Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

13 July 2017*

(Reference for a preliminary ruling — Public procurement — Directive 2004/18/EC — Article 47(1), (4) and (5) — Economic and financial standing of the tenderer — Directives 89/665/EEC and 2007/66/EC — Judicial review of a decision to exclude a tenderer from a tendering procedure — Charter of Fundamental Rights of the European Union — Article 47 — Right to an effective remedy)

In Case C-76/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic), made by decision of 28 January 2016, received at the Court on 11 February 2016, in the proceedings

Ingsteel spol. s r. o.,

Metrostav a.s.

v

Úrad pre verejné obstarávanie,

intervener:

Slovenský futbalový zväz,

THE COURT (Second Chamber),

composed of M. Ilešič, President of the Chamber, A. Prechal, A. Rosas, C. Toader (Rapporteur) and E. Jarašiūnas, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Slovak Government, by B. Ricziová, acting as Agent,

– the European Commission, by A. Tokár, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 21 March 2017,

* Language of the case: Slovak.

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 47(1)(a), (4) and (5) 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); Articles 1(1) and 2(3) and (6) to (8) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 (OJ 2007 L 335, p. 31) ('Directive 89/665'); and Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter').

2 The request has been made in proceedings between, on the one hand, Ingsteel spol. s r. o. and Metrostav a.s. (together, 'the unsuccessful tenderer') and, on the other hand, l'Úrad pre verejné obstarávanie (Public Procurement Regulatory Authority, Slovak Republic) concerning a public procurement procedure launched by Slovenský futbalový zväz (Slovak Football Federation, 'the contracting authority').

Legal context

EU law

Directive 2004/18

3 Pursuant to Article 91 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 (OJ 2014 L 94, p. 65), Directive 2004/18 was repealed as of 18 April 2016. Given the date of the material facts in the main proceedings, the present reference for a preliminary ruling will be considered by reference to Directive 2004/18, as in force before its repeal.

4 Recital 39 of Directive 2004/18 read as follows:

'Verification of the suitability of tenderers, in open procedures, and of candidates, in restricted and negotiated procedures with publication of a contract notice and in the competitive dialogue, and the selection thereof, should be carried out in transparent conditions. For this purpose, non-discriminatory criteria should be indicated which the contracting authorities may use when selecting competitors and the means which economic operators may use to prove they have satisfied those criteria. In the same spirit of transparency, the contracting authority should be required, as soon as a contract is put out to competition, to indicate the selection criteria it will use and the level of specific competence it may or may not demand of the economic operators before admitting them to the procurement procedure.'

5 Article 44 of Directive 2004/18, entitled 'Verification of the suitability and choice of participants and award of contracts', provided in the second paragraph thereof as follows:

'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 47 of that directive, entitled 'Economic and financial standing', provided:

'1. Proof of an economic operator's economic and financial standing may, as a general rule, be furnished by one or more of the following references:

(a) appropriate statements from banks or, where appropriate, evidence of professional risk indemnity insurance;

…

4. Contracting authorities shall specify, in the contract notice or in the invitation to tender, which reference or references mentioned in paragraph 1 they have chosen and which other references must be provided.

5. If, for any valid reason, the economic operator is unable to provide the references requested by the contracting authority, he may prove his economic and financial standing by any other document which the contracting authority considers appropriate.'

7 Article 48 of that directive set out the conditions relating to the technical and/or professional abilities of the economic operators.

Directives 89/665 and 2007/66

8 Recital 36 of Directive 2007/66 states:

'This Directive respects the fundamental rights and observes the principles recognised in particular by the [Charter]. In particular, this Directive seeks to ensure full respect for the right to an effective remedy and to a fair hearing, in accordance with the first and second subparagraphs of Article 47 of the Charter.'

9 Article 1 of Directive 89/665, entitled 'Scope and availability of review procedures', provides:

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

…

Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive [2004/18], decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed Community law in the field of public procurement or national rules transposing that law.

…

3. Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.

…

5. Member States may require that the person concerned first seek review with the contracting authority. In that case, Member States shall ensure that the submission of such an application for review results in immediate suspension of the possibility to conclude the contract.

…

The suspension referred to in the first subparagraph shall not end before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contracting authority has sent a reply if fax or electronic means are used, or, if other means of communication are used, before the expiry of either at least 15 calendar days with effect from the day following the date on which the contracting authority has sent a reply, or at least 10 calendar days with effect from the day following the date of the receipt of a reply.'

