Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

13 June 2013*

(Public contracts — Directive 2004/18/EC — Definition of 'public contract' — Article 1(2)(a) — Contract concluded between two local authorities. — Transfer by one entity of the responsibility for cleaning certain of its buildings to another entity in return for financial compensation)

In Case C-386/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberlandesgericht Düsseldorf (Germany), made by decision of 6 July 2011, received at the Court on 20 July 2011, in the proceedings

Piepenbrock Dienstleistungen GmbH & Co. KG

v

Kreis Düren,

intervening party:

Stadt Düren,

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Chamber, A. Rosas, E. Juhász, D. Šváby (Rapporteur) and C. Vajda, Judges,

Advocate General: V. Trstenjak,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 7 February 2013,

after considering the observations submitted on behalf of:

— Piepenbrock Dienstleistungen GmbH & Co. KG, by L. Wionzeck, Rechtsanwalt,

— Kreis Düren, by R. Gruneberg and A. Wilden, Rechtsanwälte,

— the Italian Government, by G. Palmieri, acting as Agent, assisted by W. Ferrante, avvocato dello Stato,

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

* Language of the case: German.

— the European Commission, by A. Tokár, G. Wilms and C. Zadra, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 1(2)(a) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

2 The request has been made in proceedings between Piepenbrock Dienstleistungen GmbH & Co. KG ('Piepenbrock') and Kreis Düren (District of Düren, Germany) concerning a draft contract pursuant to which Kreis Düren is to transfer to Stadt Düren (City of Düren) the responsibility for cleaning buildings situated on the latter's territory, but belonging to and used by Kreis Düren, in return for financial compensation.

Legal context

European Union law

3 Recital 2 in the preamble to Directive 2004/18 states:

'The award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law entities, is subject to the respect of the principles of the [EC] Treaty and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency. However, for public contracts above a certain value, it is advisable to draw up provisions of Community coordination of national procedures for the award of such contracts which are based on these principles so as to ensure the effects of them and to guarantee the opening-up of public procurement to competition. ...'

4 Article 1 of Directive 2004/18 provides:

'...

2.

(a) "Public contracts" are 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 within the meaning of this Directive....

(d) "Public service contracts" are public contracts other than public works or supply contracts having as their object the provision of services referred to in Annex II.

...

8. The terms “contractor”, “supplier” and “service provider” mean any natural or legal person or public entity or group of such persons and/or bodies which offers on the market, respectively, the execution of works and/or a work, products or services.

The term “economic operator” shall cover equally the concepts of contractor, supplier and service provider. It is used merely in the interest of simplification.

...’

5 Building-cleaning services are services within the meaning of Directive 2004/18, in accordance with Annex II A, Category 14, thereto.

German law

6 Article 28(2) of the Basic Law for the Federal Republic of Germany (Grundgesetz für die Bundesrepublik Deutschland) provides:

‘Municipalities must be guaranteed the right to regulate all local affairs on their own responsibility, within the limits prescribed by legislation. Within the limits of their functions designated by legislation, associations of municipalities shall also have the right of self-government according to legislation. ...’

7 Paragraph 23 of the Law on work performed jointly by local authorities in the *Land* of North Rhine-Westphalia (Gesetz über kommunale Gemeinschaftsarbeit des Landes Nordrhein-Westfalen; ‘the GkG NRW’) is worded as follows:

‘1. Local authorities and associations of local authorities may agree that one of their number shall assume competence for individual tasks incumbent on the other participants or undertake to perform such tasks for the other participants.

2. If one participant assumes competence for a task incumbent on the others, the right and obligation to perform the task shall be transferred to that participant. If one of the participants undertakes to perform a task for the others, their rights and obligations as the parties on whom that task is incumbent shall remain unaffected.

3. The agreement may grant the other participants a right of involvement in the fulfilment or performance of the tasks; the same shall apply to the appointment of service personnel.

4. Provision shall be made in the agreement for appropriate compensation, which shall, as a rule, be so calculated as to cover the costs arising from the assumption or performance of tasks.

