Reports of Cases

JUDGMENT OF THE COURT (Tenth Chamber)

10 October 2013 *

(Request for a preliminary ruling — Public procurement — Directive 2004/18/EC — Principle of equal treatment — Restricted procedure — Contract notice — Requirement for a copy of the most recent published balance sheet to be enclosed with the application — Copies of balance sheets not enclosed with some candidates' applications — Right of the contracting authority to ask those candidates to provide copies of those balance sheets after the deadline for filing applications)

In Case C-336/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Østre Landsret (Denmark), made by decision of 4 July 2012, received at the Court on 16 July 2012, in the proceedings

Ministeriet for Forskning, Innovation og Videregående Uddannelser

v

Manova A/S,

THE COURT (Tenth Chamber),

composed of E. Juhász, President of the Tenth Chamber, acting for the President of the Chamber, A. Rosas, and D. Šváby (Rapporteur), Judges,

Advocate General: Y. Bot,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 6 June 2013,

after considering the observations submitted on behalf of:

— Manova A/S, by J. Munk Plum, advokat,

— the Danish Government, by V. Pasternak Jørgensen, acting as Agent, assisted by R. Holdgaard, advokat,

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

— the Netherlands Government, by B. Koopman and C. Wissels, acting as Agents,

— the European Commission, by U. Nielsen and A. Tokár, acting as Agents,

* Language of the case: Danish.

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of the principle of equal treatment.

2 The request has been made in proceedings between the Ministeriet for Forskning, Innovation og Videregående Uddannelser (Ministry of Science, Innovation and Higher Education) and Manova A/S ('Manova') concerning the lawfulness of a public procurement procedure organised by the Undervisningsministeriet (Education Ministry) ('the Ministry').

Legal context

European Union ('EU') law

3 According to recital 2 in the preamble 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 2004 L 134, p. 114):

'The award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law entities, is subject to the respect of the principles of the [EC] 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. …'

4 Article 2 of that directive, which concerns 'the principles of awarding contracts', provides:

'Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.'

5 Under Article 21 of Directive 2004/18, contracts which have as their object services listed in Annex IIB to that directive are to be subject solely to Article 23, which relates to technical specifications, and Article 35(4), which relates to the notice of the results of the award procedure. Category 24 of that annex covers education and vocational education services.

6 Under Article 51 of Directive 2004/18, '[t]he contracting authority may invite economic operators to supplement or clarify the certificates and documents submitted pursuant to Articles 45 to 50'.

Danish law

7 Directive 2004/18 was transposed into Danish law by Order No 937 of 16 September 2004 ('Order No 937/2004'), which was in force at the time when the public procurement procedure at issue was organised. Under paragraph 1(1) of Order No 937/2004, contracting authorities were required to comply with Directive 2004/18, which was reproduced in the annex to the order.

8 Part II of the Law on obtaining tenders for certain public and publicly-supported contracts (lov om indhentning af tilbud på visse offentlige og offentlig støttede kontrakter), as published by Order No 1410 of 7 December 2007, lays down provisions on goods and services contracts. Under

paragraph 15a(1) of that law, Part II applies to public service contracts which, like the contract at issue, relate to services listed in Annex IIB to Directive 2004/18 and have a value which exceeds DKK 500 000.

9 Under paragraph 15d(1) of that law, contracting authorities must ensure that, during the tendering procedure and award of the contract, '…the selection of tenderers is done on the basis of objective, factual and non-discriminatory criteria and that there is no discrimination as between tenderers'.

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

10 By notice published on 12 September 2008, the Ministry launched a call for tenders in respect of services required for the operation of seven occupational guidance and advice centres ('guidance centres') starting from 1 August 2009. The value of the contract to be awarded was above the threshold which, under Article 7 of Directive 2004/18, triggers application of that directive.

11 The services in question, which essentially consist in the provision of guidance to people hoping to follow a higher educational or vocational training course, fall within Category 24 of Annex IIB to Directive 2004/18.

12 Since the Ministry took the view that the contract at issue related to complex services requiring negotiations, the procedure included a preliminary screening stage.

13 The section of the contract notice entitled 'Qualitative selection criteria' laid down the following provision:

'Tenderers wishing to be considered must, as a basis for the assessment of their economic and technical qualifications, provide the following information and satisfy the minimum requirements set out:

…

(2) Submit a copy of the most recent balance sheet in so far as the tenderer is obliged to draw up such a document.