10 Article 2 of that directive, which governs the requirements for review procedures, states:

'1. Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers to:

(a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

(c) award damages to persons harmed by an infringement.

2. The powers specified in paragraph 1 and Articles 2d and 2e may be conferred on separate bodies responsible for different aspects of the review procedure.

3. When a body of first instance, which is independent of the contracting authority, reviews a contract award decision, Member States shall ensure that the contracting authority cannot conclude the contract before the review body has made a decision on the application either for interim measures or for review. The suspension shall end no earlier than the expiry of the standstill period referred to in Article 2a(2) and Article 2d(4) and (5).

4. Except where provided for in paragraph 3 and Article 1(5), review procedures need not necessarily have an automatic suspensive effect on the contract award procedures to which they relate.

…

6. Member States may provide that, where damages are claimed on the grounds that a decision was taken unlawfully, the contested decision must first be set aside by a body having the necessary powers.

7. Except where provided for in Articles 2d to 2f, the effects of the exercise of the powers referred to in paragraph 1 of this Article on a contract concluded subsequent to its award shall be determined by national law.

Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract in accordance with Article 1(5), paragraph 3 of this Article or Articles 2a to 2f, the powers of the body responsible for review procedures shall be limited to awarding damages to any person harmed by an infringement.

8. Member States shall ensure that decisions taken by bodies responsible for review procedures can be effectively enforced.

9. Where bodies responsible for review procedures are not judicial in character, written reasons for their decisions shall always be given. Furthermore, in such a case, provision must be made to guarantee procedures whereby any allegedly illegal measure taken by the review body or any alleged defect in the exercise of the powers conferred on it can be the subject of judicial review or review by another body which is a court or tribunal within the meaning of [Article 267 TFEU] and independent of both the contracting authority and the review body.

…'

Slovak law

11 According to Article 9(3) of Law No 25/2006 on public procurement, in the version applicable in the case under consideration:

'In procedures for the award of public contracts, the principles of equal treatment, non-discrimination between tenderers and competitors, transparency, economy and effectiveness shall apply.'

12 Article 27 of that law, entitled 'Economic and financial standing', provides as follows:

'1. Financial and economic standing shall generally be proved by:

(a) a statement made by a bank or a statement by a branch of a foreign bank, such as a loan commitment by the bank or a branch of a foreign bank.

…

3. If the tenderer or competitor, for objective reasons, is not in a position to demonstrate his economic and financial standing by means of financial or economic references, the contracting authority may agree to such proof being provided by means of any other document.'

13 Article 32(1)(b) of that law is worded as follows:

'The contracting authority shall specify in the contract notice the selection criteria concerning

…

(b) economic and financial standing and references referred to in Article 27

…'

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

14 By notice published on 16 November 2013 in the supplement to *Official Journal of the European Union* No 223/2013 and in the *Slovak Official Journal for Procurement Notices* of the same date under reference 18627-MSP, the contracting authority launched a call for tenders with a view to the award of a public contract relating to restructuring, modernisation and construction works at 16 football stadiums ('the contract').

15 According to the information provided by the referring court in answer to a request for clarification, the value of the contract was EUR 25 500 000, plus value added tax (VAT).

16 As regards the requirements in respect of economic and financial standing, the contract notice, with reference to Article 27(1)(a) of Law No 25/2006, required the participants in the tendering procedure to provide a statement from a Slovak bank or a Slovak branch office of a foreign bank confirming that it would grant them credit in the amount of at least EUR 3 000 000, a sum which should be available to them throughout the entire duration of the contract. That statement was to be in the form of a loan agreement or credit facility agreement and have been given by a person authorised to commit the bank in question.

17 The unsuccessful tenderer took part in that call for tenders. To show that it met the requirements referred to in the preceding paragraph, it provided a statement, given by a bank, which contained information on the opening of a current-account credit facility for an amount exceeding EUR 5 000 000, and a sworn statement from the tenderer certifying that, if its bid was successful, it would have available in its current account, at the time of conclusion of the contract for works and throughout the period of performance of the contract, a minimum amount of EUR 3 000 000.

