Reports of Cases

OPINION OF ADVOCATE GENERAL
JÄÄSKINEN
delivered on 8 September 2015 [1]

Case C-324/14

Partner Apelski Dariusz
v
Zarząd Oczyszczania Miasta

(Request for a preliminary ruling from the Krajowa Izba Odwoławcza (Poland))

(Public procurement — Directive 2004/18/EC — Article 48(3) — Technological and professional capacity of an economic operator — Reliance by tenderers 'where appropriate' on the capacities of other entities — Character of the links between the tenderer and these other entities — Form and degree of the use of the capacities of other entities — Details required in the contract notice — Pertinence of Directive 2014/24/EU to the interpretation of Directive 2004/18)

I – **Introduction**

1. This request for a preliminary ruling from the Krajowa Izba Odwoławcza (National Appeal Chamber) concerns two legal issues that are relevant to the field of public procurement law, and a third that concerns the broader issue of the extent to which a directive that has not yet entered into force in the relevant period *ratione temporis*, and the implementation period of which has not expired, can be used as an aid to interpretation of a directive that it will ultimately replace.

2. In substance, the Zarząd Oczyszczania Miasta (the municipal cleansing authority; 'the contracting authority'), an organisational unit of the capital city of Warsaw, excluded Partner Dariusz Apelski (hereafter 'Partner') from the procedure for the award of a public contract for mechanical cleaning of the roads of Warsaw. It did so because it was not persuaded that Partner would duly perform the contract, given that part of its tender included services to be provided by a third party located in another and relatively remote Polish town.

3. In the first group of questions referred by the Krajowa Izba Odwoławcza the Court is asked essentially, if not exclusively, about the proof required from an economic operator when it relies on 'the capacities of other entities' for a particular contract pursuant to Article 48(3) 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. [2] These questions include queries about the content of the contract notice and clarification of the tender. The second group of questions asks about the circumstances in which an electronic auction already completed by a contracting authority is to be annulled for irregularities in the tendering process.

1 — Original language: English.
2 — OJ 2004 L 134, p. 114.

4. Finally, by the last question, the Court is asked whether Directive 2014/24/EU of the European Parliament and of the Council 26 February 2014 on public procurement and repealing Directive 2004/18/EC[3] can be used as a guide to interpretation of Directive 2004/18 in order to solve the problems to hand, even though Directive 2014/24 had not yet entered into force at the date the contract award procedure was published.

II – **Legal framework**

A – *Directive 2004/18*

5. Article 2 of Directive 2004/18 entitled '[p]rinciples of awarding contracts' states that '[c]ontracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.'

6. Article 44 of Directive 2004/18 entitled '[v]erification of the suitability and choice of participants and award of contracts' states as follows:

'1. Contracts shall be awarded on the basis of the criteria laid down in Articles 53 and 55, taking into account Article 24, after the suitability of the economic operators not excluded under Articles 45 and 46 has been checked by contracting authorities in accordance with the criteria of economic and financial standing, of professional and technical knowledge or ability referred to in Articles 47 to 52, and, where appropriate, with the non-discriminatory rules and criteria referred to in paragraph 3.

2. The contracting authorities may require candidates and tenderers to meet minimum capacity levels in accordance with Articles 47 and 48.

The extent of the information referred to in Articles 47 and 48 and the minimum levels of ability required for a specific contract must be related and proportionate to the subject-matter of the contract.

These minimum levels shall be indicated in the contract notice.

…'

7. Article 48 of Directive 2004/18 entitled '[t]echnical and/or professional ability' states that:

'1. The technical and/or professional abilities of the economic operators shall be assessed and examined in accordance with paragraphs 2 and 3.

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:

(a) (i) …

(ii) a list of the principal deliveries effected or the main services provided in the past three years, with the sums, dates and recipients, whether public or private, involved

…

3 — OJ 2014 L 94, p. 65.

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.

…'

8. Article 51 of Directive 2004/18 entitled '[a]dditional documentation and information' states that the 'contracting authority may invite economic operators to supplement or clarify the certificates and documents submitted pursuant to Articles 45 to 50'.

9. Article 54 of Directive 2004/18 entitled 'use of electronic auctions' states:

'1. Member States may provide that contracting authorities may use electronic auctions.

…'

4. Before proceeding with an electronic auction, contracting authorities shall make a full initial evaluation of the tenders in accordance with the award criterion/criteria set and with the weighting fixed for them.

All tenderers who have submitted admissible tenders shall be invited simultaneously by electronic means to submit new prices and/or new values; …

…

8. After closing an electronic auction contracting authorities shall award the contract in accordance with Article 53 on the basis of the results of the electronic auction.

Contracting authorities may not have improper recourse to electronic auctions nor may they use them in such a way as to prevent, restrict or distort competition or to change the subject-matter of the contract, as put up for tender in the published contract notice and defined in the specification.'

B – *Directive 2014/24*

10. Article 63 of Directive 2014/24 is entitled 'reliance on the capacities of other entities', and states as follows:

'1. With regard to criteria relating to economic and financial standing as set out pursuant to Article 58(3), and to criteria relating to technical and professional ability as set out pursuant to Article 58(4), 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. With regard to criteria relating to the educational and professional qualifications as set out in point (f) of Annex XII Part II, or to the relevant professional experience, economic operators may however only rely on the capacities of other entities where the latter will perform the works or services for which these capacities are required. Where an economic operator wants to rely on the capacities of other entities, it shall prove to the contracting authority that it will have at its disposal the resources necessary, for example, by producing a commitment by those entities to that effect.

