Reports of Cases

JUDGMENT OF THE COURT (Eighth Chamber)

21 December 2016*

(Reference for a preliminary ruling — Public procurement — Directive 89/665/EEC — Review procedures in the area of public procurement — Article 1(3) — Legal interest in bringing proceedings — Article 2a(2) — Concept of a 'tenderer concerned' — Right of a tenderer definitively excluded by the contracting authority to seek review of a subsequent award decision)

In Case C-355/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Verwaltungsgerichtshof (Administrative Court, Austria), made by decision of 20 May 2015, received at the Court on 13 July 2015, in the proceedings

Bietergemeinschaft Technische Gebäudebetreuung GesmbH und Caverion Österreich GmbH

v

Universität für Bodenkultur Wien,

VAMED Management und Service GmbH & Co. KG in Wien,

THE COURT (Eighth Chamber),

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

Advocate General: M. Wathelet,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Bietergemeinschaft Technische Gebäudebetreuung GesmbH und Caverion Österreich GmbH, by J. Schramm, Rechtsanwalt,

— Universität für Bodenkultur Wien, by O. Sturm, Rechtsanwalt,

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

— the Italian Government, by G. Palmieri, acting as Agent, and by S. Varone, avvocato dello Stato,

— the Polish Government, by B. Majczyna, acting as Agent,

* Language of the case: German.

— the European Commission, by B.-R. Killmann and A. Tokár, 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(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 Bietergemeinschaft Technische Gebäudebetreuung GesmbH und Caverion Österreich GmbH ('the consortium'), and Universität für Bodenkultur Wien (University of Natural Resources and Life Sciences, Vienna, Austria, 'the BOKU Wien') concerning the latter's award of a framework contract for public services to VAMED Management und Service GmbH & Co. KG in Wien ('Vamed').

Legal context

EU law

Directive 89/665

3 Recitals 3, 4, 6, 8, 18, 25 and 27 of Directive 2007/66, the directive amending the original Directive 89/665, states:

'(3) Consultations of the interested parties and the case-law of the Court of Justice have revealed a certain number of weaknesses in the review mechanisms in the Member States. As a result of these weaknesses, the mechanisms established [in particular by Directive 89/665] do not always make it possible to ensure compliance with Community law, especially at a time when infringements can still be corrected. …

…

(4) The weaknesses which were noted include in particular the absence of a period allowing an effective review between the decision to award a contract and the conclusion of the contract in question. This sometimes results in contracting authorities and contracting entities who wish to make irreversible the consequences of the disputed award decision proceeding very quickly to the signature of the contract. In order to remedy this weakness, which is a serious obstacle to effective judicial protection for the tenderers concerned, namely those tenderers who have not yet been definitively excluded, it is necessary to provide for a minimum standstill period during which the conclusion of the contract in question is suspended …

…

(6) The standstill period should give the tenderers concerned sufficient time to examine the contract award decision and to assess whether it is appropriate to initiate a review procedure. When the award decision is notified to them, the tenderers concerned should be given the relevant information which is essential for them to seek effective review. …

…

(8) ... [A] standstill period is not necessary if the only tenderer concerned is the one who is awarded the contract and there are no candidates concerned. In this case there is no other person remaining in the tendering procedure with an interest in receiving the notification and in benefiting from a standstill period to allow for effective review.

…

(18) In order to prevent serious infringements of the standstill obligation and automatic suspension, which are prerequisites for effective review, effective sanctions should apply. Contracts that are concluded in breach of the standstill period or automatic suspension should therefore be considered ineffective in principle if they are combined with infringements [in particular 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, and corrigendum, OJ 2004 L 351, p. 44) to the extent that those infringements have affected the chances of the tenderer applying for review to obtain the contract.

…

(25) … The need to ensure over time the legal certainty of decisions taken by contracting authorities and contracting entities requires the establishment of a reasonable minimum period of limitation on reviews seeking to establish that the contract is ineffective.

…

(27) ... For reasons of legal certainty the enforceability of the ineffectiveness of a contract is limited to a certain period. The effectiveness of these time limits should be respected.'

4 Article 1 of Directive 89/665 is worded as follows:

'1. This Directive applies to contracts referred to in Directive [2004/18], unless such contracts are excluded in accordance with Articles 10 to 18 of that Directive.

…

Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive [2004/18], 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.