18 The unsuccessful tenderer claimed that it was objectively impossible for it to satisfy the requirements relating to economic and financial standing set by the contracting authority in any other way, drawing on statements made by Slovak banks questioned by the latter to the effect that a binding undertaking to grant credit, such as that required by the contract notice, could be issued only after approval of the transaction covered by the credit and satisfaction of all the requirements laid down by the bank for the conclusion of a loan agreement.

19 Taking the view that the unsuccessful tenderer had not satisfied the requirements, particularly those in respect of economic and financial standing referred to in Article 27(1)(a) of Law No 25/2006, the contracting authority decided to exclude it from the tendering procedure. That decision was confirmed by the Public Procurement Regulatory Authority. The Krajský súd de Bratislava (Bratislava Regional Court, Slovakia) having dismissed the action brought against that decision by judgment of 13 January 2015, the unsuccessful tenderer brought an appeal against that judgment before the referring court, the Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic).

20 The referring court questions the legality of the decision of the contracting authority which — despite the fact that the unsuccessful tenderer had, at the time of the tendering procedure, a commitment from a bank for the provision of credit in the amount of EUR 5 000 000 — considered that it did not fulfil the criterion with regards to economic and financial standing laid down in the contract notice.

21 The referring court is also uncertain whether economic and financial standing could be shown by other means and, if so, whether a sworn statement provided by the unsuccessful tenderer certifying that, should its bid be successful, it would, at the time of conclusion of the contract for works and throughout the period of performance of the contract, have available in its account a minimum amount of EUR 3 000 000, would suffice for that purpose.

22 Lastly, the referring court is uncertain whether the judicial remedy available to the unsuccessful tenderer at national level may be regarded as 'effective' within the meaning of EU law, since the subject matter of the action has ceased to exist, the successful tenderer having performed the contract almost in its entirety.

23 In those circumstances, the Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic) decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) May the conduct of a national authority, which finds that a tenderer for a contract with an estimated value of EUR 3 000 000 does not satisfy the selection criterion relating to economic and financial standing, even though a sworn statement submitted by the tenderer and a statement provided by its bank certify that it will be able to draw on funds under a secured loan, which can be used for any purpose, up to a maximum amount exceeding the value of the contract, be considered compatible with the objective in particular of Article 47(1)(a) and (4) of Directive [2004/18]?

(2) Where, in a binding undertaking to grant credit, a bank operating on the banking-services market of a Member State, makes the release of funds conditional upon fulfilment of conditions for granting credit which are not specifically indicated in the loan agreement at the time of the tendering procedure, does such conduct constitute, for the purpose of Article 47(5) of Directive 2004/18, a "valid reason" why the tenderer cannot produce the references requested by the contracting authority, so that it is possible for the tenderer to prove its economic and financial standing by means of a sworn statement to the effect that its credit arrangement with the bank is sufficient for the purpose in question?

(3) In an action for review of the decision of a national authority responsible for public tendering procedures to exclude a tenderer, may the fact that the successful tenderer has almost completed performance of the various contracts be regarded as an objective impediment precluding the national court from giving effect to the provisions of Article 47(1) and (2) of the [Charter], in conjunction with Article 1(1) and Article 2(3) and (6) to (8) of Directive [89/665]?'

Consideration of the questions referred

The first question

24 By its first question, the referring court asks, in essence, whether Article 47(1)(a) and (4) of Directive 2004/18 must be interpreted as meaning that a contracting authority may not exclude a tenderer from a tendering procedure on the ground that it does not fulfil the criterion regarding economic and financial standing laid down in the contract notice with respect to the provision of a statement given by a bank undertaking to grant credit in the amount specified in the contract notice and to guarantee that that amount will be available to the tenderer throughout the period of performance of the contract.

25 As a preliminary point, it should be noted that Article 267 TFEU does not empower the Court to apply rules of EU law to a particular case, but only to rule on the interpretation of the Treaties and of acts adopted by the EU institutions. The Court may, however, in the framework of the judicial cooperation provided for by that article and on the basis of the material presented to it, provide the national court with an interpretation of EU law which may be useful to it in assessing the effects of one or other of its provisions (judgment of 16 July 2015, *CHEZ Razpredelenie Bulgaria*, C-83/14, EU:C:2015:480, paragraph 71 and the case-law cited).

26 Article 44 of Directive 2004/18 provides that the contracting authority may require the tenderers to satisfy minimum capacity levels. Such minimum capacity levels must be indicated in the contract notice.