…

2. In the case of works contracts, service contracts and siting or installation operations in the context of a supply contract, contracting authorities may require that certain critical tasks be performed directly by the tenderer itself …'

11. Article 90(1) of Directive 2014/24 entitled '[t]ransposition and transitional provisions' states that 'Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 18 April 2016. They shall forthwith communicate to the Commission the text of those measures.' Pursuant to Article 93 Directive 2014/24 entered into force on the twentieth day following that of its publication in the Official Journal, which took place on 28 March 2014.

III – **Facts, procedure and questions referred**

12. The contracting authority conducted a procedure for the award of a public contract for 'comprehensive mechanical cleansing of roadways of the capital city of Warsaw in the winter and summer season in the years 2014-17 — Stage I'. The procedure was published in the *Official Journal of the European Union* of 24 December 2013, since the value exceeded EU thresholds. The contracting authority divided the contract into eight lots covering the separate districts of Warsaw and allowed tenders for lots without limiting the number of lots for which an economic operator could tender. It conducted an open procedure (open tendering), which provided for the holding of an electronic auction.

13. Winter cleansing consists in preventing and removing icy conditions by salting and ploughing national, regional, district and municipal roadways used by urban public transport. Summer cleansing involves sweeping and wet cleaning of roadways. According to the tendering specifications, economic operators had to demonstrate that in the three years prior to the time-limit for submitting tenders, or, where the period during which the activity was carried on was shorter, in that period, they had performed, or were performing, a service or services consisting in the winter maintenance of roadways having a total value of at least PLN 1 000 000.

14. The contracting authority indicated that in evaluating whether that condition had been fulfilled it would take account solely of services using pre-wetting technology to prevent or remove icy conditions. [4] The contracting authority also indicated that where tenders for more than one lot were submitted, the economic operator had to carry out work with a correspondingly higher value, that is to say PLN 1 000 000 multiplied by the number of lots for which it tendered. Therefore, an economic operator which tendered for eight lots must have proven services with a value of at least PLN 8 000 000. [5]

15. In the list of services attached to the tender Partner referred to 14 services, 12 of which were based on its own experience, and two on the experience of PUM Sp. z o.o. ('PUM'), an undertaking established in Grudziądz (some 227 kilometres from Warsaw) as another entity on whose resources Partner relied. Partner attached to the tender an undertaking by PUM to 'make available the necessary resources'. The undertaking set out the way in which the resources made available would be used, namely advisory services covering, inter alia, training of the economic operator's workers, and providing the economic operator with consultation, including help to resolve any problems which might arise at the performance stage of the contract.

4 — That is to say sodium chloride or a mixture of sodium chloride and calcium chloride, which is wetted when sprayed and turns into salt solution.

5 — The order for reference states that, at the hearing before the national court, the contracting authority stated that it evaluated fulfilment of that condition by aggregating the value of the services which were demonstrated and accepted and dividing it by 1 000 000, thus obtaining the number of lots in respect of which the economic operator had fulfilled that condition.

16. After the contracting authority had informed Partner on 11 March 2014 that it considered the economic operator as not having the necessary means for executing the contract Partner replied on 18 March 2014 that, if the contracting authority considered that the experience demonstrated was insufficient, its other experience should have been attributed in the following order: lots V, I, II, III, VIII, IV, VII, VI. In that respect it argued that where an economic operator submits a tender for several lots, the tender can be treated separately in relation to each of them. Therefore, any exclusion of an economic operator and rejection of its tender may not relate to the entire contract but only to the individual lots thereof in relation to which the economic operator failed to fulfil the conditions.

17. The contracting authority did not take account of the partial experience of Partner, and excluded it from the procedure in respect of each lot pursuant to Article 24(2)(4) of the Law on Public Contracts (Ustawa PZP) [6] on the ground that it had failed to prove that it had fulfilled the conditions for participation in the procedure. The contracting authority considered that, having regard to the specific nature of the work, the familiarity with the topography of the city, and the time requirements for attaining the specific winter maintenance standards etc., it would not be possible to reliably satisfy the obligation arising from the procedure carried out without the personal participation of PUM in the performance of the contract requirements. Thereafter the contracting authority organised an electronic auction to which Partner was not invited to participate.

18. In the appeal lodged with the Krajowa Izba Odwoławcza Partner alleged that the contracting authority had carried out a defective examination and evaluation of the tenders. It argued that the contracting authority had not pointed out in the tendering specifications that fulfilment of the condition relating to relevant knowledge and experience is contingent on the personal participation in the performance of the contract of the entity which made knowledge and experience available to Partner, or that the experience must relate to specific topographic knowledge.

19. The Krajowa Izba Odwoławcza referred the following questions to the Court under Article 267 TFEU.

‘(1) Can Article 48(3) of Directive 2004/18 … in conjunction with Article 2 thereof, be interpreted, where it states that “where appropriate” an economic operator may rely on the capacities of other entities, as covering any situation where a particular economic operator does not have the skills required by the contracting authority and wishes to rely on the capacities of other entities? Or must the indication that an economic operator may rely on the resources of other entities only “where appropriate” be regarded as a restriction indicating that such reliance may be had only exceptionally and not as a rule when providing evidence of the skills of economic operators in procedures for the award of public contracts?

