Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

19 December 2012*

(Public contracts — Directive 2004/18/EC — Article 1(2)(a) and (d) — Services — Study and evaluation of the seismic vulnerability of hospital structures — Contract concluded between two public entities, one of which is a university — Public entity capable of being classified as an economic operator — Contract for pecuniary interest — Consideration not exceeding the costs incurred)

In Case C-159/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Italy), made by decision of 9 November 2010, received at the Court on 1 April 2011, in the proceedings

Azienda Sanitaria Locale di Lecce,

Università del Salento

v

Ordine degli Ingegneri della Provincia di Lecce and Others,

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts, vice-President, A. Tizzano, M. Ilešič, L. Bay Larsen, J. Malenovský, Presidents of Chambers, U. Lõhmus, J.-C. Bonichot, A. Arabadjiev, C. Toader, J.-J. Kasel, M. Safjan and D. Šváby (Rapporteur), Judges,

Advocate General: V. Trstenjak,

Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 27 March 2012,

after considering the observations submitted on behalf of:

— the Azienda Sanitaria Locale di Lecce, by M. de Stasio and V. Pappalepore, avvocati,

— the Università del Salento, by E. Sticchi Damiani and S. Sticchi Damiani, avvocati,

— the Consiglio Nazionale degli Ingegneri, by P. Quinto, avvocato,

— the Associazione delle Organizzazioni di Ingegneri, di Architettura e di Consultazione Tecnico Economica (OICE) and others, by A. Clarizia and P. Clarizia, avvocati,

* Language of the case: Italian.

— the Consiglio Nazionale degli Architetti, Pianificatori, Paesaggisti e Conservatori (CNAPPC), by F. Sciaudone, M. Sanino, R. Sciaudone and A. Neri, avvocati,

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

— the Czech Government, by M. Smolek and J. Vláčil, acting as Agents,

— the Polish Government, by M. Szpunar and M. Laszuk, acting as Agents,

— the Swedish Government, by K. Petkovska, S. Johannesson and A. Falk, acting as Agents,

— the European Commission, by E. Kružiková and C. Zadra, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 2 May 2012,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 1(2)(a) and (d), Article 2 and Article 28 of, and of Categories 8 and 12 in Annex II A to, 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 L 134, p. 114), as amended by Commission Regulation (EC) No 1422/2007 of 4 December 2007 (OJ 2007 L 317, p. 34; 'Directive 2004/18').

2 The reference has been made in proceedings between the Azienda Sanitaria Locale di Lecce (Local Health Authority of Lecce; 'ASL') and the Università del Salento (University of Salento; 'the University'), on the one hand, and the Ordine degli Ingegneri della Provincia di Lecce (Order of Architects of the Province of Lecce) and others, on the other hand, concerning the consultancy contract concluded between the ASL and the University ('the consultancy contract') and relating to the study and the evaluation of the seismic vulnerability of hospital structures in the province of Lecce.

Legal context

European Union law

3 Pursuant to recital 2 in the preamble to Directive 2004/18:

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

4 Article 1 of Directive 2004/18 provides:

‘...

(2)

(a) “Public contracts” are contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive....

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

...

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

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

...

(9) “Contracting authorities” means the State, regional or local authorities, entities governed by public law, associations formed by one or several of such authorities or one or several of such entities governed by public law.

...’

5 Under Article 2 of Directive 2004/18, ‘[c]ontracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way’.

6 Pursuant to Article 7(b) of Directive 2004/18, the directive applies inter alia to public service contracts awarded by contracting authorities other than the central governmental authorities listed in Annex IV to that directive, in so far as they are contracts which are not excluded in accordance with the exceptions referred to in that article and their value exclusive of value-added tax (VAT) is equal to or greater than EUR 206 000.

7 According to Article 9(1) and (2) of that directive, the calculation of the estimated value of a public contract is based on the total amount payable, net of VAT, as estimated by the contracting authority at the moment at which the contract notice is sent or, as the case may be, at the moment at which the contract awarding procedure commences.

