Reports of Cases

ORDER OF THE COURT (Eighth Chamber)

25 April 2018 *

(Reference for a preliminary ruling — Article 53(2) and Article 94 of the Rules of Procedure of the Court of Justice — Article 267 TFEU — Concept of a 'court or tribunal of a Member State' — Proceedings intended to lead to a decision of a judicial nature — National court of auditors — Prior review of the legality and budgetary justification of public expenditure — Manifest inadmissibility)

In Case C-102/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal de Contas (Court of Auditors, Portugal), made by decision of 17 January 2017, received at the Court on 28 February 2017, in the proceedings

Secretaria Regional de Saúde dos Açores,

interested party:

Ministério Público,

THE COURT (Eighth Chamber),

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

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Secretaria Regional de Saúde dos Açores, by P. Linhares Dias and L. da Ponte, advogados,

– the Ministério Público, by J.V. de Almeida,

– the Portuguese Government, by L. Inez Fernandes, M. Figueiredo and F. Batista, acting as Agents,

– the European Commission, by M. Farrajota and A. Tokár, acting as Agents,

having regard to the decision taken, after hearing the Advocate General, to give a decision by reasoned order in accordance with Article 53(2) of the Rules of Procedure of the Court,

* Language of the case: Portuguese.

makes the following

Order

1 This request for a preliminary ruling concerns the interpretation of Article 58(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) 2015/2170 of 24 November 2015 (OJ 2015 L 307, p. 5), ('Directive 2014/24').

2 The request has been made in the context of an appeal brought by the Secretaria Regional de Saúde dos Açores (Regional Ministry of Health of the Azores, Portugal) ('the Ministry of Health') against Decision No 7/2016 of the Secção Regional dos Açores do Tribunal de Contas (Azores Regional Section of the Court of Auditors, Portugal) ('the SRATC') of 26 September 2016 ('the contested decision'), issued in the prior review proceedings No 51/2016, which refused authorisation for the public works contract for the restoration and upgrading of the Velas health centre building (Portugal) concluded between the Ministry of Health of the Autonomous Region of the Azores ('the RAA') and Afavias — Engenharia e Construções — Açores SA ('Afavias'), for a price of EUR 1 387 000.00.

Legal context

EU law

3 Article 94 of the Rules of Procedure of the Court of Justice, entitled 'Content of the request for a preliminary ruling', provides:

'In addition to the text of the questions referred to the Court for a preliminary ruling, the request for a preliminary ruling shall contain:

(a) a summary of the subject matter of the dispute and the relevant findings of fact as determined by the referring court or tribunal, or, at least, an account of the facts on which the questions are based;

(b) the tenor of any national provisions applicable in the case and, where appropriate, the relevant national case-law;

(c) a statement of the reasons which prompted the referring court or tribunal to inquire about the interpretation or validity of certain provisions of European Union law, and the relationship between those provisions and the national legislation applicable to the main proceedings.'

4 Under the heading 'Selection criteria', Article 58(4) of Directive 2014/24 provides:

'With regard to technical and professional ability, contracting authorities may impose requirements ensuring that economic operators possess the necessary human and technical resources and experience to perform the contract to an appropriate quality standard.

Contracting authorities may require, in particular, that economic operators have a sufficient level of experience demonstrated by suitable references from contracts performed in the past. A contracting authority may assume that an economic operator does not possess the required professional abilities where the contracting authority has established that the economic operator has conflicting interests which may negatively affect the performance of the contract.

In procurement procedures for supplies requiring siting or installation work, services or works, the professional ability of economic operators to provide the service or to execute the installation or the work may be evaluated with regard to their skills, efficiency, experience and reliability.'

Portuguese law

5 Article 214 of the Constitution provides:

'1. The Tribunal de Contas [Court of Auditors] shall be the senior body with authority to scrutinise the legality of public expenditure and judge such accounts as the law may require to be submitted to it. It shall particularly be responsible for:

(a) issuing an opinion on the General State Accounts, including the social security accounts;

(b) issuing an opinion on the accounts of the Azores and Madeira Autonomous Regions;

(c) enforcing liability for financial infractions, as laid down by law;

(d) fulfilling such other responsibilities as the law may confer upon it.

2. Without prejudice to the provisions of Article 133(m), the term of office of the President of the Court of Auditors shall be four years.

3. The Court of Auditors may operate in a decentralised manner, in regional sections, as laid down by law.

4. In the Azores and Madeira Autonomous Regions there shall be sections of the Court of Auditors with full responsibility for the matter in question in the respective region, as laid down by law.'