27 In this regard, Article 47(1) of the same directive lists the references that may, as a general rule, be required from an economic operator to demonstrate its economic and financial standing. Those references are intended to establish that the tenderer has the necessary means to perform a public contract. Among those references is listed 'appropriate statements from banks'.

28 In accordance with Article 47(4) of Directive 2004/18, the contracting authorities must specify in the contract notice the references that they have chosen from that list as well as the references that must be provided.

29 In the present case, as a criterion for proving economic and financial standing, the contract notice at issue in the main proceedings required the tenderers to provide a document issued by a bank certifying that it had been granted credit of a minimum amount of EUR 3 000 000 that would be available throughout the period of performance of the contract, namely 48 months.

30 It is apparent from the documents submitted to the Court that the unsuccessful tenderer provided a statement, given by a bank, that included information on its financial situation and a declaration confirming the opening of a current-account credit facility for an amount exceeding EUR 5 000 000. The unsuccessful tenderer also provided a sworn statement attesting that, should its bid be successful, it would have a minimum of EUR 3 000 000 available in its account throughout the period of performance of the contract.

31 The contracting authority considered, however, that the unsuccessful tenderer had not met the economic and financial standing requirements since its economic and financial situation did not satisfy the condition for participation requiring the submission of evidence with the content and in the form prescribed.

32 In this respect it must be noted that Article 47 of Directive 2004/18 leaves a fair degree of freedom to the contracting authorities, which is apparent, in particular, from the expression 'as a general rule' in that provision. As is clear from the Court's case-law, unlike Article 48 of that directive, which establishes a closed system limiting the methods of assessment and verification available to those authorities and, therefore, limits their opportunities to lay down requirements, Article 47(4) expressly authorises contracting authorities to choose the references that must be produced by candidates or tenderers in order to prove their economic and financial standing. As Article 44(2) of Directive 2004/18 refers to Article 47 thereof, the same freedom of choice exists as regards the minimum levels of economic and financial standing (see, to that effect, judgment of 18 October 2012, *Édukövízig and Hochtief Construction*, C-218/11, EU:C:2012:643, paragraph 28).

33 That said, it is expressly stated in the second subparagraph of Article 44(2) of Directive 2004/18 that the minimum levels of ability required for a specific contract must be related and proportionate to the subject matter of the contract. It follows that the requirements in terms of economic and financial standing must be objectively such as to provide information on such standing of an economic operator and must be adapted to the size of the contract concerned in that they constitute objectively a positive indication of the existence of a sufficient economic and financial basis for the performance of that contract, without, however, going beyond what is reasonably necessary for that purpose (see, to that effect, judgment of 18 October 2012, *Édukövízig and Hochtief Construction*, C-218/11, EU:C:2012:643, paragraph 29).

34 Furthermore, it must be noted, first, that the principle of equal treatment requires tenderers to be afforded equality of opportunity when formulating their tenders, which therefore implies that the bids of all tenderers must be subject to the same conditions. Second, the obligation of transparency, which

is its corollary, is intended to preclude any risk of favouritism or arbitrariness on the part of the contracting authority. That obligation implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the contract notice or tender specifications so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way and, second, the contracting authority is able to ascertain whether the tenders submitted satisfy the criteria applying to the contract in question (judgment of 2 June 2016, *Pizzo*, C-27/15, EU:C:2016:404, paragraph 36 and the case-law cited).

35 As regards, first, the requirement expressly laid down in the contract notice that the financial guarantee should be provided 'to ensure performance of the contract', it appears from the wording of the first question referred that the contracting authority believed that that requirement was not satisfied since the credit granted to the tenderer, although exceeding the amount required by the contract notice, was a current-account credit facility that was not tied to performance of the contract.

36 In this respect, it must be noted that a requirement to obtain a loan tied to performance of the contract is, objectively, a reasonable means of obtaining information on the economic ability of the tenderer to perform the contract successfully. As the European Commission noted, the grant of a loan is an appropriate means of establishing that the tenderer has at its disposal resources which it does not itself own and which are necessary for the performance of the contract (see, to that effect, judgment of 2 December 1999, *Holst Italia*, C-176/98, EU:C:1999:593, paragraph 29). It is, however, once again for the referring court to confirm that the amount required in the contract notice is proportionate to the subject matter of the contract.

