Reports of Cases

JUDGMENT OF THE COURT (Tenth Chamber)

5 September 2019*

(Reference for a preliminary ruling — Review procedures on the award of public supply and public works contracts — Directive 89/665/EEC Action for annulment of the decision awarding a public contract by a tenderer whose bid was unsuccessful — Counterclaim brought by the successful tenderer — Admissibility of the main action in the event that the counterclaim is well founded)

In Case C-333/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Council of State, Italy), made by decision of 14 February 2018, received at the Court on 23 May 2018, in the proceedings

Lombardi Srl

v

Comune di Auletta,

Delta Lavori SpA,

Msm Ingegneria Srl,

intervening party:

Robertazzi Costruzioni Srl,

THE COURT (Tenth Chamber),

composed of C. Lycourgos, President of the Chamber, E. Juhász (Rapporteur) and M. Ilešič, 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

– Lombardi Srl, by A. Brancaccio and A. La Gloria, avvocati,

– Delta Lavori SpA, by G.M. Di Paolo and P. Piselli, avvocati,

* Language of the case: Italian.

– the Italian Government, by G. Palmieri, acting as Agent, and by D. Del Gaizo, avvocato dello Stato,

– the European Commission, by G. Gattinara and P. Ondrůšek and by L. Haasbeek, 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 the third subparagraph of Article 1(1) and (3) of Council 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 of 11 December 2007 (OJ 2007 L 335, p. 31) ('Directive 89/665').

2 The request has been made in proceedings between Lombardi Srl, on the one hand, and the Commune di Auletta (Municipality of Auletta, Italy), Delta Lavori SpA and Msm Ingegneria, on the other, concerning the award of a public contract by the Municipality of Auletta to design and carry out hydrogeological works.

Legal context

European Union law

3 Article 1 of Directive 89/665, entitled 'Scope and availability of review procedures', provides:

'1. This Directive applies to contracts referred to in 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)], unless such contracts are excluded in accordance with Articles 10 to 18 of that Directive.

Contracts within the meaning of this Directive include public contracts, framework agreements, public works concessions and dynamic purchasing systems.

Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive 2004/18/EC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed Community law in the field of public procurement or national rules transposing that law.

…

3. Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.

…'

Italian law

4 Article 112 of the codice di procedura civile (Code of Civil Procedure) provides:

'The court must address the application in its entirety, but may not exceed the limits thereof; and may not rule of its own motion on counterclaims that may only be raised by the parties.'

5 Under the terms of Article 2697 of the codice civile (Civil Code):

'The party seeking to enforce a right in the courts must prove the facts on which that claim is founded. The party alleging that those facts are immaterial or that the right has altered or been extinguished must prove the facts on which that plea is founded.'

6 Article 2909 of the codice civile (Civil Code) is drafted as follows:

'Findings made in judgments which have acquired the force of *res judicata* shall be binding in all respects on the parties, their lawful successors and assignees.'

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

7 In a notice published on 29 June 2015, the Commune di Auletta (Municipality of Auletta) issued an open call for tenders with a view to awarding a contract for the design and execution of hydrogeological improvements to the historical centre of that municipality. According to the procurement documents, the total amount of that contract was EUR 6 927 970.95 and the selection process was to be based on the most economically advantageous bid.

8 Lombardi, placed third in the final ranking, brought proceedings before the Tribunale amministrativo regionale per la Campania (Regional Administrative Court, Campania, Italy) disputing, first, the admission to the tendering procedure of the successful tenderer, Delta Lavori, on the ground that the designer indicated by that firm, Msm Ingegneria, did not possess the characteristics required by the tender specifications, and, second, the tenderer in second place, Robertazzi Costruzioni Srl — Giglio Costruzioni Srl, a temporary association of undertakings.

9 Delta Lavori requested that the action be dismissed and filed a counterclaim contending that Lombardi should have been excluded from the public procurement procedure (the '"excluding" counterclaim'), on the grounds that in the course of the procedure, the latter had ceased to satisfy the eligibility criteria laid down in the call for tender.

