Reports of Cases

JUDGMENT OF THE COURT (Tenth Chamber)

8 December 2022*

(Reference for a preliminary ruling – Public procurement – Directive 2014/24/EU – Article 18(1) – Principles of equal treatment, transparency and proportionality – Decision to withdraw an invitation to tender – Tenders submitted separately by two tenderers belonging to the same economic operator and constituting the two most economically advantageous tenders – Refusal of the successful tenderer to sign the contract – Decision of the contracting authority to refuse the tender of the next tenderer, terminate the procedure and issue a new call for tenders)

In Case C-769/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Administratīvā rajona tiesa (District Administrative Court, Latvia), made by decision of 13 December 2021, received at the Court on 13 December 2021, in the proceedings

AAS 'BTA Baltic Insurance Company'

v

Iepirkumu uzraudzības birojs,

Tieslietu ministrija,

THE COURT (Tenth Chamber),

composed of E. Regan (Rapporteur), President of the Fifth Chamber, acting as President of the Tenth Chamber, I. Jarukaitis and Z. Csehi, Judges,

Advocate General: G. Pitruzzella,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– AAS 'BTA Baltic Insurance Company', by M. Brizgo, advokāts,

– the Latvian Government, by J. Davidoviča and K. Pommere, acting as Agents,

* Language of the case: Latvian.

– the European Commission, by P. Ondrůšek, A. Sauka and G. Wils, 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 18(1) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).

2 The request has been made in proceedings between AAS BTA Baltic Insurance Company ('Baltic'), on the one hand, and, on the other, the Tieslietu ministrija (Ministry of Justice, Latvia) and the Iepirkumu uzraudzības birojs (Procurement Monitoring Bureau, Latvia), concerning a decision to terminate a public procurement procedure for a health insurance services contract.

Legal context

European Union law

3 Article 18 of Directive 2014/24, entitled 'Principles of procurement', provides, in paragraph 1 thereof:

'Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.

…'

4 Article 55 of that directive, entitled 'Informing candidates and tenderers', provides, in paragraph 1 thereof:

'Contracting authorities shall as soon as possible inform each candidate and tenderer of decisions reached concerning the conclusion of a framework agreement, the award of the contract or admittance to a dynamic purchasing system, including the grounds for any decision not to conclude a framework agreement, not to award a contract for which there has been a call for competition, to recommence the procedure or not to implement a dynamic purchasing system.'

Latvian law

5 Article 2 of the Publisko iepirkumu likums (Law on public procurement) of 15 December 2016 (*Latvijas Vēstnesis*, 2016, No 254) is worded as follows:

'The purpose of this law is to ensure:

(1) transparency of procurement;

(2) free competition between suppliers, and their equal and fair treatment;

(3) efficient use of the contracting authority's resources by minimising its risk.'

6 Under Paragraphs 23 and 24 of Ministru kabineta noteikumi Nr.107 'Iepirkuma procedūru un metu konkursu norises kārtība' (Decree No 107 of the Council of Ministers on public procurement procedures and competitions) of 28 February 2017 (*Latvijas Vēstnesis*, 2017, No 45):

'23. If the tenderer to which the procurement contract has been awarded declines to conclude the said contract with the contracting authority, the procurement committee shall have the power to decide to award the procurement contract to the tenderer which has submitted the next most economically advantageous tender or to terminate the procurement procedure without selecting any tender. Where a decision has been taken to award the procurement contract to the tenderer which has submitted the next most economically advantageous tender, but the tenderer in question declines to conclude the said contract, the procurement committee shall make a decision to terminate the procurement procedure without selecting any tender.

24. Before taking a decision on whether to award the procurement contract to the tenderer which has submitted the next most economically advantageous tender, the procurement committee shall assess whether that tenderer and the tenderer originally selected which declined to conclude the contract in question with the contracting authority must not be regarded together as a single economic operator. Where necessary, the procurement committee shall have the power to require the next tenderer to provide a declaration and, where necessary, evidence that it and the tenderer originally selected must not be regarded together as a single economic operator. If the next tenderer and the tenderer originally selected must be regarded together as a single economic operator, the procurement committee shall decide to terminate the procurement procedure without selecting any tender.'