6 It follows from Article 5(1)(c) of the Law on the Organisation and Procedure of the Tribunal de Contas (Court of Auditors), which was approved by Law No 98/97 of 26 August 1997 (*Diário da República* I, Series I, I-A, No 196 of 26 August 1997; 'the LOPTC') that it is for the Tribunal de Contas (Court of Auditors), in particular, to carry out prior review proceedings to determine the legality and the budgetary justification for acts and contracts of any kind involving expenditure or representing a direct or indirect charge or liability for the bodies referred to in Article 2(1) and (2)(a) to (c), and for bodies of any kind created by the State or by any other public body to perform administrative functions initially incumbent on the public administration, on which charges have been conferred, directly or indirectly, including in the form of guarantee by the body which created them.

7 Article 96(1) of the LOPTC provides:

'1. Final decisions on refusal, award and exemption from authorisation, or on allowances, including those issued by regional chambers, may be challenged by appeal lodged with the Plenary Assembly of the First Chamber by:

(a) the public prosecutor, for all final decisions;

(b) the author of the act or the authority approving the contract which is the subject of the refusal of the authorisation;

(c) the person responsible for the decisions concerning approvals.'

8 Under the heading 'Admission documents', Article 40 of Regional Legislative Decree No 27/2015/A of 29 December 2015, approving the legal regime of public procurement contracts in the [RAA] and transposing Directive 2014/24 into the regional legal order of the Azores (*Diário da República*, Series I, No 253 of 29 December 2015; 'Regional Decree No 27/2015/A') provides:

'3. In addition to the requirements of the preceding paragraph, the call for tenders or the tender specifications may also require proof of other qualifying criteria relating to the successful tenderer's economic and financial standing and technical and professional ability to perform the contract, as set out in the following subparagraphs.

…

5. For the purposes of assessing technical and professional ability, the regional contracting entities may require:

(a) a document certifying that the tenderer has sufficient human and technical resources to ensure the sound performance of the contract;

(b) a document certifying that the human and technical resources available to the tenderer demonstrate professional experience relevant to the sound performance of the contract;

(c) suitable references, relating to contracts previously performed by the successful tenderer, which demonstrate a sufficient level of experience appropriate for the sound performance of the contract.

6. Where the conditions referred to in paragraphs 3 to 5 apply, the regional contracting authorities are required to indicate in the procurement notice the minimum thresholds of economic, financial, technical and professional capacity required and the documents that demonstrate them.'

9 In accordance with Articles 100(1) and 104, Regional Decree No 27/2015/A entered into force on 1 January 2016 and applies to public procurement procedures undertaken from that date.

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

10 By decision of 8 March 2016, the Ministry of Health authorised the opening of a tendering procedure for the award of a public works contract for the restoration and upgrading of the Velas health centre building, located on an island in the Azores archipelago, for an amount of approximately EUR 1 400 000.00 excluding value added tax.

11 Within the framework of that procedure, the procurement notice, published in the *Jornal Oficial da República* of the RAA on 11 March 2016 (Series II, No 50), contains a point 8.3(a) under which, in accordance with Article 40(3) of Regional Decree No 27/2015/A, contracts may be awarded only to economic entities which demonstrate, at the admission stage, that they have each performed three public contracts in the RAA with a unit value greater than EUR 750 000.00 ('the criterion relating to geographical qualification').

12 Moreover, it is apparent from point 25.1(e) of that contract notice that the successful tenderer must, in particular, submit, at the stage of admission, references issued by the respective project supervisors of each of the three public contracts in question, establishing compliance with the criterion relating to geographical qualification.

13 By Decree No 44/2016 of 30 March 2016, the Council of the Government of the RAA ratified the decision of the Minister of Health of 8 March 2016, opening the invitation to tender and approving the relevant documents.

14 By Decision No 116/2016 of the Council of the Government of 7 June 2016, the contract was awarded to Afavias, one of the two tenderers which had replied to the invitation to tender.

15 The contract concluded with Afavias was submitted to the SRATC for prior review in accordance with Article 214(1) of the Constitution.

16 By the contested decision, the SRATC refused to grant prior authorisation to that contract on the ground that the criterion relating to geographical qualification required in the contract notice infringes Article 40(3) and (5)(c) of Regional Decree No 27/2015/A. Moreover, according to the SRATC, such a criterion does not make it possible to establish the technical and professional capacity of the successful tenderer for the performance of the contract in question. In those circumstances, the contract notice in question is capable of restricting competition in breach of, in particular, the principle of equal treatment.