…’

5 Directive 89/665 provides for several cases in which, after the decision awarding the contract has been adopted, the contracting authority is temporarily prohibited from concluding a contract with the successful tenderer. Such a prohibition stems in particular from the automatic suspensive effect attaching to any applications for review lodged beforehand with the contracting authority, in accordance with Article 1(5) of that directive, and to applications for review to a first-instance review body, in accordance with Article 2(3) of that directive. Those prohibitions supplement the obligation imposed on the contracting authority, under Article 2a of that directive, to observe a standstill period between the adoption of the decision awarding the contact and the conclusion of the contract with the successful tenderer. Article 2a provides:

‘1. The Member States shall ensure that the persons referred to in Article 1(3) have sufficient time for effective review of the contract award decisions taken by contracting authorities, by adopting the necessary provisions respecting the minimum conditions set out in paragraph 2 of this Article and in Article 2c.

2. A contract may not be concluded following the decision to award a contract falling within the scope of Directive [2004/18] before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned if fax or electronic means are used or, if other means of communication are used, before the expiry of a period of either at least 15 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned or at least 10 calendar days with effect from the day following the date of the receipt of the contract award decision.

Tenderers shall be deemed to be concerned if they have not yet been definitively excluded. An exclusion is definitive if it has been notified to the tenderers concerned and has either been considered lawful by an independent review body or can no longer be subject to a review procedure.

…

The communication of the award decision to each tenderer and candidate concerned shall be accompanied by the following:

— a summary of the relevant reasons …, and

— a precise statement of the exact standstill period applicable pursuant to the provisions of national law transposing this paragraph.’

6 Under the first paragraph of Article 2b of Directive 89/665:

‘Member States may provide that the periods referred to in Article 2a(2) of this Directive do not apply in the following cases:

…

(b) if the only tenderer concerned within the meaning of Article 2a(2) of this Directive is the one who is awarded the contract and there are no candidates concerned;

…’

7 Article 2d(1) of that directive provides:

‘Member States shall ensure that a contract is considered ineffective by a review body independent of the contracting authority or that its ineffectiveness is the result of a decision of such a review body in any of the following cases:

…

(b) in case of an infringement of Article 1(5), Article 2(3) or Article 2a(2) of this Directive, if this infringement has deprived the tenderer applying for review of the possibility to pursue pre-contractual remedies where such an infringement is combined with an infringement of Directive [2004/18], if that infringement has affected the chances of the tenderer applying for a review to obtain the contract;

…’

Directive 2004/18

8 In accordance with Article 7(b) of Directive 2004/18, as amended by Commission Regulation (EU) No 1251/2011 of 30 November 2011 (OJ 2011 L 319, p. 17) (‘Directive 2004/18’), that directive is to apply to public service contracts awarded by contracting authorities other than Central Government authorities, which have a value exclusive of value-added tax (VAT) estimated to be equal to or greater than EUR 200 000.

9 Article 44(1) of that directive provides:

‘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.’

Austrian law

10 Paragraph 331 of the Bundesvergabegesetz 2006 (the 2006 Federal Law on public procurement, BGBl. I, 17/2006), in the version applicable to the main proceedings, appears in the part of that law relating to declaratory procedures. Paragraph 331(1) provides:

‘An undertaking which had an interest in the conclusion of a contract falling within the scope of this Federal Law may, in so far as it has suffered harm or is at risk of suffering harm in consequence of the alleged infringement, apply for a declaration that …’

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

11 In October 2012, BOKU Wien issued a call for tenders in the form of a negotiated procedure with prior publication of a contract notice, with a view to concluding with a single successful tenderer a framework agreement for the technical management, maintenance, repair and servicing of its buildings and laboratory facilities.

12 Only the consortium and Vamed submitted a tender within the deadline set.

13 By a decision of 20 December 2013, notified to the consortium, the latter was excluded from the tendering procedure because the original of the proof of a bank guarantee had not been submitted in good time.

14 The application brought by the consortium against that decision was dismissed by a judgment of the Bundesverwaltungsgericht (Federal Administrative Court, Austria) of 31 January 2014. The extraordinary appeal on a point of law against that judgment was also dismissed by an order of the Verwaltungsgerichtshof (Administrative Court, Austria) of 25 May 2014.

15 By an award decision of 14 March 2014, notified to Vamed, the BOKU Wien accepted its bid. The framework contract was subsequently concluded and Vamed began to perform the services concerned.

16 The consortium brought an action against that award decision before the Bundesverwaltungsgericht (Federal Administrative Court). That action was dismissed by a judgment of 8 August 2014 on the ground that the rights of a tenderer whose bid has been properly excluded cannot be infringed by illegalities relating to the procedure followed to select another bid for the purposes of awarding the contract.