10 The remaining tenderers ranked lower than Lombardi did not intervene in the dispute.

11 The Tribunale amministrativo regionale per la Campania (Regional Administrative Court, Campania) gave priority to examining Delta Lavori's counterclaim, and granted that claim, after declaring the public procurement procedure in the main proceedings invalid due to the fact that Lombardi had not been excluded. On that basis, that court dismissed Lombardi's claim as being inadmissible on the ground of its lack of interest in bringing proceedings.

12 Lombardi brought an appeal before the Consiglio di Stato (Council of State, Italy), alleging, inter alia, infringement of the principles established by the Court in the judgment of 5 April 2016, *PFE*, (C-689/13, EU:C:2016:199). It argued that irrespective of the court's ruling on the counterclaim, the substance of the main action should have been examined in consideration of Lombardi's derived (*strumentale*) and indirect interest in having the failure to exclude the successful tenderer declared

unlawful, since a decision to that effect could have led to the contracting authority cancelling the tendering procedure at issue in the main proceedings and issuing a new public procurement procedure.

13 The Fifth Chamber of the Consiglio di Stato (Council of State), having observed divergences in the case-law of that court regarding the implementation of the judgment of 5 April 2016, *PFE* (C-689/13, EU:C:2016:199), decided to refer the following question to the plenary session of that court:

'In an action for review against measures in an open public procurement procedure, is the court required to examine the main action and the successful tenderer's counterclaim to exclude the applicant, even if other candidates, whose tenders have not been challenged, took part in the procurement process and the court finds that only the contested tenders are marred by the irregularities relied on in support of the action?'

14 The Plenary Session of the Consiglio di Stato (Council of State) noted that, under national case-law, if only two tenderers have responded to a call for tenders and each has brought an action seeking exclusion of the other, both the main action and the counterclaim have to be examined. Furthermore, it was clear to that court that where there are more than two tenderers, the same applies if the main action is founded on pleas which, if granted, would result in the entire procedure being repeated, whether those claims contest the eligibility of the successful tenderer and the other tenderers still in play in the procedure, or the validity of the selection procedure itself.

15 However, doubts remain where, as in the present case, the main action is not founded on pleas which, if granted, would result in the entire procedure being repeated.

16 There is conflicting national case-law on that point. One branch of case-law interprets the judgment of 5 April 2016, *PFE* (C-689/13, EU:C:2016:199) as requiring, under those circumstances, examination of the main action even after the counterclaim has been granted, regardless of how many undertakings are party to the proceedings or the irregularities raised as pleas in the main action. The referring court observes, however, that that branch of case-law fails to take account of the judgment of 21 December 2016, *Bietergemeinschaft Technische Gebäudebetreuung und Caverion Österreich* (C-355/15, EU:C:2016:988), in which the Court of Justice held that Directive 89/665 does not preclude a tenderer who has been excluded from a public procurement procedure by a decision of the contracting authority which has become final being refused access to a review of the decision awarding the public contract concerned. The referring court adds that that line of case-law fails to take account of the fact that the review and cancellation of the public procurement procedure is entirely optional, with the result that the main applicant does not have a vested legal interest in the case.

17 Under the other branch of case-law, the main action for review must be examined solely where the merits of the claim would confer a real advantage on the applicant, meaning that the bids by tenderers not party to the proceedings were marred by the same illegality as that underpinning the decision allowing the main action for review. However, according to the referring court, that interpretation has been criticised as being at variance with the judgment of 5 April 2016, *PFE* (C-689/13, EU:C:2016:199) and overlooking the fact that, even if, upon examination of the counterclaim and the main action, it were found that all of the bids, including those submitted by tenderers not party to the proceedings, contain defects analogous to those marring the bids examined by the court, the fact remains that the contracting authority would merely have the option, but not the obligation, to recommence the tendering procedure.

18 In the opinion of the Plenary Session of the Consiglio di Stato (Council of State), for reasons of consistency with national procedural law and the principle of procedural autonomy based on the initiative of the parties, the applicant's legal interest should be assessed in concrete terms by the court hearing the case, not by reference to purely theoretical grounds. From that perspective, Member States should be allowed to determine the methods for demonstrating whether the party has a vested interest

in the case, whilst safeguarding the rights of defence of the tenderers still in play in the public procurement procedure, but not joined to the proceedings, and observing the principles in relation to the burden of proof.