(2) Can Article 48(3) of Directive 2004/18, in conjunction with Article 2 thereof, be interpreted as meaning that reliance by an economic operator on the capacities of other entities in terms of their knowledge and experience “regardless of the legal nature of the links which it has with them” and “having at its disposal the resources” of those entities denote that during performance of the contract an economic operator need not have links with those entities or can have very loose and vague links, that is to say, it can perform the contract independently (without the involvement of another entity) or such participation can consist of “advice”, “consultation”, “training” and the like? Or must Article 48(3) be interpreted as meaning that the entity on whose capacities the economic operator relies must actually and personally perform the contract in so far as its capacities were declared?

6 — Ustawa Prawo zamówień publicznych (Law on public contracts) (consolidated text, *Dziennik Ustaw* of 2013, heading 907). Article 24(2)(4) states that: ‘[T]he following shall also be excluded from procedures for the award of public contracts … economic operators which have failed to demonstrate that they fulfil the conditions for participation in the procedure …’

(3) Can Article 48(3) of Directive 2004/18, in conjunction with Article 2 thereof, be interpreted as meaning that an economic operator which has its own experience but to a lesser degree than it would like to indicate to the contracting authority (for example, insufficient experience to submit a tender for the whole contract) may rely additionally on the capacities of other entities to improve its situation in the procedure?

(4) Can Article 48(3) of Directive 2004/18, in conjunction with Article 2 thereof, be interpreted as meaning that in the contract notice or the tendering specifications the contracting authority can (or even must) lay down the rules under which the economic operator may rely on the capacities of other entities, for example in what way the economic operators must participate in the performance of the contract, in what way the capacity of the economic operator and another entity can be combined, and whether the other entity will bear joint and several liability with the economic operator for the due performance of the contract in so far as the economic operator has relied on its capacities?

(5) Does the principle of equal and non-discriminatory treatment of economic operators set out in Article 2 of Directive 2004/18 allow reliance on the capacities of another entity under Article 48(3) where the capacities of two or more entities which do not have the capacities in terms of knowledge and experience required by the contracting authority are combined?

(6) Therefore, does the principle of equal and non-discriminatory treatment of economic operators set out in Article 2 of Directive 2004/18 allow an interpretation of Articles 44 and 48(3) of Directive 2004/18 to the effect that the conditions for participation in the procedure that are laid down by the contracting authority may be fulfilled just formally for the purposes of participating in the procedure and regardless of the actual skills of the economic operator?

(7) Where it is permitted to submit a tender for lots, does the principle of equal and non-discriminatory treatment of economic operators set out in Article 2 of Directive 2004/18 allow an economic operator, after the submission of tenders, to state — for example in the context of the supplementing or explaining of documents — to which lot the resources specified by it in order to prove that the conditions for participation in the procedure have been fulfilled are to be assigned?

(8) Do the principle of equal and non-discriminatory treatment of economic operators and the principle of transparency set out in Article 2 of Directive 2004/18 allow an auction which has been carried out to be annulled and an electronic auction to be repeated where it was carried out improperly in an essential respect, for example where not all economic operators which submitted admissible tenders were invited to participate?

(9) Do the principle of equal and non-discriminatory treatment of economic operators and the principle of transparency set out in Article 2 of Directive 2004/18 allow a contract to be awarded to an economic operator whose tender was selected as a result of such an auction without it being repeated, where it is not possible to determine whether or not the participation of the economic operator which was not taken into consideration would have altered the result of the auction?

(10) In interpreting the provisions of Directive 2004/18, is it permitted to use as a guide to interpretation the content of the provisions of Directive 2014/24 … and of the preamble thereto, even though the period for implementing it has not expired, in so far as it explains certain assumptions and intentions of the EU legislature and is not contrary to Directive 2004/18?'

20. Written observations were received from Partner, Remondis sp.z o.o. and Mr Road Service sp. Z o.o., intervening in the main proceedings, the Governments of Spain, Latvia and Poland, along with the Commission. All of them, aside from the Government of Latvia, participated in the hearing that took place on 7 May 2015, as did the contracting authority, although it had not filed written observations.

IV – **Analysis**

A – *Questions concerning reliance on another economic operator's technical and professional capacities (Questions 1, 2, 3, 5 and 6)*

21. Pursuant to these questions, which I will consider together, the national referring court is essentially asking for guidance on the circumstances in which a tenderer may, for a particular contract, rely on the capacities of other entities with regard to technological and/or professional ability when tendering for a given contract. This facility is provided for under Article 48(3) of Directive 2004/18. In my opinion these questions cover basically three problems. They are (1) a tenderer's entitlement to rely on external capacities to fulfil contract requirements with respect to technical and/or professional ability; (2) the reality of reliance on third party capacities, and; (3) whether such capacities are transferable in the sense they may be relied on in the light of the nature and objective of the contract concerned. It goes without saying that Article 2, which embodies the general principle of non-discrimination and transparency, is pertinent to answering all the questions.

22. At the outset it is useful to underscore the difference between reliance on the capacities of other entities under Article 48(3) of Directive 2004/18, and subcontracting as provided in Article 25 thereof. As pointed out in the written observations of Spain, these legal arrangements are different in two respects. With respect to reliance on third party capacities, these are integrated with those of the tenderer prior to the award of the contract, while subcontracting is concluded at the point of the contract's execution. Secondly, subcontracting is subject to limitations that do not apply to reliance on the capacities of third parties.[7]

1. An economic operator's entitlement to rely on external capacities

23. As far as the words 'where appropriate' in Article 48(3) of Directive 2004/18 are concerned, they impose no substantive limitation on the circumstances in which an economic operator can call on the resources of a third party when tendering for a public contract.

