Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

26 March 2015*

(Reference for a preliminary ruling — Directive 2004/18/EC — Public service contracts — Conduct of the procedure — Contract award criteria — Qualifications of the staff assigned to performance of the contract)

In Case C-601/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Supremo Tribunal Administrativo (Portugal), made by decision of 24 October 2013, received at the Court on 25 November 2013, in the proceedings

Ambisig — Ambiente e Sistemas de Informação Geográfica SA

v

Nersant — Associação Empresarial da Região de Santarém,

Núcleo Inicial — Formação e Consultoria Lda,

THE COURT (Fifth Chamber),

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

Advocate General: M. Wathelet,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 6 November 2014,

after considering the observations submitted on behalf of:

— Ambisig — Ambiente e Sistemas de Informação Geográfica SA, by H. Rodrigues da Silva, advogado,

— Nersant — Associação Empresarial da Região de Santarém, by A. Robin de Andrade and D. Melo Fernandes, advogadas,

— the Portuguese Government, by L. Inez Fernandes and H. Fragoso, acting as Agents,

— the Greek Government, by F. Dedousi and V. Stroumpouli, acting as Agents,

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

* Language of the case: Portuguese.

— the European Commission, by M. Afonso and S. Delaude, and by A. Tokár and G. Braga da Cruz, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 18 December 2014,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 44 to 48 and 53 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).

2 The request has been made in proceedings between Ambisig — Ambiente e Sistemas de Informação Geográfica SA ('Ambisig') and Nersant — Associação Empresarial da Região de Santarém ('Nersant') concerning the decision by Nersant to award to Iberscal — Consultores Lda ('Iberscal'), and not to Ambisig, a contract for the supply of training and consultancy services.

Legal context

EU law

Directive 2004/18

3 Recital 46 in the preamble to Directive 2004/18 states that contracts should be awarded on the basis of objective criteria which ensure compliance with the principles of transparency, non-discrimination and equal treatment and which guarantee that tenders are assessed in a transparent and objective manner under conditions of effective competition.

4 It is stated in the third paragraph of recital 46 in the preamble to that directive that:

'Where the contracting authorities choose to award a contract to the most economically advantageous tender, they shall assess the tenders in order to determine which one offers the best value for money. In order to do this, they shall determine the economic and quality criteria which, taken as a whole, must make it possible to determine the most economically advantageous tender for the contracting authority. The determination of these criteria depends on the object of the contract since they must allow the level of performance offered by each tender to be assessed in the light of the object of the contract, as defined in the technical specifications, and the value for money of each tender to be measured.'

5 Article 44(1) and (2) of Directive 2004/18 is worded as follows:

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

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

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

These minimum levels shall be indicated in the contract notice.'

6 Article 48(1) of Directive 2004/18 provides that the technical and/or professional abilities of the economic operators are to be assessed and examined in accordance with paragraphs 2 and 3 thereof. Article 48(2)(a)(ii) and (e) of that directive provides that evidence of the technical abilities may be furnished by means according to the nature, quantity or importance, and use of the services concerned, including by the presentation of the list of the main services provided in the past three years and by a statement of the educational and professional qualifications of the service provider or contractor and/or those of the undertaking's managerial staff and, in particular, those of the person or persons responsible for providing the services.

7 Article 53 of Directive 2004/18 provides:

'1. Without prejudice to national laws, regulations or administrative provisions concerning the remuneration of certain services, the criteria on which the contracting authorities shall base the award of public contracts shall be either:

(a) when the award is made to the tender most economically advantageous from the point of view of the contracting authority, various criteria linked to the subject-matter of the public contract in question, for example, quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion, or;

(b) the lowest price only.

2. Without prejudice to the provisions of the third subparagraph, in the case referred to in paragraph 1(a) the contracting authority shall specify in the contract notice or in the contract documents or, in the case of a competitive dialogue, in the descriptive document, the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender.

Those weightings can be expressed by providing for a range with an appropriate maximum spread.

Where, in the opinion of the contracting authority, weighting is not possible for demonstrable reasons, the contracting authority shall indicate in the contract notice or contract documents or, in the case of a competitive dialogue, in the descriptive document, the criteria in descending order of importance.'

Portuguese law

8 Under Article 75(1) of the Public Procurement Code (Código dos Contratos Públicos) ('the CCP'), '[t]he factors and any sub-factors corresponding to the criterion for award to the economically most advantageous tender must comprise all aspects, and only those aspects, pertaining to the performance of the contract to be concluded which is put out to tender, as laid down in the tendering specifications, and may not, directly or indirectly, bear upon the situations, qualities, characteristics or other factual aspects relating to the tenderers'.