17 In the appeal on a point of law brought against that judgment before the referring court, the consortium submits that the situation at issue in the main proceedings and the case giving rise to the judgment of 4 July 2013, *Fastweb* (C-100/12, EU:C:2013:448), are similar. In both cases, only two tenderers were present and, although the consortium was indeed excluded, it submits that the Vamed's bid ought to have been rejected because the business management calculations at key points in its bid are neither explicable nor comprehensible. Consequently, as in the abovementioned judgment, there are two tenderers both of which have an equivalent economic interest in the other tenderer's bid being excluded and could assert that interest even if their own bid must be rejected.

18 The referring court states that, in accordance with Paragraph 331 of the 2006 Federal Law on Public Procurement, in order for an application for a declaration that a public procurement decision is unlawful to be admissible, the economic operator bringing proceedings must have had an interest in the conclusion of the contract concerned and the unlawfulness must have harmed or risks harming it.

19 Examining the judgment of 4 July 2013, *Fastweb* (C-100/12, EU:C:2013:448), the referring court observes that, in the context of that judgment, it was not the contracting authority which found, in the procurement procedure concerned, that the bid of the tenderer bringing the legal proceedings was unlawful, but that unlawful nature came to light in the legal proceedings brought by that tenderer with a view to challenging the decision to award the contract to another tenderer. The referring court notes that, in paragraph 33 of that judgment, the Court of Justice held that, where the validity of the bid submitted by each of the operators is challenged in the course of the same proceedings and on identical grounds, each competitor can claim a legitimate interest in the exclusion of the bid submitted by the other. It follows from this that, in that situation, the unsuccessful tenderer whose bid has been rejected enjoys judicial protection, although that bid does not comply with all the technical rules for the contract at issue.

20 The referring court is uncertain whether the principles laid down in the judgment of 4 July 2013, *Fastweb* (C-100/12, EU:C:2013:448), also apply when, after two tenderers have initially submitted bids, the tenderer which intends to challenge the award decision has already been definitively excluded by the contracting authority itself. Its doubts are based on various factors which it identifies in Directive 89/665, chief among which is the concept of the 'tenderer concerned' within the meaning of Article 2a(2) of that directive.

21 However, although it appears to the referring court that that directive does not protect definitively excluded tenderers against the illegalities which may vitiate the decision awarding the contract after they have been definitively excluded, it asks whether the principle of equal treatment applicable to tenderers could nonetheless give grounds for granting such a definitively excluded tenderer a right to seek review of the award decision when it benefits the only other tenderer competing.

22 In addition, if the tenderer definitively excluded from the tender procedure still has a right to seek review of the award decision, the referring court explains, first, that the Bundesverwaltungsgericht (Federal Administrative Court) also took the view that there was no need to take into account the grounds for excluding Vamed's bid alleged by the consortium since they were not readily apparent from the case-file. However, such a position could be justified by the need for reviews to be carried out as rapidly as possible, referred to in Article 1(1) and (3) of Directive 89/665. Secondly, the referring court is unsure as to the significance, in the context of the right to effective judicial protection, of the fact that the grounds on which the two bids present should be rejected are the same or different.

23 In those circumstances the Verwaltungsgerichtshof (Administrative Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) In the light of the judgment of the Court of Justice of 4 July 2013, *Fastweb* (C-100/12, EU:C:2013:448), is Article 1(3) of Directive 89/665 … to be interpreted as meaning that a tenderer whose bid was definitively excluded by the contracting authority and who is therefore not a tenderer concerned within the meaning of Article 2a of Directive 89/665 may be refused access to a review of the award decision (decision on the conclusion of a framework agreement) and of the conclusion of the contract (including the award of damages required under Article 2(7) of the Directive), even where only two tenderers submitted bids and the bid submitted by the successful tenderer, to whom the contract was awarded, should, in the submission of the tenderer not concerned [who sought that review], also have been excluded?

(2) If the answer to Question 1 is in the negative, in the light of the … judgment of the Court of Justice of 4 July 2013 in *Fastweb* (C-100/12, EU:C:2013:448), is Article 1(3) of Directive 89/665 to be interpreted as meaning that the tenderer not concerned (within the meaning of Article 2a of the Directive) must be granted access to a review only:
(a) where it is apparent from the documents forming part of the review procedure that the successful tenderer's bid is not valid; or
(b) where the successful tenderer's bid is not valid on identical grounds?'

Consideration of the questions referred

24 First of all, it is to be noted that, in accordance with Article 1(1) of Directive 89/665, that directive applies only to reviews relating to public procurement procedures referred to in Directive 2004/18 not excluded from the scope of that directive by Articles 10 to 18 thereof.

25 Although the order for reference does not indicate the value of the framework contract at issue in the main proceedings in the light of the threshold for applying Directive 2004/18, set at EUR 200 000 for public service contracts awarded by contracting authorities other than Central Government authorities in accordance with Article 7(b) of that directive, it is apparent from various pieces of information in the file for the national proceedings that that threshold has been largely exceeded as regards that framework contract, which must, however, be verified by the referring court.