24. I pointed out in my Opinion in *Swm Costruzioni 2 and Mannocchi Luigino* (C-94/12, EU:C:2013:130) that the wording of Article 48(3) of Directive 2004/18 is suggestive of a right of economic operators to choose this method of fulfilling the selection criteria, provided they can prove they actually have at their disposal the resources of the other entities concerned that are necessary to carry out the contract in question.[8] This interpretation is most in conformity with the goal of opening up public contracts to the widest possible competition, and the encouragement of access thereto of small and medium sized undertakings.

7 — Article 25 of Directive 2004/18 states that, 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. The provision goes on to state that this shall be without prejudice to the question of the principal economic operator's liability.

8 — Ibid., paragraph 24. See also notably judgment in *Siemens and ARGE Telekom* (C-314/01, EU:C:2004:159), paragraph 46, and judgments in *Ballast Nedam Groep* (C-389/92, EU:C:1994:133) and *Ballast Nedam Groep* (C-5/97, EU:C:1997:636).

25. Furthermore, it was found by the Court in *Holst Italia* (C-176/98, EU:C:1999:593), and later confirmed in Article 48(3) of Directive 2004/18, that the nature of the legal links between the economic operator and the third entity or entities on which it seeks to rely is irrelevant. [9]

26. Hence, in the light of the Court's case-law, there can in principle be no objection to a tenderer relying additionally on the capacities of other entities to improve its situation in the contract procedure. This is subject, however, to the limitations I shall discuss below. As pointed out in the written observations of the Commission, what counts is that the tenderer *actually has at its disposal* the capacities of other entities in order to properly execute the contract. This 'disposition' needs to take no particular legal form.

2. The reality of third party capacities relied on by the tenderer

27. Notwithstanding what has been said in the preceding paragraphs, the onus rests on tenderers who rely on the capacities of others entities to prove to the contracting authority that they in fact are available to them. [10] From this perspective, Article 48(3) of Directive 2004/18 might best be viewed as one imposing an evidential requirement, and one in which the assessment of that proof is left to the contracting authority. Pursuant to Article 44(1) of Directive 2004/18, it is for the contracting authorities to check the suitability of candidates or tenderers in accordance with the criteria referred to in Articles 47 to 52 of Directive 2004/18. [11] In other words, as emphasised by the contracting authority and Poland at the hearing, a contracting authority is bound by an obligation to ensure that the successful tenderer is actually able to properly execute the contract.

28. The goal of the provisions of Directive 2004/18 concerning the participation of third parties in the execution of public contracts is to avoid the situation in which an undertaking would be entitled to have access to a contract award even though it doesn't have the necessary means to execute the contract. Hence, Article 48(3) of Directive 2004/18 precludes a contracting authority from taking a purely formal approach to the proof supplied by a tenderer, due to the duties by which it is bound. In other words, it is not acceptable that tenderers refer to third party capacities if it is done only for the purpose of formally fulfilling the minimum capacity condition set out in the contract notice.

3. Transferability of technological and/or professional abilities

29. In *Swm Costruzioni 2 and Mannocchi Luigino* (C-94/12, EU:C:2013:646) the Court interpreted Articles 47(2) and 48(3) of Directive 2004/18, read in conjunction with Article 44(2) of Directive 2004/18, as precluding a general rule prohibiting economic operators participating in a tendering procedure for a public works contract from relying on the capacities of more than one undertaking for the same qualification category. However, the Court also observed that 'there may be works with special requirements necessitating a certain capacity which cannot be obtained by combining the capacities of more than one operator' and that 'in such circumstances, the contracting authority would be justified in requiring that the minimum capacity level concerned be achieved by a single economic operator'. [12]

9 — Opinion of Advocate General Jääskinen in *Swm Costruzioni and Mannocchi Luigino* (C-94/12, EU:C:2013:130), point 22. This position built on the findings of the Court in judgments in *Ballast Nedam Groep* (C-5/97, EU:C:1997:636) and *Ballast Nedam Groep* (C-389/92, EU:C:1994:133), in which the legal relations in issue concerned companies in the same group. See points 20 to 22 of the Opinion.

10 — See my Opinion in *Swm Costruzioni 2 and Mannocchi Luigino* (C-94/12, EU:C:2013:130) point 23.

11 — Judgment in *Swm Costruzioni 2 and Mannocchi Luigino* (C-94/12, EU:C:2013:646), paragraph 26. See similarly judgment in *Holst Italia* (C-176/98, EU:C:1999:593), paragraph 28.

12 — Judgment in *Swm Costruzioni 2 and Mannocchi Luigino* (C-94/12, EU:C:2013:646), paragraph 35.

30. That said, the problem in issue is, however, whether the capacities relating to technological and professional ability specified in the contract award notice are transferable. If they are not, Partner would not qualify as a tenderer.