(3) Reference list …

(4) Information on the tenderer's educational and technical qualifications …

If the [Ministry] receives more than three applications for each of the seven lots, all of which fulfil the above requirements, the candidates who will be invited to submit tenders and take part in the subsequent negotiation procedure shall be selected from among those who have demonstrated the best and most suitable experience in relation to the services put out for tender. References shall accordingly be accorded more weight than professional and technical qualifications.'

14 By 14 October 2008, the deadline for applications, 10 undertakings/institutions had lodged applications for screening, including the Syddansk Universitet (University of Southern Denmark) ('the USD'), the Københavns Universitet (University of Copenhagen) ('the UC'), and Manova.

15 The applications from the USD and the UC did not include copies of their balance sheets; in that connection, the UC referred to its website.

16 On 29 October 2008, the Ministry sent an email to each of those universities asking it to forward a copy of its balance sheet, a request which the UC met that same day and the USD on the following day.

17 On 4 November 2008, nine candidates – including Manova, the USD and the UC – were judged successful at the screening stage and invited to submit tenders, three candidates to tender for each guidance centre. For one of those centres, Manova found itself competing with the USD and for another, with the UC.

18 On 1 May 2009, following the final assessment of the tenders for those two guidance centres, the Ministry found that the tenders from the USD and the UC were economically more advantageous than the tenders submitted by Manova – which, ultimately, was the only other candidate to have submitted a competing tender for those centres – and concluded the contracts relating to those centres with those two universities. Those contracts are still in force.

19 Manova filed a complaint before the Klagenævnet for Udbud (Complaints Board for Public Procurement; 'the Complaints Board') against the decision to award those lots to those universities. By order of 10 March 2010, the Complaints Board found that the Ministry had acted in breach of the principle of equal treatment by not rejecting the candidature of the USD and the UC on the ground that copies of their most recent balance sheets had not been provided at the same time as their applications for admission to the screening stage. The Complaints Board accordingly annulled the contracts.

20 On 29 April 2010, the Ministry brought an action contesting that order. The case was referred to the Østre Landsret (Eastern Regional Court), the referring court.

21 The Østre Landsret observes that the approach consistently taken by the Complaints Board in its decision-making practice is that, under Article 51 of Directive 2004/18 and, more generally, the principle of equal treatment, a contracting authority may not, where certain information has not been provided, ask the tenderer to provide the information at a later stage, if the provision of that information was a condition which had to be met in submitting an application or a tender, failing which the application or tender would be rejected.

22 The referring court also notes that, as a general rule, paragraph 12 of Order No 712 of 15 June 2011 (which replaced Order No 937/2004 with effect from 1 July 2011) allows a contracting authority which has received applications or tenders which do not meet the formal requirements set out in the contract documents – because, for example, information or documents are missing – not to reject those applications or tenders, provided that the awarding authority acts in accordance with the principle of equal treatment.

23 The Østre Landsret believes that there is uncertainty as to what steps a contracting authority may take if 'records' have not been included with an application and as to the implications of the principle of equal treatment in such a situation.

24 In those circumstances, the Østre Landsret decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Does the EU law principle of equal treatment mean that, after the deadline for applications to take part in a tendering procedure, a contracting authority may not ask a candidate to forward a copy of its most recent balance sheet, provision of which was required under the notice announcing a screening procedure, if the candidate did not provide such documents with its application?'

Consideration of the question referred

25 By its question, the referring court asks, in essence, whether the principle of equal treatment is to be interpreted as precluding a contracting authority from asking a candidate, after the deadline for applying to take part in a tendering procedure, to provide documents describing that candidate's situation – such as a copy of its published balance sheet – which were called for in the contract notice, but were not included with that candidate's application.

26 As a preliminary point, it should be borne in mind that, although, under Article 21 of Directive 2004/18, public contracts concerning services listed in Annex IIB to that directive are to be subject solely to Articles 23 and 35(4) thereof, the fundamental rules of the Treaty and the general principles of EU law apply to such contracts where they are of certain cross-border interest. The Court has found that the system established by the EU legislature for public contracts relating to services falling within the ambit of that annex cannot be interpreted as precluding application of the principles deriving from Articles 43 EC and 49 EC (now, respectively, Articles 49 TFEU and 56 TFEU) (see to that effect, inter alia, Case C-226/09 *Commission* v *Ireland* [2010] ECR I-11807, paragraphs 29 and 31).

27 It appears from the observations submitted to the Court that, from the point of view of the contracting authority itself, that is the position in the case before the referring court since one of the requirements under the contract notice was for applicants to declare on their honour that they had fulfilled all their obligations concerning taxes and social security contributions, not only in Denmark but also – where appropriate – in their Member State of establishment. However, it is for the referring court to carry out the necessary assessments in that regard.