37 In respect, second, of the requirement, also laid down in the contract notice, regarding the grant of credit in a minimum amount of EUR 3 000 000 'for the period of performance of the contract (48 months)', although, admittedly Article 47 of Directive 2004/18 does not expressly provide that the contracting authority may require a tenderer to have at its disposal the resources necessary for the performance of the contract throughout the duration of the performance of the contract, it must be noted, as the Advocate General observed in point 46 of his Opinion, that the contracting authority's verification of the tenderer's compliance with the economic and financial criteria in a tendering procedure, is intended to provide that authority with the assurance that the successful tenderer will indeed be able to use whatever resources it relies on throughout the period covered by the contract (see, to that effect, judgment of 14 January 2016, *Ostas celtnieks*, C-234/14, EU:C:2016:6, paragraph 26 and the case-law cited).

38 Moreover, the continued availability of the amount required throughout the period of performance of the contract is a useful tool in assessing, in a tangible manner, the economic and financial standing of the tenderer with respect to its commitments. The proper performance of the contract is indeed intrinsically linked to whether the tenderer has the financial means for the execution of the contract.

39 Therefore, in the present case, the condition requiring the tenderer to have the funds available throughout the period of performance of the contract is appropriate for securing the objectives of Article 47(1) of Directive 2004/18.

40 However, it is for the national court to determine the relevance of the evidence provided by the tenderer for that purpose, in particular the contract opening a current-account credit facility.

41 It follows from the foregoing that the answer to the first question is that Article 47(1)(a) and (4) of Directive 2004/18 must be interpreted as meaning that a contracting authority may exclude a tenderer from a tender procedure on the ground that it does not fulfil the criterion regarding economic and financial standing laid down in the contract notice with respect to the provision of a statement given

by a bank undertaking to grant credit in the amount specified in the contract notice and to guarantee that that amount will be available to the tenderer throughout the period of performance of the contract.

The second question

42 By its second question, the referring court seeks to ascertain, in essence, whether, when a contract notice requires the provision of a statement given by a bank undertaking to grant credit in the amount specified in the contract notice and to guarantee that that amount will be available to the tenderer throughout the duration of the performance of the contract, the fact that the banks approached by the tenderer consider themselves unable to provide the tenderer with a statement in the terms specified by the contract notice may constitute a 'valid reason', within the meaning of Article 47(5) of Directive 2004/18, allowing the tenderer, where appropriate, to prove its economic and financial standing by any other document considered appropriate by the contracting authority, such as a sworn statement certifying that, should its bid be selected, its current account will be credited with an amount corresponding to the amount specified in the contract notice from the time of conclusion of the contract and throughout the duration of performance of the contract.

43 Article 47(5) of Directive 2004/18 allows tenderers that are unable for any valid reason to provide the references required by the contracting authority to prove their economic and financial standing by any other document, provided that the contracting authority considers such a document to be appropriate for this purpose.

44 In the present case, the unsuccessful tenderer provided a sworn statement certifying that, should its bid be selected, its account would be credited with at least EUR 3 000 000 throughout the duration of the performance of the contract, claiming that it was impossible to obtain a statement from a bank undertaking to grant it credit in the amount specified by the contract notice.

45 In this regard, it is for the referring court to determine whether it was objectively impossible for the unsuccessful tenderer to provide the references required by the contracting authority. This would be the case, in particular, as the Advocate General noted in point 53 of his Opinion, if, in Slovakia, the tenderer was not able to obtain the references required in the contract notice.

46 Only if the referring court should find that that was objectively impossible would that court be required to determine whether the contracting authority was entitled to take the view that the sworn statement provided by the tenderer was not an appropriate document to prove its economic and financial standing. It would also be for the referring court to determine, in accordance with Article 44(2) of Directive 2003/18, read in the light of recital 39 thereof, whether the extent of the information and the competence required were related and proportionate to the subject matter of the contract and whether the selection criteria were applied in a non-discriminatory way.

47 With regard to factual considerations, it is for the referring court to determine whether it was objectively impossible for the unsuccessful tenderer to provide the references required by the contracting authority and, if so, whether the contracting authority was entitled to consider that the sworn statement provided by the tenderer was not an appropriate document for proving its economic and financial standing.