17 In support of its appeal against the contested decision before the Tribunal de Contas (Court of Auditors), the Ministry of Health contends that the criterion relating to geographical qualification is compliant with Article 40 of Regional Decree No 27/2015/A, which itself is compliant with both Article 58 of Directive 2014/24 and Annex XII to that directive.

18 The Tribunal de Contas (Court of Auditors) takes the view that the requirement that tenderers prove evidence of their past experience is likely to demonstrate their technical and professional capacity to perform the contract in question. However, it considers it excessive to require tenderers to furnish experience in the field covered by that contract solely in a specific country or region, as this would constitute a failure to respect the principles of transparency, non-discrimination and equal treatment.

19 However, the wording of Article 58(4) of Directive 2014/24 does not make it possible to determine whether 'the suitable references, relating to contracts performed by the successful tenderer in the past, which demonstrate a sufficient level of experience appropriate for the sound performance of the contract', which are listed in Article 40(5)(c) of Regional Decree No 27/2015/A, may include in a specific procedure a criterion relating to geographical qualification relating solely to work carried out in the past in the RAA. In addition, the referring court notes the lack of case-law of the Court of Justice on this matter.

20 In those circumstances, the Tribunal de Contas (Court of Auditors) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Must Article 58(4) of Directive No 2014/24 be interpreted as precluding national legislation, such as that contained in Article 40(3) and (5)(c) of Regional Decree No 27/2015/A which, in the area of public procurement, allows a geographical criterion, requiring three public contracts to have been performed previously in the same autonomous region, to be imposed as a qualifying criterion?'

Admissibility of the request for a preliminary ruling

21 Under Article 53(2) of the Rules of Procedure, where a request or an application 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.

22 That provision must be applied in the present case.

23 In accordance with settled case-law of the Court, the procedure provided for by Article 267 TFEU is an instrument for cooperation between the Court and national courts by means of which the Court provides national courts with the criteria for the interpretation of EU law which they need in order to decide the disputes before them (see, inter alia, judgment of 27 November 2012, *Pringle*, C-370/12, EU:C:2012:756, paragraph 83, and order of 8 September 2016, *Google Ireland and Google Italy*, C-322/15, EU:C:2016:672, paragraph 14).

24 It follows that, in order to be able to refer a matter to the Court in the context of the preliminary ruling procedure, the referring body must be capable of being classified as a 'court or tribunal' within the meaning of Article 267 TFEU, this being a matter for the Court to verify on the basis of the request for a preliminary ruling.

25 The requirements concerning the content of a request for a preliminary ruling are expressly set out in Article 94 of the Rules of Procedure, of which the referring court is deemed, in the context of the cooperation instituted by Article 267 TFEU, to be aware and which it is bound to observe scrupulously (see orders of 3 July 2014, *Talasca*, C-19/14, EU:C:2014:2049, paragraph 21, and of 8 September 2016, *Google Ireland and Google Italy*, C-322/15, EU:C:2016:672, paragraph 15).

26 Those requirements are, moreover, noted in paragraphs 13 and 15 of the Recommendations of the Court to national courts and tribunals, in relation to the initiation of preliminary ruling proceedings (OJ 2016 C 439, p. 1).

27 While being intended to enable the governments of the Member States and other interested parties to submit observations in accordance with Article 23 of the Statute of the Court of Justice of the European Union, the information which must be included in the order for reference is also intended to enable the Court, first, to verify the admissibility of such a request and, second, to provide useful answers to the questions submitted by the referring court.

28 Since the request for a preliminary ruling is the basis for the proceedings before the Court, it is essential that, in that application, the national court should, in particular, set out the factual and regulatory background to the dispute in the main proceedings.

29 That obligation must particularly be observed in certain areas characterised by complex factual and legal situations (see, to that effect, judgment of 26 January 1993, *Telemarsicabruzzo and Others*, C-320/90 to C-322/90, EU:C:1993:26, paragraph 7; order of 19 March 1993, *Banchero*, C-157/92, EU:C:1993:107, paragraph 5; and judgment of 12 December 2013, *Ragn-Sells*, C-292/12, EU:C:2013:820, paragraph 39), but also when the body making the reference has been entrusted by law with functions of a different nature.

30 In the latter case, the admissibility of the request for a preliminary ruling may depend on whether a national body can be classified as 'a court or tribunal' within the meaning of Article 267 TFEU when it is performing judicial functions, but not when exercising other functions, inter alia functions of an administrative nature (see order of 26 November 1999, *ANAS*, C-192/98, EU:C:1999:589, paragraph 22).

