26 Therefore, if, in the present case, the Municipality of Peso da Régua remunerates the successful tenderer for the supply of parking meters and parking control services, the contract concluded for that purpose should be deemed to be a public contract. However, if that municipality grants the land by means of a concession for the purposes of the installation and operation of parking meters by the successful tenderer, at his own risk and for his own account, the contract concluded should be deemed to be a services concession.

27 It must also be pointed out that a contract which contains elements of supply, works and services contracts and of concessions must be deemed to be a 'mixed contract' in accordance with the third subparagraph of Article 3(4) of Directive 2014/24. In particular, that would be the case where a municipality, on the one hand, acquired parking meters from a successful tenderer through a public supply procurement procedure and, on the other hand, entrusted the operation of those parking meters to the same tenderer by means of a concession.

28 In the present case, although the referring court describes in detail the procedures for the application of the disputed award criterion in the award procedure, it does not, in any event, specify the payment terms provided for by the contract and nor does it specify which operator bears the risk in relation to the operation of the parking meters in question.

29 Under those circumstances, first, the Court is not in a position to determine with certainty whether the interpretation of Directive 2014/24 sought by the referring court will be useful to that court for the purposes of giving a ruling on the case before it.

30 Secondly, it must be noted that the order for reference is the only document which will be served on the interested parties referred to in Article 23 of the Statute of the Court of Justice of the European Union. Since the wording of the question referred may be interpreted as relating both to a concession and a public contract, the governments of the Member States and the other interested parties will not be in a position to submit useful observations in accordance with Article 23 of that statute (see, to that effect, orders of 30 June 2016, *ERDF*, C-669/15, not published, EU:C:2016:509, paragraphs 16 and 20, and of 23 November 2017, *Cunha Martins*, C-131/17, not published, EU:C:2017:902, paragraph 12).

31 Nevertheless, it must be recalled that the referring court retains the right to submit a new request for a preliminary ruling when it is in a position to provide the Court with all the information enabling the Court to give a ruling (order of 7 June 2018, *easyJet Airline*, C-241/18, not published, EU:C:2018:421, paragraph 20).

32 To that end, this Court reminds the referring court that special procedures prescribed by the EU directives coordinating public procurement and concessions procedures apply only to contracts whose value exceeds a threshold expressly laid down in each of the directives in question. Accordingly, the rules laid down in those directives do not apply to contracts with a value below the threshold set by those directives (see, by analogy, order of 7 July 2016, *Sá Machado & Filhos*, C-214/15, not published, EU:C:2016:548, paragraph 29). Consequently, it is for the referring court to indicate, in the order for reference, the estimated value of the contract at issue in the main proceedings and to verify that it exceeds the relevant threshold applicable to concessions, provided for in Article 8 of Directive 2014/23, or as regard public contracts, in Article 4 of Directive 2014/24.

33 Directive 2014/24 may also be applicable by virtue of a direct and unconditional reference by Portuguese law to the provisions of that directive. Similarly, public procurement procedures that do not fall within the scope of that directive are nonetheless subject to the fundamental rules and general principles flowing from the FEU Treaty, in particular, the principles of equal treatment and non-discrimination on grounds of nationality and the resulting obligation of transparency, provided that such contracts are of certain cross-border interest (see, to that effect, order of 7 July 2016, *Sá Machado & Filhos*, C-214/15, not published, EU:C:2016:548, paragraphs 33, 35 and 37). In that regard, the referring court may not merely submit to the Court evidence showing that certain cross-border interest cannot be ruled out but must, on the contrary, provide information capable of proving that it exists (judgment of 6 October 2016, *Tecnoedi Costruzioni*, C-318/15, EU:C:2016:747, paragraph 22).

34 It is sufficient to note that the order for reference gives no indication as to the estimated value of the contract or the national legal framework from which a direct and unconditional reference to EU law may be inferred, or indeed other factors from which the Court could infer the existence

of certain cross-border interest. Assuming that the contract in question were a public contract, the Court would still not have the legal and factual material needed for the purposes of determining whether EU law applies to the dispute in the main proceedings.

35 Having regard to all of the foregoing considerations, it must be held that the present request for a preliminary ruling is manifestly inadmissible for the purpose of Article 53(2) of the Rules of Procedure.

Costs

36 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.

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

The request for a preliminary ruling made by the Tribunal Central Administrativo Norte (Northern Central Administrative Court, Portugal) by decision of 26 July 2019 is manifestly inadmissible.

[Signatures]