5. If the period of validity of the agreement is unlimited or exceeds 20 years, the agreement shall specify under what conditions and in what form it may be terminated by a participant.’

8 The order for reference notes that that the GkG NRW thus makes a distinction between ‘mandating’ agreements, pursuant to which one entity undertakes to perform certain tasks on behalf of another entity, and ‘delegating’ agreements, involving a transfer of competence, under which one entity performs a task incumbent on another. It also notes that, according to the national case-law, ‘mandating’ agreements are governed by public procurement law in so far as they involve a pecuniary interest.

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

9 Kreis Düren is an association of local authorities which include Stadt Düren. Pursuant to a number of contracts, Piepenbrock carried out the cleaning of buildings owned by Kreis Düren.

10 Kreis Düren drew up a draft public contract with Stadt Düren whereby it would transfer responsibility for the cleaning of its office, administrative and school buildings, located within the territory of Stadt Düren, to the latter, initially for a two-year pilot phase.

11 Article 1 of the draft contract is worded as follows:

'1. Kreis Düren shall assign the task incumbent on it of cleaning those buildings in its possession which are located in the municipal territory of Düren to Stadt Düren with the effect of discharging its obligations.

2. The task of cleaning shall comprise the cleaning of premises and glass in the office, administrative and school buildings of Kreis Düren.

3. Stadt Düren shall assume sole responsibility for the task described under subparagraphs 1 and 2. The right and obligation to perform this task shall be transferred to Stadt Düren (Paragraph 23(1), first option, and Paragraph 23(2), first sentence, GkG NRW). Stadt Düren shall assume the duties of the Kreis (District) and shall to that extent have sole responsibility.

4. Stadt Düren may avail itself of the services of third parties to perform the tasks assigned to it pursuant to subparagraph 1.'

12 That draft contract provides that Stadt Düren is to receive financial compensation for the costs which it incurs, in accordance with Paragraph 23(4) of the GkG NRW, established on the basis of an hourly rate.

13 It is also apparent from the file to which the Court has had access that that draft contract reserves to Kreis Düren the right unilaterally to terminate the contract in the event of improper implementation on the part of Stadt Düren.

14 Finally, it follows from the order for reference that the cleaning tasks concerned were to be carried out by Dürener Reinigungsgesellschaft mbH, a company owned by Stadt Düren.

15 Piepenbrock brought an action by which it sought an order prohibiting Kreis Düren from entering into that contract without carrying out a public procurement procedure, claiming that the accomplishment of those tasks in return for remuneration constitutes a commercial service that could also be furnished by private service providers. It further argued that the draft contract does not involve a type of in-house award to which public procurement law does not apply, in accordance with the judgment in Case C-107/98 *Teckal* [1999] ECR I-8121, since the conditions for the application of that exception are not met, while a reference to Case C-480/06 *Commission* v *Germany* [2009] ECR I-4747 is not relevant, in the absence of 'horizontal cooperation' between the two public entities concerned.

16 Piepenbrock's action was dismissed at first instance on the ground that the draft contract is a 'delegating' agreement, in accordance with Paragraph 23 of the GkG NRW, which is not subject to public procurement law. Piepenbrock appealed against that decision to the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf), claiming that that description of the draft contract as a delegating agreement is meaningless in view of its characteristics.

17 Kreis Düren claims, on the contrary, that such a public-law delegation of tasks constitutes a decision on internal organisational matters, which is not subject to the law on public procurement.

18 The referring court draws attention to that characteristic of the draft contract, raising the question of the effect, as regards the application of the rules on public procurement, of the public-law nature of that contract.

19 It finds, first, that the task concerned does not involve the exercise of official authority, within the meaning of the first paragraph of Article 51 TFEU and Article 62 TFEU, and is therefore not exempt, on that basis, from the provisions of the TFEU relating to the freedom of establishment and the freedom to provide services or acts of secondary legislation implementing those freedoms, such as Directive 2004/18.

20 The referring court finds, secondly, that the exception demonstrated in *Teckal* does not apply to the draft contract at issue in the present proceedings, since Kreis Düren does not exercise over Stadt Düren – or over the company Dürener Reinigungsgesellschaft – a control similar to that which it exercises over its own departments.