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

7 The Ministry of Justice issued, as contracting authority, a call for tenders for the award of a public contract for health insurance for its employees and those of the Valsts zemes dienests (State Land Service, Latvia), the Datu valsts inspekcija (National Data Protection Agency, Latvia), the Maksātnespējas kontroles dienests (Insolvency Control Service, Latvia) and the Patentu valde (Patent Office, Latvia).

8 A number of tenderers, including Baltic and Compensa Life Vienna Insurance Group SE Latvijas filiāle ('Compensa'), submitted tenders in order to be awarded that public contract.

9 By decision of 19 November 2020, the procurement committee of the Ministry of Justice found that the tender submitted by Compensa was the most economically advantageous tender. However, that company declined to conclude the procurement contract.

10 By decision of 1 December 2020, that procurement committee stated that Baltic was the next most economically advantageous tenderer eligible to be awarded the contract, while requiring, on the basis of Paragraph 24 of Decree No 107 of 28 February 2017, a declaration and evidence that Baltic and Compensa should not be regarded as constituting one and the same economic operator.

11 In response to that request, Baltic stated that it had to be regarded as forming a single economic operator with Compensa, while declaring that it had prepared its tender independently and without coordination with Compensa.

12 In those circumstances, by decision of 9 December 2020, the procurement committee of the Ministry of Justice, relying on Paragraph 23 of Decree No 107 of 28 February 2017, terminated the public procurement procedure.

13 On 16 December 2020, the Ministry of Justice launched a new procurement procedure.

14 By decision of 21 January 2021, the Procurement Monitoring Bureau, hearing a complaint from Baltic, confirmed the decision of 9 December 2020. It noted that Paragraph 24 of Decree No 107 of 28 February 2017 requires the contracting authority, for the purpose of preventing the possibility of a concerted practice between undertakings in the same group once tenders have been submitted, to terminate the public procurement procedure where it finds that the tenderer originally selected, which has declined to conclude the contract with the contracting authority, and the next tenderer, must be regarded as constituting a single market participant. Moreover, according to the Procurement Monitoring Bureau, the contracting authority, in accordance with Paragraph 23 of that decree, is entitled, in any event, to terminate the public contract if the successful tenderer declines to conclude the said contract with the contracting authority, as no other tenderer has the subjective right to require that it be awarded the tender.

15 Baltic then brought an action before the Administratīvā rajona tiesa (District Administrative Court, Latvia), the referring court, seeking to have that decision annulled.

16 In Baltic's opinion, the contracting authority was under an obligation to evaluate its explanations concerning the nature of the link between the two companies and the preparation of the tenders and thereby strike a fair balance between all of the principles enshrined in Article 2 of the Law on public procurement.

17 The presumption in Paragraph 24 of Decree No 107 of 28 February 2017 that undertakings in the same group will have coordinated their tenders in order to distort competition is disproportionate and infringes the principles laid down both in Directive 2014/24 and in the judgment of 19 May 2009, *Assitur* (C-538/07, EU:C:2009:317).

18 The fact that the amount of the tender of the tenderer originally selected was higher than that of its tender proves that the tenders were not coordinated, meaning that the withdrawal of the first tender could not confer any advantage on the companies from the group.

19 The Procurement Monitoring Bureau considers, for its part, that the judgment of 19 May 2009, *Assitur* (C-538/07, EU:C:2009:317), refers only to the right of linked undertakings to take part in a public procurement procedure and to submit tenders, which has not been restricted in the present case.

20 That situation must be distinguished from one in which the contracting authority is required to terminate the public procurement procedure where the selected tenderer declines to conclude the public procurement contract in question. In the first case, referred to in the judgment of 19 May 2009, *Assitur* (C-538/07, EU:C:2009:317), the contracting authority, after having rejected the tenders of the linked undertakings, selects another tender and the public procurement leads to

the award of a contract, whereas, in the second case, the contracting authority terminates the public procurement procedure without selecting any tender, thereby restoring competition and giving all tenderers the chance to take part in a new procedure.