31. Transferability of technological capacities relates to the question of whether technology or know-how can meaningfully be transferred from one economic operator to another, for example by means of consultations and the provision of advice. In the written observations there are also points which rather relate to the issue of whether such capacities of different entities can be added on in general, which in my opinion is the approach taken by the EU legislature in Article 48 of Directive 2004/14. However, in the main proceedings the real dispute concerns the issue whether the technological ability of PUM was transferable to Partner without the first mentioned economic operator itself participating directly in the execution of the contract. The dispute is not about simply adding similar capacities to those that Partner already has.

32. Much depends on the facts and the nature and object of the contract. Capacities exist that are transferrable. Let us imagine a contract award by a public health service provider concerning screening for a form of cancer using a standard technology, and which is to be provided to a defined group of people. Let us further imagine that the terms of the contract award state that in unclear cases the findings must be confirmed by a specialist having certain and superior professional qualifications. In such circumstances there should be no reason why a tenderer could not rely on a third party who is to provide the necessary consultation. However, if the contract concerned screening by means of a new and non-standard methodology, the contracting authority could reasonably require that the tenderer itself possesses relevant capacity. Here we are faced with a question of the factual circumstances of the contract award.

33. Thus, as I have already mentioned, account must be taken of the nature of each contract and the need to be fulfilled. This is a question to be assessed by the national court.

34. Whether or not a contracting authority may require the participation of a third party entity in the execution of the contract, as the sole means of proving that the relevant capacities are at the disposal of the tenderer concerned, this is also a question to be assessed on a case-by-case basis. It will all depend on the nature and objective of the contract. In my opinion it is easy to envisage scenarios in which the commitment concerned is of such a degree of technical difficulty that it must be executed by the third party possessing the relevant expertise if its capacity is relied upon, rather than on the basis of advice and counselling on the part of such an entity, with the relevant commitment being executed by the tenderer itself.

4. Intermediary conclusion

35. On the basis of the observations above, Questions 1, 2, 3, 5 and 6 can be answered as follows: Articles 44 and 48(3) of Directive 2004/18, read in conjunction with Article 2 thereof, are to be interpreted in the sense that the term ‘where appropriate’ imposes no substantive limitation on the circumstances in which an economic operator may rely on the capacities of other entities in order to prove to a contracting authority that it will have the technological and/or professional ability necessary for the execution of a given public contract. The nature of the legal links between the economic operator and the third party entity is irrelevant, but the economic operator must be able to prove to the contracting authority that it in fact has at its disposal all the means to execute the terms of the contract. A tenderer may rely on the capacities of other entities to prove its technological and/or professional ability, subject to the limitations flowing from the nature and objective of the contract, the execution of which is required.

B – *Contract notice, tendering specifications and joint and several liability (Question 4)*

36. Question 4 essentially asks whether the contracting authority can, (or even must), in the contract notice or tendering specifications lay down the rules under which tenderers may or may not rely on the capacities of other entities. To be more specific, can the contracting authority stipulate the way in which the tenderer is bound to participate in the performance of the contract, the manner in which the capacities of the tenderer concerned and other entities can be combined, and whether the other entity will bear joint and several liability with the tenderer for the due performance of the contract in so far as the tenderer has relied on its capacities?

37. Spain states in its written observations that the contract notice or tender specifications should stipulate the rules pursuant to which a tenderer can rely on the capacities of other entities, provided that these requirements are proportionate and are directly connected to the object of the contract concerned. The written observations of Poland also argue in this sense.

38. However, in my opinion the correct position is the one defended by the Commission. It points out in its written observations that because tenderers are entitled to rely on the capacities of third party entities, contracting authorities are precluded from imposing any express conditions that may impede that right. The tenderer is entitled to determine how it will access these capacities. The Commission rightly adds that, for practical reasons, it might be nearly impossible for the contracting authority to fix, in advance, specifications on the ways in which the capacities of others can be relied upon; it cannot predict in advance all possible scenarios for the use of capacities of others. This is, of course, subject to the absence of criteria set out in the *Swm 2 costruzione* case-law concerning situations where such reliance is excluded.

39. The general principles developed by the Court concerning the contract notice and tendering specifications and the *principle of transparency* are relevant to this question. I recall that the obligation of transparency is intended to preclude any risk of arbitrariness on the part of the contracting authority,[13] and that the principle of equal treatment and the obligation of transparency prohibit the contracting authority from rejecting a tender which satisfies the requirements of the invitation to tender on grounds which are not set out in the tender specifications.[14] I also note that Article 23(2) of Directive 2004/18 states that technical specifications 'shall afford equal access for tenderers and not have the effect of creating unjustified obstacles to the opening up of public procurement to competition' while pursuant to Article 23(3)(c), technical requirements can include performance requirements.

40. In my opinion, if the particular conditions set out in the judgment in *Swm Costruzioni 2 and Mannocchi Luigino* (C-94/12, EU:C:2013:646, paragraph 35) arise, and the contracting authority imposes, *as a condition of the contract award procedure*, that the minimum capacity level concerned be achieved by a single economic operator, then it is required to state this beforehand in the contract notice and/or tendering specifications. In such circumstances, the facility for reliance on third party capacity in Article 48(3) of Directive 2004/18 is excluded. This would seem to be the only means of complying with the obligation of transparency in the examination of the suitability of the candidates because otherwise potential tenderers would not be informed of all obligatory and unconditional requirements relating to minimum capacities.[15]

13 — Judgment in *SC Enterprise Focused Solutions* (C-278/14, EU:C:2015:228), paragraph 26 and case-law cited.

14 — Ibid., paragraph 28.