8 Article 20 of Directive 2004/18 provides that contracts which have as their object services listed in Annex II A thereto are to be awarded in accordance with Articles 23 to 55 of the directive, and Article 28 of the directive states that ‘[i]n awarding their public contracts, contracting authorities are to apply the national procedures adjusted for the purposes of th[at] Directive’.

9 Annex II A to Directive 2004/18 contains inter alia the following categories of services:

— Category 8, concerning research and development services, except research and development services other than those where the benefits accrue exclusively to the contracting authority for its use in the conduct of its own affairs on condition that the service provided is wholly remunerated by the contracting authority;

— Category 12, concerning architectural services, engineering services and integrated engineering services, urban planning and landscape engineering services, related scientific and technical consulting services and technical testing and analysis services.

National law

10 Under Article 15(1) of Law No 241 of 7 August 1990 introducing new rules governing administrative procedure and relating to the right of access to administrative documents (nuove norme in materia di procedimento amministrativo e di diritto di accesso ai documenti amministrativi, GURI No 192 of 18 August 1990, p. 7), 'public administrative authorities may at any time enter into agreements among themselves with a view to laying down rules governing cooperation in activities of common interest'.

11 Article 66 of the Decree of the President of the Republic No 382 of 11 July 1980 on the reorganisation of University education, concerning training and organisational and teaching methodology reforms (riordinamento della docenza universitaria, relativa fascia di formazione nonché sperimentazione organizzativa e didattica, standard supplement to GURI No 209 of 31 July 1980), provides:

'Provided that the performance of their academic function of dissemination of knowledge is not thereby impaired, universities may carry out research and consultancy activities under contracts and agreements with public and private entities. The carrying out of those contracts and agreements shall, as a rule, be entrusted to [university] departments or, where such departments are not in place, to institutes or university clinics, or to individual full-time teachers.

The proceeds from the performance of the contracts and agreements referred to in the preceding paragraph shall be allocated in accordance with rules approved by the university's governing council on the basis of rules … laid down by the Ministry of Education.

The teaching and non-teaching staff cooperating in the provision of those services may be rewarded up to an annual sum not exceeding 30% of total remuneration. In each case, the sum so paid to staff may not exceed 50% of the overall proceeds from those services.

The rules referred to in the second paragraph shall determine the amount to be allocated for general expenditure incurred by the university and the criteria for the allocation to the staff of the sum referred to in the third paragraph. The remainder of the revenue shall be allocated to the purchase of teaching and research materials and to operating costs of departments, institutes or clinics which have carried out such contracts or agreements.

The expenditure incurred by the university in carrying out those services shall in any case be deducted beforehand from the proceeds of each service as allocated in accordance with the rules set out in the second paragraph.

The proceeds derived from the activities referred to in the preceding paragraph shall constitute revenue in the budget of the university.'

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

12 By decision of 7 October 2009, the Director-General of the ASL approved the specification for the university to carry out a study and evaluation of the seismic vulnerability of hospital structures in the Province of Lecce, in the light of the recent national legislation in relation to the safety of structures, in particular, of strategic buildings (hereafter, respectively, 'the specification' and 'the study').

13 In accordance with the specification, that study contains, in respect of each building concerned, the three following parts:

— identification of the structural typology of the materials used for construction and the methods of calculation adopted; brief verification of the state of affairs in the light of the project documentation made available;

— verification of the soundness of the structure; brief analysis of the overall seismic resistance of the building; where appropriate, on-site analysis of structural elements or subsystems that are significant for the purposes of identifying overall seismic resistance; and

— compilation of the results referred to in the previous indent, and drafting of technical data sheets on structural diagnosis; in particular: reports on the structural typology observed, on the materials and on the state of conservation of the structure, with particular reference to the aspects having a major effect on structural reactions in relation to the seismic risk of the site of the works; drawing up of technical data sheets for the classification of the seismic vulnerability of the hospitals; technical reports on the structural elements or subsystems identified as critical in relation to the verification of seismic vulnerability; preliminary suggestions and a brief description of works which may be needed to bring the buildings up to standard or to improve them, with regard to their seismic resistance, with particular reference to the advantages and limitations, in technical and economic terms, of the various possible technologies.