19 In those circumstances, the Consiglio di Stato (Council of State) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Can the third paragraph of Article 1(1) and Article 1(3) of Directive [89/665] be interpreted as allowing, where several undertakings have participated in the tendering procedure and have not been joined to the legal proceedings (and in any event no objection has been lodged in respect of the tenders submitted by some of them), it to be left to the court concerned, by virtue of the procedural autonomy accorded to the Member States, to assess whether the interest claimed in the main action by the candidate against whom an "excluding" counterclaim, considered to be well founded, has been brought, is a vested interest, using the procedural instruments available to it under the national legal order and thus ensuring that the protection of that subjective position is in line with the consolidated national principles: (i) that the court must address all the parties' claims but can grant only the relief sought by them (Article 112 of the Code of Civil Procedure); (ii) relating to proof of the interest alleged (Article 2697 of the Civil Code); and (iii) that a judgment having the force of *res judicata* has effect only as between the parties to the proceedings and cannot concern the position of persons not involved in the dispute (Article 2909 of the Civil Code)?'

Consideration of the question referred

20 By its question, the referring court seeks to ascertain, in essence, whether the third subparagraph of Article 1(1) and Article 1(3) of Directive 89/665 must be interpreted as meaning that a main action for review brought by a tenderer with an interest in obtaining a particular contract who has been or could be adversely affected by an alleged infringement of EU public procurement law or rules transposing that law, seeking the exclusion of another tenderer, can be declared inadmissible under national jurisprudential procedural rules or practices on the treatment of actions brought by the parties, seeking exclusion of one another (the 'reciprocal "excluding" actions'), irrespective of the number of tenderers having participated in the procurement procedure or the number of those having brought actions for review.

21 As a preliminary point, it should be observed that, as apparent from the second recital of Directive 89/665, that directive is intended to strengthen the existing mechanisms, at both national and EU levels, to ensure the effective application of the directives relating to public procurement, in particular at a stage when infringements can still be corrected (judgment of 5 April 2017, *Marina del Mediterráneo and Others*, C-391/15, EU:C:2017:268, paragraph 30).

22 It follows from the third subparagraph of Article 1(1) and Article 1(3) of Directive 89/665 that in order for the review of decisions taken by contracting authorities to be regarded as effective, they must be available at least to any person having or having had an interest in obtaining a particular contract who has been or risks being harmed by an alleged infringement.

23 Accordingly, where, following a public procurement procedure, two tenderers bring actions, each seeking the exclusion of the other, each of those tenderers will have an interest in obtaining a particular contract, within the meaning of the provisions referred to in the preceding paragraph. On the one hand, the exclusion of one tenderer may lead to the other being awarded the contract directly in the same procedure. On the other, if all tenderers are excluded and a new public procurement procedure is launched, each of those tenderers may participate in the new procedure and thus obtain the contract indirectly (see, to that effect, judgment of 5 April 2016, *PFE*, C-689/13, EU:C:2016:199, paragraph 27).

24 It follows that the counterclaim brought by the successful tenderer cannot bring about the dismissal of an action for review brought by an unsuccessful tenderer where the validity of the bid submitted by each of the operators is challenged in the course of the same proceedings, given that, in such a situation, each competitor can claim a legitimate interest in the exclusion of the bid submitted by the other, which may lead to a finding that the contracting authority is unable to select a lawful bid (judgments of 4 July 2013, *Fastweb*, C-100/12, EU:C:2013:448, paragraph 33, and of 5 April 2016, *PFE*, C-689/13, EU:C:2016:199, paragraph 24).

25 The principle established in the judgments referred to in the preceding paragraph that the interests pursued in actions by tenderers, in the context of reciprocal 'excluding' actions, are to be regarded as equivalent in principle, means, for the courts hearing those proceedings, to refrain from declaring inadmissible the main action seeking exclusion under national procedural rules providing for the counterclaim by the other tenderer to be examined first.

26 That principle also applies when, as is the case in the main proceedings, other tenderers have submitted bids in the context of the procurement process and when the reciprocal 'excluding' actions by parties, do not relate to bids ranked lower than those that are the subject of the 'excluding' actions.