15 — See by analogy the case law on award criteria, for example judgment in *Commission* v *France* (C-299/08, EU:C:2009:769), paragraph 41, where the Court held that 'both the principle of equal treatment and the obligation of transparency which flows from it require the subject-matter of each contract and the *criteria governing its award* to be clearly defined' (my emphasis). See also judgment in *ATI EAC e Viaggi di Maio and Others* (C-331/04, EU:C:2005:718), which established, at paragraph 32, limits on attaching specific weight to the subheadings of award criteria, and judgment in *Universale-Bau and Others* (C-470/99, EU:C:2002:746), paragraph 100, in which the contracting authority was required to state, in the contract notice or tender documents, rules for weighting the criteria for selecting candidates who would be invited to tender.

41. This is, however, a different question than the appreciation of whether a tenderer relying on third party capacities *in fact* satisfies the conditions of technological and/or professional ability required in the tender notice. This matter can only be examined on the basis of the tenders when compared to the suitability requirements stated in the tender notice and tendering specifications, in light of the criteria described above in the context of Questions 1, 2, 3, 5 and 6.

42. Finally, with respect to joint and several liability, the written observations of the Commission have sought to rely on Article 63(1), third line, of Directive 2014/24 in order to support an argument in its favour. Partner and Spain, on the other hand, argue that the imposition of joint and several liability is not possible, given that it is only the tenderer who has participated in the tendering procedure that is responsible for the contract's execution, and not any third entity on whose capacities it has relied.

43. For the reasons that I shall set out in my answer to Question 10, no unconditional rules can be derived from Directive 2014/24 in applying Directive 2004/18, when they are either absent from Directive 2004/18 or impose more detailed norms or requirements than the corresponding provisions thereof. Therefore, imposition of joint and several liability should be excluded before the period for implementing Directive 2014/24 expires.

44. For these reasons the Court should respond to Question 4 in the sense that Article 48(3) of Directive 2004/18, in conjunction with Article 2 thereof, must be interpreted as meaning that, in the contract notice or the tendering specifications, the contracting authority is required to specify any condition entailing the preclusion of recourse to Article 48(3) of Directive 2004/18 for demonstrating fulfillment of requirements relating to minimum capacities. The contracting authority is otherwise precluded from laying down in the contract notice or the tendering specifications express conditions or rules concerning if and how tenderers may rely on the capacities of other entities.

C – *Clarification of the tender (Question 7)*

45. Question 7 essentially asks about the extent to which dialogue can be entered into between the contracting authority and the tenderer, for example in the context of supplementing or explaining documents after the submission of tenders, when it is possible to tender in lots. I recall in this respect that according to Article 51 of Directive 2004/18 the contracting authority may invite economic operators to supplement or clarify the certificates and documents submitted pursuant to Articles 45 to 50 thereof.

46. In my opinion the Court can supply a short answer to this question. The Court has already excluded any negotiation between the contracting authority and one or other of the tenderers. Contracting authorities may not request clarification of tenders which it regards as imprecise or as failing to meet the technical requirements of the tender specification before such tenders are rejected. [16]

16 — Judgment in *SAG ELV Slovensko and Others* (C-599/10, EU:C:2012:191), paragraphs 36 and 37. I recall that there is provision in Directive 2004/18 for competitive dialogue with respect to particularly complex contracts (Article 29) and negotiated procedures (Article 30). These provisions are, however, irrelevant to the case to hand.

47. Once a tender is made, it cannot be modified, either at the initiative of the tenderer or the contracting authority.[17] The latter can exceptionally request amplification of details, such as mere clarification or corrections of obvious material errors, without requesting or accepting any amendment to the tender.[18]

48. In my opinion providing information concerning the order of priority of lots covered by a tender after the submission of the tenders is not a mere precision but a material change to the tender. Accepting it would amount to a breach of the principles of fair competition. This does not fall within the exceptional set of circumstances in which clarifications of tenders is permissible.

49. Thus, in my opinion Question 7 should be answered in the sense that, where it is permitted to submit a tender for lots, the principle of equal and non-discriminatory treatment of economic operators set out in Article 2 of Directive 2004/18 does not allow an economic operator, after the submission of tenders, to state to which lot the resources specified by it in order to prove that the conditions for participation in the procedure have been fulfilled are to be attributed.

D – *Irregularities in electronic auction (Questions 8 and 9)*

50. Questions 8 and 9 concern the consequences that follow, in the terms of the award of a contract, when all suitable tenderers have not been allowed to participate in an electronic auction.

51. Here I recall at the outset that in accordance with Article 54(4), second subparagraph, of Directive 2004/18 '[a]ll tenderers who have submitted admissible tenders shall be invited simultaneously by electronic means to submit new prices and/or new values'. Article 54(8) of Directive 2004/18 precludes recourse to electronic auctions to, inter alia, prevent or distort competition. I observe further that the national court is not querying the remedies available to the economic operators in relation to an irregular electronic auction,[19] but the obligations of the contracting authority under Directive 2004/18 in such a situation.

52. In my opinion, if a suitable tenderer fulfilling the criteria set out in the contract notice and technological specifications should have been invited to take part in the electronic auction, pursuant to Article 54(4) of Directive 2004/18, but was not, then it follows from the requirement of equal and non-discriminatory treatment as set out in Article 2 of Directive 2004/18 that the auction should be repeated. This applies independently of whether its participation would have altered the outcome of the auction or not.[20] This means that the contract cannot be awarded on the basis of illegal or irregular electronic auctions of this kind.