28 One of the principal objectives of the public procurement rules under EU law is to ensure the free movement of services and the opening up of undistorted competition in all the Member States. In order to pursue that twofold objective, EU law applies, inter alia, the principle of the equal treatment of tenderers and the corollary obligation of transparency.

29 Accordingly, the application of the principle of equal treatment to public procurement procedures does not constitute an end in itself, but must be viewed in the light of the aims that it is intended to achieve.

30 It is settled case-law that the principle of equal treatment requires that comparable situations must not be treated differently, and that different situations must not be treated in the same way, unless such treatment is objectively justified (see Joined Cases C-21/03 and C-34/03 *Fabricom* [2005] ECR I-1559, paragraph 27 and the case-law cited).

31 The principle of equal treatment and the obligation of transparency preclude any negotiation between the contracting authority and a tenderer during a public procurement procedure, which means that, as a general rule, a tender cannot be amended after it has been submitted, whether at the request of the contracting authority or at the request of the tenderer concerned. It follows that, where the contracting authority regards a tender as imprecise or as failing to meet the technical requirements of the tender specifications, it cannot require the tenderer to provide clarification (see, to that effect, Case C-599/10 *SAG ELV Slovensko and Others* [2012] ECR, paragraphs 36 and 37).

32 However, the Court has explained that Article 2 of Directive 2004/18 does not preclude the correction or amplification of details of a tender, on a limited and specific basis, particularly when it is clear that they require mere clarification, or to correct obvious material errors (*SAG ELV Slovensko and Others*, paragraph 40).

33 In *SAG ELV Slovensko and Others*, the Court laid down certain requirements to mark the bounds of the contracting authority's right to make a written request to the tenderer or tenderers concerned for clarification of their bid.

34 First of all, a request for clarification of a tender, which may not be made until after the contracting authority has looked at all the tenders, must, as a general rule, be sent in an equivalent manner to all tenderers in the same situation (see, to that effect, *SAG ELV Slovensko and Others*, paragraphs 42 and 43).

35 Next, the request must relate to all sections of the tender which require clarification (see, to that effect, *SAG ELV Slovensko and Others*, paragraph 44).

36 In addition, that request may not lead to the submission, by a tenderer, of what would appear in reality to be a new tender (see, to that effect, *SAG ELV Slovensko and Others*, paragraph 40).

37 Lastly, as a general rule, when exercising its right to ask a tenderer to clarify its tender, the contracting authority must treat tenderers equally and fairly, in such a way that a request for clarification does not appear unduly to have favoured or disadvantaged the tenderer or tenderers to which the request was addressed, once the procedure for selection of tenders has been completed and in the light of its outcome (*SAG ELV Slovensko and Others*, paragraph 41).

38 That guidance in relation to tenders can also be applied to applications filed at the screening stage for candidates in a restricted procedure.

39 Accordingly, a contracting authority may request the correction or amplification of details of such an application, on a limited and specific basis, so long as that request relates to particulars or information, such as a published balance sheet, which can be objectively shown to pre-date the deadline for applying to take part in the tendering procedure concerned.

40 However, it should be explained that this would not be the case if the contract documents required provision of the missing particulars or information, on pain of exclusion. It falls to the contracting authority to comply strictly with the criteria which it has itself laid down (see, to that effect, Case C-496/99 P *Commission* v *CAS Succhi di Frutta* [2004] ECR I-3801, paragraph 115).

41 In the present case, it appears that the conditions mentioned in paragraphs 39 and 40 above have been respected. Nevertheless, it is for the referring court to carry out the necessary assessments in that regard.

42 In the light of the foregoing, the answer to the question referred is that the principle of equal treatment must be interpreted as not precluding a contracting authority from asking a candidate, after the deadline for applying to take part in a tendering procedure, to provide documents describing that candidate's situation – such as a copy of its published balance sheet – which can be objectively shown to pre-date that deadline, so long as it was not expressly laid down in the contract documents that, unless such documents were provided, the application would be rejected. That request must not unduly favour or disadvantage the candidate or candidates to which it is addressed.

Costs

43 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Tenth Chamber) hereby rules:

The principle of equal treatment must be interpreted as not precluding a contracting authority from asking a candidate, after the deadline for applying to take part in a tendering procedure, to provide documents describing that candidate's situation – such as a copy of its published

balance sheet – which can be objectively shown to pre-date that deadline, so long as it was not expressly laid down in the contract documents that, unless such documents were provided, the application would be rejected. That request must not unduly favour or disadvantage the candidate or candidates to which it is addressed.

[Signatures]