31 In that regard, it should be recalled that, in accordance with settled case-law, in order to determine whether a body making a reference is a court or tribunal for the purposes of Article 267 TFEU, which is a question governed by EU law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent (see, inter alia, judgments of 17 September 1997, *Dorsch Consult*, C-54/96, EU:C:1997:413, paragraph 23; of 19 December 2012, *Epitropos tou Elegktikou Synedriou*, C-363/11, EU:C:2012:825, paragraph 18; and of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, paragraph 38).

32 Moreover, the notion of a court or tribunal within the meaning of Article 267 TFEU can, by its very nature, designate only an authority acting as a third party in relation to the authority which adopted the decision forming the subject matter of the proceedings (judgments of 30 March 1993, *Corbiau*, C-24/92, EU:C:1993:118, paragraph 15, and of 19 September 2006, *Wilson*, C-506/04, EU:C:2006:587, paragraph 49).

33 Lastly, a court or tribunal may refer a question to the Court only if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature (see, inter alia, orders of 5 March 1986, *Greis Unterweger*, 318/85, EU:C:1986:106, paragraph 4, and of 26 November 1999, *ANAS*, C-192/98, EU:C:1999:589, paragraph 21; and judgment of 19 December 2012, *Epitropos tou Elegktikou Synedriou*, C-363/11, EU:C:2012:825, paragraph 19).

34 In the present case, neither in its request for a preliminary ruling nor in its reply to the question of 5 October 2017 put to it by the Court in a request for information did the Tribunal de Contas (Court of Auditors) establish that it has, in the dispute in the main proceedings, the status of a 'court or tribunal' within the meaning of Article 267 TFEU.

35 In the context of the dispute in the main proceedings, it is not clear whether the decision to be taken by the Tribunal de Contas (Court of Auditors) in the prior review proceedings as to the legality and the budgetary justification in question in the main proceedings will be taken by that body in a judicial capacity and not purely in an administrative capacity (see, by analogy, judgment of 19 December 2012, *Epitropos tou Elegktikou Synedriou*, C-363/11, EU:C:2012:825, paragraph 28).

36 Moreover, it is not clear from the file submitted to the Court whether the Tribunal de Contas (Court of Auditors) has the status of a third party in relation to the authority which adopted the contested decision and, thus, whether the action brought before the plenary assembly of that body on the basis of Article 96(1) of the LOPTC against that contested decision does not constitute an administrative appeal (see, by analogy, judgments of 30 May 2002, *Schmid*, C-516/99, EU:C:2002:313, paragraph 37, and of 19 December 2012, *Epitropos tou Elegktikou Synedriou*, C-363/11, EU:C:2012:825, paragraph 23).

37 On the basis of the information submitted by the Tribunal de Contas (Court of Auditors) in reply to that request for information sent to it by the Court, it cannot therefore be established that, in the case in the main proceedings, it is performing a judicial function.

38 It follows that the request for a preliminary ruling from the Tribunal de Contas (Court of Auditors) must be declared to be manifestly inadmissible.

39 Furthermore, it should be pointed out that the Tribunal de Contas (Court of Auditors) has not established the findings necessary for the Court to ascertain whether, in the case in the main proceedings, there is certain cross-border interest. As has been pointed out in paragraphs 23 to 25 of the present order, it follows from Article 94 of the Rules of Procedure that the Court must be able to find in a request for a preliminary ruling a summary of the facts on which the questions are based and the connection, inter alia, between those facts and the questions. Therefore, the findings necessary to make possible verification of the existence of certain cross-border interest, and more generally all the findings to be made by the national courts and on which the applicability of an act of secondary and primary legislation of the European Union depends, must be made before the questions are referred to the Court (see judgment of 11 December 2014, *Azienda sanitaria locale n. 5 'Spezzino' and Others*, C-113/13, EU:C:2014:2440, paragraph 47).

40 In that regard, a conclusion that there is certain cross-border interest cannot be inferred hypothetically from certain factors which, considered in the abstract, might constitute evidence to that effect, but must be the positive outcome of a specific assessment of the circumstances of the contract at issue (judgment of 6 October 2016, *Tecnoedi Costruzioni*, C-318/15, EU:C:2016:747, paragraph 22).

41 Notwithstanding the geographical isolation of the Azores archipelago, the request for a preliminary ruling does not contain any information positively indicating the existence of certain cross-border interest.

42 It follows from all of the foregoing considerations that the request for a preliminary ruling made by the Tribunal de Contas (Court of Auditors) must be declared manifestly inadmissible.

Costs

43 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 (Eighth Chamber) hereby orders:

The request for a preliminary ruling brought by the Tribunal de Contas (Court of Auditors, Portugal), by decision of 17 January 2017, is manifestly inadmissible.

[Signatures]