27 It must be recognised that the tenderer ranked in third place, as in the present case, who brought the main action, has a legitimate interest in the exclusion of the bids submitted by the successful tenderer and the second-placed tenderer, for even if its bid were declared invalid, it cannot be excluded that the contracting authority would find that it could not select another valid bid, and would therefore organise a new procedure.

28 In particular, if the action by the unsuccessful tenderer were held to be well founded, the contracting authority could decide to cancel the procurement procedure and open a new one on the ground that the remaining valid bids do not sufficiently meet the contracting authority's expectations.

29 Under those circumstances, the admissibility of the main action cannot, without depriving Directive 89/665 of its effectiveness, be contingent on a prior finding that all of the bids ranked lower than that of the tenderer are invalid. That admissibility cannot, moreover, be made subject to the condition that the tenderer adduces evidence that the contracting authority will have to restart the public procurement procedure. The mere existence of such a possibility must be regarded as being sufficient in that respect.

30 It must be added that the fact that other bidders ranked lower than the applicant in the main action were not party to the main proceedings has no bearing on that interpretation. As the Court has previously held, the number of participants in the public procurement procedure concerned, as well as the number of participants who have instigated actions for review and the differing legal grounds relied on by those participants are irrelevant to the question of the applicability of the principle established by the case-law referred to in paragraph 25 above (see, to that effect, judgment of 5 April 2016, *PFE*, C-689/13, EU:C:2016:199, paragraph 29).

31 The judgment of 21 December 2016, *Bietergemeinschaft Technische Gebäudebetreuung und Caverion Österreich* (C-355/15, EU:C:2016:988), cited by the referring court, is not incompatible with such an interpretation. Although it is true that in paragraphs 13 to 16, 31 and 36 of that judgment, the Court held that the tenderer whose bid had been excluded by the contracting authority from a public procurement procedure could be refused access to a review of the decision awarding the public contract, in the case giving rise to that judgment, the decision to exclude that tenderer had been confirmed by a decision that had acquired the force of *res judicata* before the court hearing the review of the contract award decision gave its decision, so that that tenderer had to be regarded as definitively excluded from the public procurement procedure at issue (see, to that effect, judgment of 11 May 2017, *Archus and Gama*, C-131/16, EU:C:2017:358, paragraph 57).

32 In the main proceedings, none of the tenderers who have brought an action to have the other party excluded have been definitively excluded from the procurement process. Therefore, that judgment in no way undermines the legal principle referred to in the preceding point.

33 Finally, as regards the principle of procedural autonomy of the Member States, it is sufficient to note that that principle may not, in any case, serve to justify provisions of domestic law that render virtually impossible or excessively difficult the exercise of rights conferred by the EU legal order (see, to that effect, judgment of 11 April 2019, *PORR Építési Kft.*, C-691/17, EU:C:2019:327, paragraph 39 and the case-law cited). For the reasons set out in the paragraphs above, it follows from the third subparagraph of Article 1(1) and Article 1(3) of Directive 89/665, as interpreted by the Court, that a tenderer who has brought an action for review such as that at issue in the main proceedings may not, on the basis of national procedural rules or practices, such as those described by the referring court, be deprived of its right to an examination of the substance of his claim.

34 In the light of the foregoing, the answer to the question referred is that the third subparagraph of Article 1(1) and (3) of Directive 89/665 must be interpreted as precluding a main action for review brought by a tenderer with an interest in obtaining a particular contract, who has been or could be adversely affected by an alleged infringement of EU public procurement law or rules transposing that law, and seeking the exclusion of another tenderer, from being declared inadmissible in application of national jurisprudential procedural rules or which concern the treatment of reciprocal 'excluding' actions brought by the parties, irrespective of the number of tenderers having participated in the procurement procedure or the number of those having brought actions for review.

Costs

35 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 (Tenth Chamber) hereby rules:

The third subparagraph of Article 1(1) and (3) of Council 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, as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007, must be interpreted as precluding a main action for review brought by a tenderer with an interest in obtaining a particular contract who has been or could be adversely affected by an alleged breach of EU public procurement law or rules transposing that law, and seeking the exclusion of another tenderer, from being declared inadmissible in application of national jurisprudential procedural rules or which concern the treatment of reciprocal 'excluding' actions brought by the parties, irrespective of the number of tenderers having participated in the procurement procedure or the number of those having brought actions for review.

[Signatures]