53. I therefore propose that Questions 8 and 9 are answered in the sense that Article 2 of Directive 2004/18 requires the annulment and repetition of an electronic auction if a candidate fulfilling the criteria of participation in the contract award was not invited to the electronic auction.

17 — See judgment in *Manova* (C-336/12, EU:C:2013:647) where the Court held at paragraph 31 that 'the principle of equal treatment and the obligation of transparency preclude any negotiation between the contracting authority and a tenderer during a public procurement procedure, which means that, as a general rule, a tender cannot be amended after it has been submitted, whether at the request of the contracting authority or at the request of the tenderer concerned. It follows that, where the contracting authority regards a tender as imprecise or as failing to meet the technical requirements of the tender specifications, it cannot require the tenderer to provide clarification'.

18 — Judgment in *SAG ELV Slovensko and* Others (C-599/10, EU:C:2012:191), paragraphs 40 and 41. See also judgment in *Manova* (C-336/12, EU:C:2013:647), paragraph 32.

19 — These are provided in Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Directive 2007/66/EC of the European Parliament and of the Council amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (OJ 2007 L 335, p. 31).

20 — PARTNER stated at the hearing that it was not invited to participate in the electronic auction for the award of the contract in issue.

E – *Can Directive 2014/24 be taken into account in the interpretation of Directive 2004/18? (Question 10)*

54. The referring national court queries in Question 10 whether, in interpreting the provisions of Directive 2004/18, it is permitted to use as a guide to interpretation the content of the provisions of Directive 2014/24, and of the preamble thereto, even though the period for implementing it has not expired, in so far as it explains certain assumptions and intentions of the EU legislature and is not contrary to Directive 2004/18.

55. This issue is related to the fact that Article 63(1) of Directive 2014/24 is entitled 'reliance on the capacities of other entities' and provides rules applicable to this situation that are more detailed than those which appear in Directive 2004/18. Article 63(1) of Directive 2014/24, like Article 48(3) of Directive 2004/18, provides that the 'legal nature' of the links between the entities is immaterial. However, Article 63(1) of Directive 2014/24 adds that when the operator concerned is dependent on 'educational and professional qualifications', or 'professional experience', it may only rely on the capacities of other entities where the latter will perform the works or services for which these capacities are required. Moreover, Article 63(2) of Directive 2014/24 states that the contracting authorities may require that certain critical tasks be performed directly by the tenderer itself.

56. I note at the outset that the problem the national court is faced with concerns the interaction *between two EU legislative acts*. Therefore the case-law concerning Member States' obligations during the period prescribed for transposition of a directive [21] on interpretation of national law during that period [22] is not pertinent.

57. Furthermore, I recall that the Court has recently held that in circumstances in which Directive 2014/24/EU entered into force after the facts in the main proceedings in issue, it could not be applicable to that dispute. [23] This is consistent with its previous findings in the context of the transition period between Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts [24] and Directive 2004/18. In a case in which a bid was excluded from the procedure for the award of a contract before the date on which the period for transposition of Directive 2004/18 had expired, the Court held that it would 'be contrary to the principle of legal certainty to determine the law applicable to the case in the main proceedings by reference to the date of the award of the contract'. [25] It therefore held that 'Directive 2004/18 is not applicable to a decision taken by a contracting authority when awarding a public works contract before the period for transposition of that directive has expired'. [26] However, the national court in the case to hand is not asking in detail about the relationship between the particular provisions of the older and new directives, and seeks only general guidance.

21 — See e.g. recently the Opinion of Advocate General Sharpston in *bpost* (C-340/13, EU:C:2014:2302), point 29, citing the judgments in *Inter-Environnement Wallonie* (C-129/96, EU:C:1997:628), paragraph 45; ATRAL (C-14/02, EU:C:2003:265), paragraph 58, and *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others* (C-43/10, EU:C:2012:560), paragraph 57.

22 — Ibid., citing judgment in *Adeneler and Others* (C-212/04, EU:C:2006:443) paragraphs 122 and 123.

23 — Judgment in *Ambisig* (C-601/13, EU:C:2015:204), paragraph 24.

24 — OJ 1993 L 199, p. 54.

25 — Judgment in *Hochtief and Linde-Kca-Dresden* (C-138/08, EU:C:2009:627), paragraph 29.

26 — Ibid., paragraph 30. This approach, I add, is consistent with that employed by the Court in judgments in *Monsees* (C-350/97, EU:C:1999:242), paragraph 27, and *Commission* v *France* (C-337/98, EU:C:2000:543), paragraphs 38 and 39.

58. This said, the Court has on at least one occasion relied on both a recital and provision of Directive 2014/24 in interpreting Directive 2004/18. However, it did not explain the reasons for so doing.[27]

59. In my opinion the relationship between two successive EU legislative acts in terms of interpretation must be addressed with due regard to the legislative intent. However, the formulation of Question 10 is not helpful in this respect because it is not clear whether the reference to 'certain assumptions and intentions of the EU legislature' refers to those in the context of Directive 2014/24 or Directive 2004/18.