21 The referring court points out, thirdly, that the context of the case before it differs from the circumstances of the case which gave rise to the judgment in Case C-480/06 *Commission* v *Germany*, inasmuch as the draft contract at issue in the present case is characterised by an absence of cooperation between the public entities concerned; one of them is purely and simply delegating one of its tasks to the other, something which is authorised by the GkG NRW.

22 However, the referring court is unsure whether, in the wake of the judgment in Case C-480/06 *Commission* v *Germany*, types of contracts between local authorities other than that at issue in that judgment are exempt from public procurement law. Thus, it raises the question of whether a distinction must be made between contracts concerning public service tasks as such, like waste disposal, and contracts which concern only indirectly the performance of those tasks, such as, in the present case, the cleaning of buildings used for the performance of such a task.

23 The referring court is also unsure whether the law on public procurement is generally inapplicable to agreements on cooperation between local authorities, as 'acts of internal administrative organisation'. It points out, in this regard, that the administrative organisation of the Member States is not a matter over which the European Union has any power and, moreover, that the administrative autonomy of the municipalities, and thus the possibility of establishing voluntary cooperation between municipalities, is guaranteed by Article 28(2) of the Basic Law for the Federal Republic of Germany.

24 On the other hand, the referring court observes that the purpose of the draft contract is virtually identical to any contract governed by Directive 2004/18 under which Stadt Düren would be commissioned to provide cleaning services for pecuniary interest. It asks, in that respect, whether the distinction made by the GkG NRW between 'mandating' agreements and 'delegating' agreements – the contract concerned being in the second category – is conclusive, given that, when a contract relates to ancillary activities which do not directly concern the external activity of local authorities, the fact that a transfer of competence takes place by virtue of the contract is a purely technical point, as the choice of either type of contract in fact produces identical effects in economic terms. For that reason, the referring court considers that, in the circumstances of the main proceedings, the use of a 'delegating' agreement might amount to 'contriving to circumvent the rules on public procurement', as referred to in paragraph 48 of the judgment in Case C-480/06 *Commission* v *Germany*.

25 In that context, the Oberlandesgericht Düsseldorf decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Is a "public contract" within the meaning of Article 1(2)(a) of Directive 2004/18/EC … to be understood as … meaning a contract between two local authorities whereby one of them assigns strictly limited competence to the other in return for the reimbursement of costs, in particular where the task assigned concerns only ancillary business, not official activities as such?'

The question referred for a preliminary ruling

26 By its question, the referring court asks, in essence, whether a contract such as that at issue in the present case – whereby one public entity assigns to another public entity the task of cleaning certain office, administrative and school buildings, the latter entity being authorised to avail of the services of third parties for the accomplishment of that task, in return for financial compensation intended to correspond to the costs incurred in the performance of the task, while reserving the power to supervise the proper execution of that task – constitutes a public service contract within the meaning of Article 1(2)(d) of Directive 2004/18, and is, as such, subject to the provisions of that directive.

27 In that regard, it must be noted that, by the draft contract at issue in the main proceedings, Kreis Düren reserves to itself such a supervisory power, as that contract provides that Kreis Düren may terminate it unilaterally in the event of improper implementation on the part of Stadt Düren.

28 It should be noted that, in accordance with Article 1(2) of Directive 2004/18, a contract for pecuniary interest concluded in writing between an economic operator and a contracting authority, and having as its object the provision of services referred to in Annex II A to that directive, is a public contract.

29 In that regard, first, it is immaterial, on the one hand, whether that operator is itself a contracting authority and, on the other hand, whether the body concerned is primarily profit-making, whether it is structured as an undertaking or whether it has a continuous presence on the market (judgment of 19 December 2012 in Case C-159/11 *Ordine degli Ingegneri della Provincia di Lecce and Others* [2012] ECR, paragraph 26).

30 Secondly, activities such as those which are the subject of the draft contract are building-cleaning services referred to in Annex II A, Category 14, to Directive 2004/18.