14 The consultancy contract of 22 October 2009 relating to the study project stipulates inter alia as follows:

— the maximum duration of that contract is laid down as sixteen months;

— the study project is to be entrusted to the technical constructions group, which may enlist the aid of highly qualified external collaborators;

— that project is to be carried out in the framework of close cooperation between the working groups set up by the ASL and by the University, in order to obtain the objectives set out in the third part of that project;

— academic responsibility is to be assigned to two persons appointed, respectively, by each party;

— ownership of all results produced by the experimental work is to lie with the ASL, which however undertakes to make express mention of the University Department in the event of publication of the results in a technical or academic context; the University has the right to use those results for publications or academic communications with ASL's approval;

— ASL is to pay the University an amount of EUR 200 000 exclusive of VAT for all the services, payable in four instalments. In the event, however, of early termination of the contract, the University is entitled to an amount dependent on the volume of work performed which corresponds to the expenditure incurred and the costs relating to the legal obligations assumed in the context of the implementation of the study project.

15 According to the file submitted to the Court, that sum of EUR 200 000 can be broken down as follows:

— acquisition and use of technical equipment: EUR 20 000;

— costs of staff missions: EUR 10 000;

— staff costs: EUR 144 000;

— general expenditure: EUR 26 000.

16 It is also apparent that the staff costs of EUR 143 999.58, rounded up to EUR 144 000, correspond to the following estimates:

— activation of three research grants of one year's duration: EUR 57 037.98;

— cost of an associate professor for 180 hours in 2009 (hourly cost of EUR 45.81) and for 641 hours in 2010 (hourly cost of EUR 48.93): EUR 39 609.93;

— cost of a senior researcher for 170 hours in 2009 (hourly cost EUR 25.91) and for 573 hours in 2010 (hourly cost EUR 32.23 euros): EUR 22 936.95;

— cost of a non-senior researcher for 170 hours in 2009 (hourly cost EUR 20.50) and for 584 hours in 2010 (hourly cost EUR 26.48): EUR 18 949.32;

— cost of a laboratory technician for 70 hours in 2009 (hourly cost EUR 20.48) and for 190 hours in 2010 (hourly cost EUR 21.22): EUR 5 465.40.

17 Various orders and professional associations and undertakings appealed against the decision approving the specification and against any preparatory measures related to or resulting from them before the Tribunale amministrativo regionale per la Puglia, sede di Lecce (Regional Administrative Court of Puglia, seat at Lecce), alleging inter alia the infringement of national and European Union public procurement legislation. By its judgment, that court upheld those appeals, considering that the study project constituted a contract for the provision of engineering services within the meaning of the Italian legislation.

18 In the appeals brought by them against that judgment, the ASL and the University argue in essence that, in accordance with Italian law, the consultancy contract constitutes a cooperation agreement between public administrations in respect of activities of general interest. The participation for pecuniary interest – but for remuneration limited to the costs incurred – of the University in such a contract falls under its institutional activities. There is in addition reliance on the fact that the study project is conferred on research bodies and the fact that it relates to research to be conducted by means of experiments and analyses to be carried out outside any standardised methodology or procedure codified or established in academic literature. The lawfulness of such cooperation agreements between public authorities under European Union law results from the case-law of the Court.

19 The referring court explains that the agreements between public authorities provided for in Article 15 of Law No 241 of 7 August 1990 aim to coordinate the action of various administrative bodies each of which pursues a particular public interest, and constitute a form of cooperation the function of which is to make management of public services as effective and economical as possible. Such an agreement may be concluded where a public institution intends to confer, in return for a pecuniary interest, the provision of a service on another public body and where that service falls within the tasks of the authority, in accordance with the institutional objectives of the entities which are parties to the agreement.