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

9 By notice published on 24 November 2011, Nersant opened a public tendering procedure for the purchase of training and consultancy services for the implementation of the project 'MOVE PME, Médio Tejo area of quality, environment, safety and health at work, food safety — SME'.

10 Article 5 of the contract notice stated that the contract would be awarded to the economically most advantageous tender, determined on the basis of the following factors:

'A. Evaluation of the team — 40%

(i) This factor will be arrived at by taking into account the composition of the team, its proven experience and an analysis of the academic and professional background of its members.

B. Quality and merits of the service proposed — 55%

(i) Overall assessment of the proposed structure including the work programme — 0 to 20%.

(ii) Description of the technical methods to be used and the implementing methodologies — 0 to 15%.

(iii) Description of the methods for checking and monitoring the quality of the work in the various spheres of activity — 0 to 20%.

C. Overall price — 5%

Preference will be given to the tender achieving the highest number of points.'

11 Ambisig submitted a tender under the tendering procedure at issue in the main proceedings. In its preliminary report, the selection board for the procedure ranked Iberscal in first place.

12 On 3 January 2012, Ambisig exercised its right to a prior hearing, challenging the fact that the contract notice in question included in its evaluation criteria the factor relating to evaluation of the team assigned to performance of the contract, provided for in Article 5(A) of that notice.

13 In an addendum of 14 February 2012 to its final report of 4 January 2012, the selection board dismissed the arguments put forward by Ambisig in support of its request for a prior hearing. The selection board stated that the purpose of the factor in Article 5(A) of the contract notice at issue in the main proceedings is to evaluate 'the specific technical team which the tenderer proposes assigning to the work to be carried out' and '[t]he experience of the proposed technical team is, in this specific case, an intrinsic characteristic of the tender and not a characteristic of the tenderer'.

14 By decision of 14 February 2012, on the basis of the board's final report, the Chairman of the Executive Committee of Nersant awarded the contract for services at issue in the main proceedings to Iberscal and approved the draft contract for the relevant provision of services. On 19 March 2012 that contract was concluded between Nersant and Iberscal.

15 Ambisig brought proceedings before the Tribunal Administrativo e Fiscal de Leiria (Administrative and Tax Court, Leiria) seeking the annulment of the decision of 14 February 2012 of the Chairman of the Executive Committee of Nersant awarding the service contract at issue in the main proceedings to

Iberscal. In the course of the proceedings, Ambisig also sought and obtained the broadening of the subject-matter of the proceedings to include the annulment of the service contract concluded on 19 March 2012.

16 Since the Tribunal Administrativo e Fiscal de Leiria dismissed the action in its entirety, Ambisig lodged an appeal before the Tribunal Central Administrativo Sul (South Central Administrative Court).

17 In upholding the decision of the court at first instance, the appellate court considered that the factor contained in Article 5(A) of the contract notice at issue in the main proceedings was permissible under Article 75(1) of the CCP, inasmuch as it related to 'the team proposed for the performance of the contract for the provision of services put out to tender and not, directly or indirectly, to situations, qualities or characteristics or other factual aspects of the tenderers'.

18 Ambisig lodged an appeal against the judgment of the Tribunal Central Administrativo Sul before the Supremo Tribunal Administrativo (Supreme Administrative Court), claiming in essence that the factor laid down in Article 5(A) of the contract notice at issue in the main proceedings was unlawful under Article 75(1) of the CCP.

19 According to the order for reference from the Supremo Tribunal Administrativo, the point of law to be settled is whether criteria such as those contained in Article 5(A) of the contract notice at issue in the main proceedings are permissible as award criteria in public procurement procedures for the purchase of training and consultancy services for the purposes of Article 53 of Directive 2004/18.

20 In that regard the Supremo Tribunal Administrativo observes that the European Commission submitted a proposal for a directive of the European Parliament and of the Council on public procurement (COM(2011) 896 final), which constitutes a new factor in relation to the case-law of the Court in this area.

21 In those circumstances, the Supremo Tribunal Administrativo decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'With regard to procurement contracts for the provision of services of an intellectual nature, training and consultancy, is it compatible with Directive 2004/18, …, to lay down, among the factors making up the award criterion in relation to tenders in a public tendering procedure, a factor enabling evaluation of the teams specifically put forward by the tenderers for the performance of the contract, taking into consideration the composition of the respective teams, their proven experience and an analysis of their academic and professional background?'