60. For me it is evident that Directive 2014/24 cannot explain the legislative intent of Directive 2004/18. However, it may stem from the preamble and provisions of Directive 2014/24 that the legislative intent relating to certain of its provisions was to codify the existing case-law in which Directive 2004/18 has been applied. In such situations there is no obstacle to taking into account the later directive in the interpretation of the former. On the other hand, if the legislative intent is to depart from the provisions of Directive 2004/18, or the existing case-law, then the new directive cannot serve as a guide to interpretation of the previous one.

61. At the other end of the scale, the national referring court mentions a proviso. Question 10 implies that the taking into account of Directive 2014/24/EU will be precluded if it is 'contrary to Directive 2004/18'. This stems, of course, from the principle of legal certainty which prohibits retroactive application of an instrument which is not applicable *ratione temporis*.[28]

62. At the heart of the question are, however, the provisions of Directive 2014/24 which add detail to Directive 2004/18 or case-law where it is applied where there is no logical contradiction between the acts, Directive 2004/18 being silent or imprecise on the matter concerned.

63. In my opinion, it follows from the principle of legal certainty that unconditional rules or conditions based on Directive 2014/24 cannot be applied as 'interpretations' of Directive 2004/18 to the detriment of economic operators participating in contract award procedures. However, if the legislative intent behind the relevant provisions of Directive 2014/24 is rather to further develop harmonisation of the existing legislation and case-law, and not to rupture it, then there is no obstacle to using them as a guide in interpretation of Directive 2004/18.

64. For these reasons I propose that Question 10 be answered in the sense that in interpreting the provisions of Directive 2004/18 it is permitted to use as a guide to interpretation the content of the provisions of Directive 2014/24, and of the preamble thereto, even though the period for implementing it has not expired, in so far as it codifies case-law applying Directive 2004/18, or adds detail thereto, but is neither contrary to Directive 2004/18 nor sets out unconditional rules or conditions to the detriment of economic operators.

27 — Judgment in *Generali-Providencia Biztosító* (C-470/13, EU:C:2014:2469), paragraph 37. I also note that Advocate General Kokott in her Opinion in *Auroux and Others* (C-220/05, EU:C:2006:410), point 50 referred to a provision of Directive 2004/18 to confirm an interpretation of Directive 93/37, even though the former was not yet relevant *ratione temporis*. The Court, however, observed at paragraph 61 of its judgment in *Auroux and Others* (C-220/05, EU:C:2007:31) that the provision in question of Directive 2004/18 was 'not applicable *ratione temporis* to the facts in the main proceedings'. See also an observation in the Opinion of Advocate General Wahl in Opinion of Advocate General Wahl in *Azienda sanitaria locale n. 5 'Spezzino' and Others* (C-113/13, EU:C:2014:291) point 40, and the exclusion by the Court of the pertinence of Directive 2014/24 at paragraph 8 of the judgment in judgment in *Azienda sanitaria locale n. 5 'Spezzino' and Others* (C-113/13, EU:C:2014:2440).

28 — Here I recall the classic formulation of the Court in its judgment in *Fédesa and Others* (C-331/88, EU:C:1990:391), paragraph 45, where it was held that 'in general the principle of legal certainty precludes a Community measure from taking effect from a point in time before its publication, it may exceptionally be otherwise where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected'. Those necessary conditions for retroactivity do not arise in this case.

V – **Conclusion**

65. On the basis of the preceding reasons, I propose that the Court give the following answers to the questions referred by the Krajowa Izba Odwoławcza:

Questions 1, 2, 3, 5 and 6

Articles 44 and 48(3) 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 conjunction with Article 2 thereof, are to be interpreted in the sense that the term 'where appropriate' imposes no substantive limitation on the circumstances in which an economic operator may rely on the capacities of other entities in order to prove to a contracting authority that it will have the technological and/or professional ability necessary for the execution of a given public contract. The nature of the legal links between the economic operator and the third party entity is irrelevant, but the economic operator must be able to prove to the contracting authority that it in fact has at its disposal all the means to execute the terms of the contract. A tenderer may rely on capacities of other entities to prove its technological and/or professional ability, subject to the limitations following from the nature and objective of the contract, the execution of which is required.

Question 4

Article 48(3) of Directive 2004/18, in conjunction with Article 2 thereof, must be interpreted as meaning that, in the contract notice or the tendering specifications, the contracting authority is required to specify any condition entailing the preclusion of recourse to Article 48(3) of Directive 2004/18 for demonstrating fulfilment of requirements relating to minimum capacities. The contracting authority is otherwise precluded from laying down in the contract notice, or the tendering specifications, express conditions or rules concerning if and how tenderers may rely on the capacities of other entities.

Question 7

Where it is permitted to submit a tender for lots, the principle of equal and non-discriminatory treatment of economic operators set out in Article 2 of Directive 2004/18 does not allow an economic operator, after the submission of tenders, to state to which lot the resources specified by it in order to prove that the conditions for participation in the procedure have been fulfilled are to be attributed.

Questions 8 and 9

Article 2 of Directive 2004/18 requires the annulment and repetition of an electronic auction if a candidate fulfilling the criteria of participation in the contract award was not invited to the electronic auction.

Question 10

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 can be used as guide to interpreting Directive 2004/18, even though the period for implementing Directive 2014/24 is yet to expire, but only in so far as it codifies case-law in which Directive 2004/18 has been applied, or adds detail thereto, and that the relevant provisions of Directive 2014/24 are neither contrary to Directive 2004/18 nor set out obligatory rules or conditions to the detriment of economic operators.