21 The Ministry of Justice further submits that, in any event, Paragraph 23 of Decree No 107 of 28 February 2017 confers on the contracting authority discretionary power over the continuation of the procurement procedure where the successful tenderer declines to conclude the contract in question.

22 According to the Administratīvā rajona tiesa (District Administrative Court), the outcome of the dispute before it depends on the question whether the mere fact that Baltic and Compensa must be regarded as constituting one and the same economic operator – which is not disputed in the present case – has an effect on the right of the contracting authority to decide to terminate the public procurement procedure.

23 That court considers that a Member State does indeed have a wide discretion to provide for the possibility of adopting a decision to withdraw the invitation to tender. In accordance with the case-law of the Court, as is set out in the judgment of 11 December 2014, *Croce Amica One Italia* (C-440/13, EU:C:2014:2435, paragraphs 33 to 35), the grounds for withdrawal may be based, inter alia, on reasons which reflect the assessment as to whether it is expedient, from the point of view of the public interest, to carry an award procedure to its conclusion, having regard, among other things, to any change that may arise in the economic context or factual circumstances, or indeed the needs of the contracting authority concerned.

24 In the present case, however, it is apparent from the account of the facts that, notwithstanding the refusal of the successful tenderer to conclude the public contract, the contracting authority intended to continue with the procurement procedure by awarding the public contract to the tenderer which had submitted the next most economically advantageous tender. The contracting authority's needs did not change, as is confirmed by the launch of a new procurement procedure, and the next tender met the contracting authority's needs and requirements. The contracting authority nevertheless terminated, pursuant to Paragraph 24 of Decree No 107 of 28 February 2017, the public procurement procedure, on the ground that the two tenderers concerned had to be regarded as constituting one and the same economic operator.

25 The referring court has doubts as to whether such national legislation is compatible with the principles of EU law applicable to public procurement procedures.

26 It is true that that legislation does not prohibit participation in the same public contract by undertakings linked by a relationship of control or affiliated to one another. It is therefore consistent with the Court's case-law resulting, in particular, from the judgments of 19 May 2009, *Assitur* (C-538/07, EU:C:2009:317, paragraphs 29 and 30), and of 8 February 2018, *Lloyd's of London* (C-144/17, EU:C:2018:78, paragraphs 34 to 36), according to which EU law precludes national legislation which lays down an absolute prohibition on simultaneous and competing participation in the same tendering procedure by undertakings linked by a relationship of control or affiliated to one another, without allowing them an opportunity to demonstrate the independence of their tenders, such legislation being contrary to the EU interest in ensuring the widest possible participation by tenderers in a call for tenders.

27 It follows, however, from that same case-law that undertakings linked by a relationship of control or affiliated to one another have the right to be awarded the contract in which they have participated. Paragraph 24 of Decree No 107 of 28 February 2017, however, prohibits the contracting authority from awarding the public contract to the next tenderer where that tenderer and the tenderer originally selected which has withdrawn its tender together constitute one and the same economic operator. Such legislation is therefore based, in essence, on the irrebuttable presumption that the two tenderers have acted in concert and that the successful tenderer withdrew its tender on that ground.

28 The referring court considers, therefore, that the national legislation at issue in the main proceedings, in spite of the wide discretion enjoyed by the Member States to establish the cases in which a public procurement procedure must be terminated in circumstances where the needs of the contracting authority have not changed and the next tender meets the contracting authority's needs and requirements, is incompatible with the principles laid down in Article 18(1) of Directive 2014/24, in particular with the obligation on Member States to treat economic operators equally and without discrimination and in accordance with the principle of proportionality. The stage of the public procurement procedure at issue is of no importance for the purpose of applying the case-law of the Court cited in paragraph 26 above, that case-law also being applicable to a decision to terminate that procedure. That legislation should therefore allow the tenderer concerned the opportunity to demonstrate the independence of its tender.

29 In those circumstances, the Administratīvā rajona tiesa (District Administrative Court) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Is national legislation which requires the contracting authority to terminate a procurement procedure in a situation where the tenderer originally selected, which declined to enter into the procurement contract with the contracting authority, must be considered to constitute a single market participant with the next tenderer, whose tender meets the contracting authority's needs and requirements, compatible with the principles of procurement defined in Article 18(1) of Directive [2014/24], in particular with the requirement for Member States to treat economic operators equally and without discrimination, and with the principle of proportionality?'