The question referred for a preliminary ruling

22 The request for a preliminary ruling concerns, in essence, the question whether, for the award of a procurement contract for the provision of services of an intellectual nature, Article 53(1)(a) of Directive 2004/18 precludes the contracting authority from using an award criterion enabling evaluation of the teams specifically put forward by the tenderers for the performance of the contract and which takes into consideration the composition of the team and the experience and academic and professional background of the team members.

23 The referring court found it necessary to refer the question due to a contradiction between, on the one hand, the Court of Justice's case-law on verification of the ability of economic operators for the performance of a contract and criteria for awarding contracts, as resulting from the judgment in *Lianakis and Others* (C-532/06, EU:C:2008:40) and, on the other, the Commission's proposal aimed at reforming the legislation on public procurement procedures, and the fact that quality is one of the

award criteria provided for by Article 53(1)(a) of Directive 2004/18, a criterion which may be linked to the composition, experience and academic and professional background of the team entrusted with performance of the contract.

24 As a preliminary point, Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18 (OJ 2014 L 94, p. 65), which entered into force subsequently to the facts in the main proceedings, is not applicable to the present case.

25 It should also be noted that the case-law highlighted in the judgment in *Lianakis and Others* (C-532/06, EU:C:2008:40) concerns the interpretation of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), which was repealed by Directive 2004/18, and that that judgment does not rule out the possibility that the contracting authority may, in certain circumstances, fix and apply a criterion such as the one contained in the question referred at the stage of awarding the contract.

26 That judgment concerns the staff and experience of the tenderers in general and not, as in present case, the staff and experience of the persons making up a particular team which must actually perform the contract.

27 It should be noted, in relation to the interpretation of Article 53(1)(a) of Directive 2004/18 which is the subject of the referring court's question, that that directive introduced new elements into the Union legislation on public procurement in relation to Directive 92/50.

28 First of all, Article 53(1)(a) of Directive 2004/18 provides that 'the tender most economically advantageous' is to be identified 'from the point of view of the contracting authority', thereby giving the contracting authority greater discretion in its decision-making.

29 Secondly, the third paragraph of recital 46 in the preamble to Directive 2004/18 states that, where the contracting authorities choose to award a contract to the most economically advantageous tender, they are to assess the tenders in order to determine which one 'offers the best value for money', which tends to reinforce the importance of quality in the award criteria for public contracts.

30 Furthermore, Article 53(1) of Directive 2004/18 does not set out an exhaustive list of the criteria which may be used by the contracting authorities in determining the economically most advantageous tender, and therefore leaves it open to the authorities awarding contracts to select the criteria on which they propose to base their award of the contract. Their choice is nevertheless limited to criteria aimed at identifying the tender which is economically the most advantageous (see, to that effect, *Lianakis and Others*, C-532/06, EU:C:2008:40, paragraphs 28 and 29 and the case-law cited). To that end, Article 53(1)(a) of Directive 2004/18 specifically requires that the award criteria be linked to the subject-matter of the contract (see judgment in *Commission* v *Netherlands*, C-368/10, EU:C:2012:284, paragraph 86).

31 The quality of performance of a public contract may depend decisively on the 'professional merit' of the people entrusted with its performance, which is made up of their professional experience and background.

32 This is particularly true where the performance of the contract is intellectual in nature and, as in the main proceedings in the present case, concerns training and consultancy services.

33 Where a contract of this nature is to be performed by a team, it is the abilities and experience of its members which are decisive for the evaluation of the professional quality of the team. That quality may be an intrinsic characteristic of the tender and linked to the subject-matter of the contract for the purposes of Article 53(1)(a) of Directive 2004/18.

34 Consequently, that quality may be included as an award criterion in the contract notice or in the relevant tendering specifications.

35 In the light of the foregoing, the answer to the question referred is that, with regard to procurement contracts for the provision of services of an intellectual nature, training and consultancy, Article 53(1)(a) of Directive 2004/18 does not preclude the contracting authority from using a criterion enabling evaluation of the teams specifically put forward by the tenderers for the performance of the contract and which takes into consideration the composition of the team and the experience and academic and professional background of the team members.

Costs

36 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:

With regard to procurement contracts for the provision of services of an intellectual nature, training and consultancy, Article 53(1)(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 does not preclude the contracting authority from using a criterion enabling evaluation of the teams specifically put forward by the tenderers for the performance of the contract and which takes into consideration the composition of the team and the experience and academic and professional background of the team members.

[Signatures]