20 The Consiglio di Stato nevertheless raises the question whether the conclusion of an agreement between public authorities is not contrary to the principle of free competition where one of the authorities concerned can be regarded as an economic operator, a classification which encompasses any public body proposing services on the market, regardless of whether it has a primarily profit-making objective, whether it is structured as an undertaking or whether it has a continuous presence on the market. The referring court refers, in that regard, to Case C-305/08 *CoNISMa* [2009] ECR I-12129. From that perspective, provided that the University has the capacity to take part in a procurement procedure, the contracts concluded with it by contracting authorities fall within the scope of European Union public procurement rules where they relate, as in the case in the main proceedings, to research services which do not appear to be incompatible with the services mentioned in categories 8 and 12 of Annex II A to Directive 2004/18.

21 In those circumstances, the Consiglio di Stato decided to stay the proceedings and to refer to the Court the following question:

'Does [Directive 2004/18] and, in particular, Article 1(2)(a) and (d), Article 2 and Article 28 of that directive and Categories 8 and 12 in Annex II[A] thereto, preclude national legislation which permits written agreements to be entered into between two contracting authorities for the study of the seismic vulnerability of hospital structures and its evaluation in the light of national regulations on the safety of structures and in particular of strategic buildings, for a consideration not exceeding the costs incurred in the performance of the service, where the authority responsible for performance may act as an economic operator?'

The question referred for a preliminary ruling

22 By its question, the referring court asks, in essence, whether Directive 2004/18 must be interpreted as precluding national legislation which permits the conclusion, without an invitation to tender, of a contract by which two public entities set up between them a form of cooperation such as that at issue in the main proceedings.

23 As a preliminary point, it should be noted that the application of Directive 2004/18 to a public contract is subject to the condition that the estimated value thereof reaches the threshold laid down in Article 7(b) of that directive, taking into consideration the usual value on the market of the works, supplies or services to which that public contract relates. Otherwise, the fundamental rules and the general principles of the FEU Treaty, in particular the principles of equal treatment and of non-discrimination on grounds of nationality and the consequent obligation of transparency apply, provided that the contract concerned has a certain cross-border interest in the light, inter alia, of its value and the place where it is carried out (see, to that effect, inter alia, Joined Cases C-147/06 and C-148/06 *SECAP and Santorso* [2008] ECR I-3565, paragraphs 20, 21 and 31 and the case-law cited).

24 However, the fact that the contract at issue in the main proceedings is capable of falling, as the case may be, either under Directive 2004/18 or the fundamental rules and general principles of the FEU Treaty does not affect the answer to be given to the question posed. The criteria laid down in the case-law of the Court in order to determine whether an invitation to tender is mandatory or not are relevant both with regard to the interpretation of that directive and with regard to the interpretation of those rules and principles of the FEU Treaty (see, to that effect, Case C-573/07 *Sea* [2009] ECR I-8127, paragraphs 35 to 37).

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

26 In that regard, first, it is immaterial whether that operator is itself a contracting authority (see, to that effect, Case C-107/98 *Teckal* [1999] ECR I-8121, paragraph 51). It is also immaterial whether the body concerned is primarily profit-making, whether it is structured as an undertaking or whether it has a continuous presence on the market (see, to that effect, *CoNISMa*, paragraphs 30 and 45).

27 Thus, with regard to entities such as public universities, the Court has held that such entities are, in principle, entitled to take part in a tendering procedure for the award of a public service contract. However, the Member States may regulate the activities of those entities and inter alia authorise or not authorise them to operate on the market, taking into account their objectives as an institution and those laid down in their statutes. None the less, if and to the extent that such entities are entitled to offer certain services on the market, they may not be prevented from participating in a tendering procedure for the services concerned (see, to that effect, *CoNISMa*, paragraphs 45, 48, 49 and 51). In the present case, the referring court stated that Article 66, first paragraph, of the Decree of the President of the Republic No 382 of 11 July 1980 on the reorganisation of University education, concerning training and organisational and teaching methodology reforms, expressly authorises public universities to supply research and consultancy services to public or private entities provided that that activity does not impair their educational role.