Consideration of the question referred

30 By its question, the referring court asks, in essence, whether general principles of EU law, such as, in particular, the principles of equal treatment and proportionality, within the meaning of Article 18(1) of Directive 2014/24, must be interpreted as precluding national legislation which requires the contracting authority to terminate a public procurement procedure where, in the event of withdrawal of the tenderer originally selected for having submitted the most economically advantageous tender, the tenderer which submitted the next most economically advantageous tender constitutes with the tenderer originally selected a single economic operator.

31 In that regard, it should be recalled at the outset that, as is apparent from the case-law of the Court, EU law does not preclude Member States from providing for the possibility, referred to in Article 55(1) of Directive 2014/24, of adopting a decision to withdraw an invitation to tender on grounds which reflect, in particular, the assessment as to whether it is expedient, from the point of view of the public interest, to carry an award procedure to its conclusion, having regard, among other things, to any change that may arise in the economic context or factual circumstances, the needs of the contracting authority concerned or the insufficient degree of

competition where, at the conclusion of the award procedure in question, only one tenderer was qualified to perform the contract (see, to that effect, judgment of 11 December 2014, *Croce Amica One Italia*, C-440/13, EU:C:2014:2435, paragraph 35).

32 However, such a decision to withdraw an invitation to tender must be adopted in compliance with the rules of EU law, in particular with general principles of EU law such as the principles of equal treatment, transparency and proportionality, which are also referred to in Article 18(1) of Directive 2014/24 (see, to that effect, judgments of 18 June 2002, *HI*, C-92/00, EU:C:2002:379, paragraphs 42 and 45 to 47, and of 11 December 2014, *Croce Amica One Italia*, C-440/13, EU:C:2014:2435, paragraphs 33, 34 and 36).

33 In the present case, it is clear that national legislation such as that at issue in the main proceedings, by requiring the contracting authority to terminate a public procurement procedure in the circumstances referred to in paragraph 30 of the present judgment, seeks to prevent any potential collusion between participants in the same procedure for the award of a public contract and to safeguard the equal treatment of candidates and the transparency of the procedure (see, by analogy, judgment of 8 February 2018, *Lloyd's of London*, C-144/17, EU:C:2018:78, paragraph 31).

34 In accordance with the principle of proportionality, such legislation must not, however, according to the case-law of the Court, go beyond what is necessary to achieve those objectives (see, to that effect, judgment of 8 February 2018, *Lloyd's of London*, C-144/17, EU:C:2018:78, paragraph 32 and the case-law cited).

35 It should be recalled, in this connection, that the EU rules on public procurement were adopted in pursuance of the establishment of a single market, the purpose of which is to ensure freedom of movement and eliminate restrictions on competition (judgment of 8 February 2018, *Lloyd's of London*, C-144/17, EU:C:2018:78, paragraph 33 and the case-law cited).

36 In that context, it is the concern of EU law to ensure the widest possible participation by tenderers in a call for tenders (judgment of 8 February 2018, *Lloyd's of London*, C-144/17, EU:C:2018:78, paragraph 34 and the case-law cited).

37 It thus follows, according to settled case-law, that the automatic exclusion of candidates or tenderers that are in a relationship of control or association with other competitors goes beyond that which is necessary to prevent collusive behaviour and, as a result, to ensure the application of the principle of equal treatment and compliance with the obligation of transparency. Such an automatic exclusion, in so far as it constitutes an irrebuttable presumption of mutual interference in the respective tenders, for the same contract, of undertakings linked by a relationship of control or of association and accordingly precludes the possibility for those candidates or tenderers of showing that their tenders are independent, is contrary to the EU interest in ensuring the widest possible participation by tenderers in a call for tenders (judgment of 8 February 2018, *Lloyd's of London*, C-144/17, EU:C:2018:78, paragraphs 35 and 36 and the case-law cited).