26 Since the framework contract does not indeed by its nature fall within the exclusions laid down in Articles 10 to 18 of Directive 2004/18, there is nothing to preclude the Court from answering the questions raised.

The first question

27 By its first question, the referring court asks, in essence, whether Article 1(3) of Directive 89/665 must, in the light of the judgment of 4 July 2013, *Fastweb* (C-100/12, EU:C:2013:448), be interpreted as precluding a tenderer who has been excluded from a public procurement procedure by a decision of the contracting authority which has become final, and who is therefore not a tenderer concerned within the meaning of Article 2a of that directive, from being refused access to a review of the decision awarding the public contract concerned and of the conclusion of the contract where only that unsuccessful tenderer and the successful tenderer submitted bids and the unsuccessful tenderer maintains that the successful tenderer's bid should also have been rejected.

28 In that regard, it should be noted that, in accordance with the third subparagraph of Article 1(1) and Article 1(3) of Directive 89/665, in order for the review of decisions taken by contracting authorities to be regarded as effective, review procedures 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 (judgment of 5 April 2016, *PFE*, C-689/13, EU:C:2016:199, paragraph 23).

29 In paragraphs 26 and 27 of that judgment, the Court emphasised that the judgment of 4 July 2013, *Fastweb* (C-100/12, EU:C:2013:448), gave concrete expression to the requirements of the third subparagraph of Article 1(1) and Article 1(3) of Directive 89/665 in a situation in which, following a public procurement procedure, two tenderers bring an action for review, each seeking the exclusion of the other. In such a situation, both of the tenderers have an interest in obtaining a particular contract.

30 However, the situation at issue in the main proceedings is very clearly distinguishable from the situations at issue in the two cases giving rise to the judgments of 4 July 2013, *Fastweb* (C-100/12, EU:C:2013:448), and 5 April 2016, *PFE* (C-689/13, EU:C:2016:199).

31 First, the bids of the tenderers concerned in the cases giving rise to those two judgments had not been the subject of an exclusion decision of the contracting authority, unlike the bid submitted by the consortium in the main proceedings in the present case.

32 Secondly, it was in the course of the same, single set of review proceedings relating to the award decision that, in both cases, each tenderer challenged the validity of the other tenderer's bid, each competitor having 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 (see, to that effect, judgments of 4 July 2013, *Fastweb*, C-100/12, EU:C:2013:448, paragraph 33, and 5 April 2016, *PFE*, C-689/13, EU:C:2016:199, paragraph 24). In the main proceedings in the present case, by contrast, the consortium brought an action, first, against the exclusion decision adopted in respect of it and, secondly, against the award decision, and it is in the course of that second set of proceedings that it contends that the successful tenderer's bid is unlawful.

33 It follows that the principle of case-law stemming from the judgments of 4 July 2013, *Fastweb* (C-100/12, EU:C:2013:448), and 5 April 2016, *PFE* (C-689/13, EU:C:2016:199), does not apply to the procedure and litigation at issue in the main proceedings.

34 It is also to be noted that, as is apparent from Article 1(3) and Article 2a of Directive 89/665, that directive ensures effective review of unlawful decisions adopted in the context of a public procurement procedure, by enabling any excluded tenderer to challenge not only the exclusion decision, but also, as long as that challenge has not been resolved, the subsequent decisions which would harm it if its exclusion were annulled.

35 In those circumstances, Article 1(3) of that directive cannot be interpreted as precluding a tenderer such as the consortium from being refused access to the review of the award decision, provided that it must be considered a definitively excluded tenderer within the meaning of the second subparagraph of Article 2a(2) of that directive.

36 In the light of all of the foregoing considerations, the answer to the question referred is that Article 1(3) of Directive 89/665 must be interpreted as not precluding a tenderer who has been excluded from a public procurement procedure by a decision of the contracting authority which has become final from being refused access to a review of the decision awarding the public contract concerned and of the conclusion of the contract where only that unsuccessful tenderer and the successful tenderer submitted bids and the unsuccessful tenderer maintains that the successful tenderer's bid should also have been rejected.

The second question

37 In the light of the answer to the first question, there is no need to answer the second question.

Costs

38 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 rules:

Article 1(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 not precluding a tenderer who has been excluded from a public procurement procedure by a decision of the contracting authority which has become final from being refused access to a review of the decision awarding the public contract concerned and of the conclusion of the contract where only that unsuccessful tenderer and the successful tenderer submitted bids and the unsuccessful tenderer maintains that the successful tenderer's bid should also have been rejected.

[Signatures]