48 Therefore, the answer to the second question is that Article 47(5) of Directive 2004/18 must be interpreted as meaning that, when a contract notice requires the production of a statement given by a bank undertaking to grant credit in the amount specified by the contract notice and to guarantee that that amount will be available to the tenderer throughout the duration of the performance of the contract, the fact that the banks approached by the tenderer consider themselves unable to provide the tenderer with a statement in the terms specified by the contract notice may constitute a 'valid

reason', within the meaning of that article, allowing the tenderer, where appropriate, to prove its economic and financial standing by any other document considered appropriate by the contracting authority, provided that it was objectively impossible for the tenderer to provide the references required by the contracting authority, which is a matter for the referring court to determine.

The third question

49 In accordance with the Court's settled case-law, the procedure provided for by Article 267 TFEU is an instrument of cooperation between the Court of Justice and national courts and tribunals, by means of which the former provides the latter with interpretation of such EU law as is necessary for them to give judgment in cases upon which they are called to adjudicate (see, inter alia, order of 8 September 2016, *Caixabank and Abanca Corporación Bancaria*, C-91/16 and C-120/16, not published, EU:C:2016:673, paragraph 13 and the case-law cited).

50 In this respect, the Court has noted many times that the need to provide an interpretation of EU law which will be of use to the national court means that the national court must define the factual and legal context of the questions it is asking or, at the very least, explain the assumptions of fact on which those questions are based (see, inter alia, order of 8 September 2016, *Caixabank and Abanca Corporación Bancaria*, C-91/16 and C-120/16, not published, EU:C:2016:673, paragraph 14 and the case-law cited).

51 The requirements concerning the content of a request for a preliminary ruling are set out expressly in Article 94 of the Rules of Procedure of the Court of Justice as well as in paragraph 15 of the Recommendations of the Court of Justice of the European Union to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (OJ 2016 C 439, p. 1), according to which any request for a preliminary ruling must contain 'a summary of the subject-matter of the dispute and the relevant findings of fact as determined by the referring court or tribunal, or, at the very least, an account of the facts on which the questions are based', 'the tenor of any national provisions applicable in the case and, where appropriate, the relevant national case-law' as well as 'a statement of the reasons which prompted the referring court or tribunal to inquire about the interpretation or validity of certain provisions of EU law, and the relationship between those provisions and the national legislation applicable to the main proceedings' (see, to that effect, order of 20 July 2016, *Stanleybet Malta and Stoppani*, C-141/16, not published, EU:C:2016:596, paragraphs 8 and 9 and the case-law cited).

52 In the present case, the order for reference does not give any indication of the national provisions intended to transpose those of Directive 89/665 relating to review procedures and their effects, as amended by Directive 2007/66. It fails, in particular, to state whether the Slovak Republic provided, as established under Article 2(6) of that directive, that the contested decision must first be set aside so that damages can be claimed, or whether, as the second subparagraph of Article 2(7) of that directive allows, it provided that after the conclusion of the contract the powers of the body responsible for review procedures are limited to awarding damages.

53 Moreover, the order for reference lacks precision as regards the facts of the main proceedings with respect to the appeal brought by the unsuccessful tenderer and the reasons why the tendering procedure continued despite the fact that an appeal against the decision of the contracting authority was pending.

54 Without this information the Court is unable to give a useful answer to the third question referred, which, as a result, is inadmissible.

Costs

55 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 (Second Chamber) hereby rules:

1. **Article 47(1)(a) and (4) 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 must be interpreted as meaning that a contracting authority may exclude a tenderer from a tendering procedure on the ground that it does not fulfil the criterion regarding economic and financial standing laid down in the contract notice with respect to the provision of a statement given by a bank undertaking to grant credit in the amount specified in the contract notice and to guarantee that that amount will be available to the tenderer throughout the period of performance of the contract.**

2. **Article 47(5) of Directive 2004/18 must be interpreted as meaning that, when a contract notice requires the provision of a statement given by a bank undertaking to grant credit in the amount specified in the contract notice and to guarantee that that amount will be available to the tenderer throughout the duration of the performance of the contract, the fact that the banks approached by the tenderer consider themselves unable to provide the tenderer with a statement in the terms specified by the contract notice may constitute a 'valid reason', within the meaning of that article, allowing the tenderer, where appropriate, to prove its economic and financial standing by any other document considered appropriate by the contracting authority, provided that it was objectively impossible for the tenderer to provide the references required by the contracting authority, which is a matter for the referring court to determine.**

[Signatures]