31 Thirdly, a contract must be considered as being 'for pecuniary interest', within the meaning of Article 1(2)(a) of Directive 2004/18 even if the remuneration provided for remains limited to reimbursement of the expenditure incurred to provide the agreed service (see, to that effect, *Ordine degli Ingegneri della Provincia di Lecce and Others*, paragraph 29).

32 Subject to the checks which must be carried out by the referring court, a contract such as that envisaged in the case in the main proceedings does appear to have all the characteristics referred to above, and therefore constitutes, in principle, a public contract.

33 Moreover, such a contract does not appear to be one of the two types of contracts which, although entered into by public entities, do not come within the scope of European Union public procurement law.

34 The first type of contracts are those concluded by a public entity with a person who is legally distinct from that entity where, at the same time, that entity exercises over the person concerned a control which is similar to that which it exercises over its own departments and where that person carries out the essential part of its activities with the entity or with entities which control it (see, to that effect, *Teckal*, paragraph 50, and *Ordine degli Ingegneri della Provincia di Lecce and Others*, paragraph 32).

35 In that respect, it is common ground that none of those conditions is satisfied in the context of a contract such as that envisaged in the case before the referring court. It is clear from the order for reference that, in the context of the main proceedings, first of all, neither entity controls the other. Moreover, the entity which is assigning the execution of a task to another, while it reserves the right to supervise the proper execution of that task, does not exercise over the second entity a control capable of being classified as similar to that which it exercises over its own departments. Lastly, that second entity is not carrying out the essential part of its activities for the first entity.

36 The second type of contracts are those which establish cooperation between public entities with the aim of ensuring that a public task that all of them have to perform is carried out (*Ordine degli Ingegneri della Provincia di Lecce and Others*, paragraph 34).

37 In those circumstances, the European Union rules on public procurement are not applicable in so far as such contracts are concluded exclusively by public entities, without the participation of a private party, no private provider of services is placed in a position of advantage vis-à-vis competitors and implementation of that cooperation is governed solely by considerations and requirements relating to the pursuit of objectives in the public interest (*Ordine degli Ingegneri della Provincia di Lecce and Others*, paragraph 35).

38 All of the above criteria are cumulative, with the result that a contract between public entities can fall outside the scope of European Union public procurement rules by virtue of that exception only if that contract fulfils all of those criteria (see, to that effect, *Ordine degli Ingegneri della Provincia di Lecce and Others*, paragraph 36).

39 However, it follows from the findings of the referring court that the aim of the draft contract at issue in the main proceedings does not appear to be to establish cooperation between the two contracting public entities with a view to carrying out a public task that both of them have to perform.

40 Furthermore, it also follows from those findings that that contract authorises the use of the services of a third party for the accomplishment of that task, with the result that that third party might be placed in a position of advantage vis-à-vis other undertakings active on the same market.

41 In the light of the foregoing, the answer to the question referred is that a contract such as that at issue in the main proceedings – whereby, without establishing cooperation between the contracting public entities with a view to carrying out a public service task that both of them have to perform, one public entity assigns to another the task of cleaning certain office, administrative and school buildings, while reserving the power to supervise the proper execution of that task, in return for financial compensation intended to correspond to the costs incurred in the performance of the task, the second entity being, moreover, authorised to avail of the services of third parties which might be capable of competing on the market for the accomplishment of that task – constitutes a public service contract within the meaning of Article 1(2)(d) of Directive 2004/18.

Costs

42 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 (Fifth Chamber) hereby rules:

A contract such as that at issue in the main proceedings – whereby, without establishing cooperation between the contracting public entities with a view to carrying out a public service task that both of them have to perform, one public entity assigns to another the task of cleaning certain office, administrative and school buildings, while reserving the power to supervise the proper execution of that task, in return for financial compensation intended to correspond to the costs incurred in the performance of the task, the second entity being, moreover, authorised to avail of the services of third parties which might be capable of competing on the market for the accomplishment of that task – constitutes a public service contract within the meaning of Article 1(2)(d) 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.

[Signatures]