28 Second, activities such as those which are the subject-matter of the contract at issue in the main proceedings – notwithstanding the fact, referred to by the referring court, that they are capable of coming under academic research – fall, according to the actual nature of those activities, either within the framework of research and development services covered by Annex II A, category 8, of Directive 2004/18 or within the framework of engineering services and related scientific and technical consulting services covered by category 12 of that annex.

29 Third, as stated by the Advocate General in paragraphs 32 and 34 of her Opinion, and as is clear from the usual and ordinary meaning of the phrase 'pecuniary interest', a contract cannot fall outside the concept of public contract merely because the remuneration remains limited to reimbursement of the expenditure incurred to provide the agreed service.

30 Subject to the checks which are for the referring court to carry out, the contract at issue in the main proceedings does appear to have all the characteristics referred to in paragraphs 26 to 29 of this judgment.

31 It follows however from the case-law of the Court that two types of contracts entered into by a public entity do not fall within the scope of European Union public procurement law.

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

33 It is however common ground that that exception is not applicable in a context such as that at issue in the main proceedings, because it is apparent from the order for reference that the ASL does not exercise any control over the University.

34 The second type of contracts are those which establish cooperation between public entities with the aim of ensuring that a public task that they all have to perform is carried out (see, to that effect, Case C-480/06 *Commission* v *Germany* [2009] ECR I-4747, paragraph 37).

35 In those circumstances, European Union rules on public procurement are not applicable in so far as, in addition, such contracts are concluded exclusively by public entities, without the participation of a private party, no private provider of services is placed in a position of advantage vis-à-vis competitors

and implementation of that cooperation is governed solely by considerations and requirements relating to the pursuit of objectives in the public interest (see, to that effect, *Commission* v *Germany*, paragraphs 44 and 47).

36 While, as stated by the referring court, a contract such as that at issue in the main proceedings appears to satisfy some of the criteria referred to in the two preceding paragraphs of this judgment, such a contract can however fall outside the scope of European Union public procurement rules only if it fulfils all those criteria.

37 In that regard, it appears to follow from the information in the order for reference, first, that that contract contains a series of substantive aspects a significant or even major part of which corresponds to activities usually carried out by engineers and architects and which, even though they have an academic foundation, do not however constitute academic research. Consequently, contrary to the holding of the Court in paragraph 37 of *Commission* v *Germany*, the public task which is the subject-matter of the cooperation between the public entities established by the abovementioned contract does not appear to ensure the implementation of a public task which the ASL and the University both have to perform.

38 Second, the contract at issue in the main proceedings may bring about an advantage for private undertakings if the highly qualified external collaborators to whom it permits the University to have recourse for the carrying out of certain services include private service providers.

39 It is however for the referring court to carry out all the necessary checks in that regard.

40 The answer to the question referred is therefore that European Union public procurement law precludes national legislation which authorises the conclusion, without an invitation to tender, of a contract by which public entities establish cooperation among each other where – this being for the referring court to establish – the purpose of such a contract is not to ensure that a public task that those entities all have to perform is carried out, where that contract is not governed solely by considerations and requirements relating to the pursuit of objectives in the public interest or where it is such as to place a private provider of services in a position of advantage vis-à-vis his competitors.

Costs

41 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 (Grand Chamber) hereby rules:

European Union public procurement law precludes national legislation which authorises the conclusion, without an invitation to tender, of a contract by which public entities establish cooperation among each other where – this being for the referring court to establish – the purpose of such a contract is not to ensure that a public task that those entities all have to perform is carried out, where that contract is not governed solely by considerations and requirements relating to the pursuit of objectives in the public interest or where it is such as to place a private provider of services in a position of advantage vis-à-vis his competitors.

[Signatures]