38 In this regard, the Court has already held that groups of undertakings can have different forms and objectives, which do not necessarily preclude controlled undertakings from enjoying a certain autonomy in the conduct of their commercial policy and their economic activities, inter alia, in the area of their participation in the award of public contracts. Relationships between undertakings in the same group may in fact be governed by specific provisions such as to guarantee both independence and confidentiality in the drawing-up of tenders which may be

submitted simultaneously by the undertakings in question in the same tendering procedure (judgment of 8 February 2018, *Lloyd's of London*, C-144/17, EU:C:2018:78, paragraph 37 and the case-law cited).

39 Observance of the principle of proportionality therefore requires that the contracting authority be required to examine and assess the facts, in order to determine whether the relationship between two entities has actually influenced the respective content of the tenders submitted in the same tendering procedure, a finding of such influence, in any form, being sufficient for those undertakings to be excluded from the procedure (judgment of 8 February 2018, *Lloyd's of London*, C-144/17, EU:C:2018:78, paragraph 38 and the case-law cited).

40 That case-law, developed in relation to national legislation providing for the automatic exclusion of participation in a public procurement procedure, applies in the same way to legislation such as that at issue in the main proceedings requiring the contracting authority, at the latter stage of the tender, to terminate such a procedure.

41 While it is true that such legislation does not automatically exclude tenderers belonging to the same economic entity from participating in the same public procurement procedure, its effects are similar.

42 In that regard, it should be noted that, by providing for the automatic closure of a public procurement procedure where, in the event of withdrawal of the tenderer originally selected for having submitted the most economically advantageous tender, the tenderer ranked in second place, which had submitted the next most economically advantageous tender, constitutes with the tenderer originally selected a single market participant, national legislation, such as that at issue in the main proceedings, establishes an irrebuttable presumption that those tenderers acted in concert in the preparation of their tenders or after their submission, on the sole ground that they belong to the same economic entity, without their being able to demonstrate the independence of their tenders.

43 Such national legislation, which concerns a stage of the procedure during which the ranking of the tenders and their content were disclosed, is all the more contrary to the EU's interest in ensuring the widest possible participation by tenderers in a call for tenders and to the principle of proportionality.

44 Not only is that legislation liable to deter companies belonging to the same group from submitting competing tenders in a public procurement procedure, since their being ranked in the first two places would automatically have the effect, in the event of withdrawal of the first ranked tenderer, of terminating both that procedure and the subsequent procedures, thereby de facto excluding them from any possibility of competing in the context of such a public contract, but, moreover, the said legislation appears itself likely to increase the risk of distortion of competition, since the disclosure of the ranking of the tenders and their content at the end of the first procedure is liable to facilitate a possible concerted practice between the tenderers in the context of the next procedure.

45 While it is true that the withdrawal of the tenderer originally selected for having submitted the most economically advantageous tender, where the tenderer which has submitted the next most economically advantageous tender constitutes with the tenderer originally selected a single economic operator, might constitute evidence of an anti-competitive concerted practice, such a withdrawal being liable to appear to be motivated by the plan to accept the highest tender

submitted by the group as a whole, the fact remains that no irrebuttable presumption to that effect can be established, as otherwise those tenderers will be denied the opportunity to demonstrate the independent nature of their tenders.

46 In those circumstances, the answer to the question referred is that the principle of proportionality, within the meaning of Article 18(1) of Directive 2014/24, must be interpreted as precluding national legislation which requires the contracting authority to terminate a public procurement procedure where, in the event of withdrawal of the tenderer originally selected for having submitted the most economically advantageous tender, the tenderer which submitted the next most economically advantageous tender constitutes with the tenderer originally selected a single economic operator.

Costs

47 Since these proceedings are, for the parties to the main proceedings, a step in the action brought 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 principle of proportionality, within the meaning of Article 18(1) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC,

must be interpreted as precluding national legislation which requires the contracting authority to terminate a public procurement procedure where, in the event of withdrawal of the tenderer originally selected for having submitted the most economically advantageous tender, the tenderer which submitted the next most economically advantageous tender constitutes with the tenderer originally selected a single economic operator.

[Signatures]