Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

10 October 2013 *

(Public contracts — Directive 2004/18/EC — Economic and financial standing — Technical and/or professional ability — Articles 47(2) and 48(3) — Right of an economic operator to rely on the capacities of other entities — Article 52 — Certification system — Public works contracts — National legislation requiring possession of a qualification certificate corresponding to the category and the value of the works covered by the contract — Prohibition on reliance on the certificates of more than one entity for works within the same category))

In Case C-94/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunale amministrativo regionale per le Marche (Italy), made by decision of 15 December 2011, received at the Court on 20 February 2012, in the proceedings

Swm Costruzioni 2 SpA,

Mannocchi Luigino DI

v

Provincia di Fermo,

intervening party:

Torelli Dottori SpA,

THE COURT (Fifth Chamber),

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

Advocate General: N. Jääskinen,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Swm Costruzioni 2 SpA and Mannocchi Luigino DI, by C. Famiglini, avvocato,

— the Italian Government, by G. Palmieri, acting as Agent, and P. Gentili, avvocato dello Stato,

* Language of the case: Italian.

— the European Commission, by C. Zadra and A. Tokár, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 28 February 2013,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 47(2) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114, and Corrigendum, OJ 2004 L 351, p. 44).

2 The request has been made in proceedings between (i) Swm Costruzioni 2 SpA ('Swm') and Mannocchi Luigino DI, undertakings which, together, have formed an ad hoc tendering consortium (Raggruppamento Temporaneo di Imprese, 'the RTI'), and (ii) the Provincia di Fermo concerning the latter's decision to exclude that RTI from a tendering procedure for the award of a public works contract.

Legal context

European Union law

3 Recital 32 in the preamble to Directive 2004/18 states as follows:

'In order to encourage the involvement of small and medium-sized undertakings in the public contracts procurement market, it is advisable to include provisions on subcontracting.'

4 Recital 45 in the preamble to that directive reads as follows:

'This Directive allows Member States to establish official lists of contractors, suppliers or service providers or a system of certification by public or private bodies, and makes provision for the effects of such registration or such certification in a contract award procedure in another Member State. As regards official lists of approved economic operators, it is important to take into account Court of Justice case-law in cases where an economic operator belonging to a group claims the economic, financial or technical capabilities of other companies in the group in support of its application for registration. In this case, it is for the economic operator to prove that those resources will actually be available to it throughout the period of validity of the registration. For the purposes of that registration, a Member State may therefore determine the level of requirements to be met and in particular, for example where the operator lays claim to the financial standing of another company in the group, it may require that that company be held liable, if necessary jointly and severally.'

5 Article 1(2)(b) and the first subparagraph of Article 1(8) of Directive 2004/18 contain the following definitions:

'2. ...

(b) "Public works contracts" are public contracts having as their object either the execution, or both the design and execution, of works related to one of the activities within the meaning of Annex I or a work, or the realisation, by whatever means, of a work corresponding to the requirements

specified by the contracting authority. A "work" means the outcome of building or civil engineering works taken as a whole which is sufficient of itself to fulfil an economic or technical function.

...

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

6 Article 4(2) of that directive provides as follows:

'Groups of economic operators may submit tenders or put themselves forward as candidates. ...'

7 The first paragraph of Article 25 of the directive states as follows:

'In the contract documents, the contracting authority may ask or may be required by a Member State to ask the tenderer to indicate in his tender any share of the contract he may intend to subcontract to third parties and any proposed subcontractors.'

8 Article 44 of that directive states as follows:

'1. Contracts shall be awarded ... after the suitability of the economic operators not excluded ... has been checked by contracting authorities in accordance with the criteria of economic and financial standing, of professional and technical knowledge or ability referred to in Articles 47 to 52 ...

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

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

...'

9 Article 47 of Directive 2004/18, entitled 'Economic and financial standing', reads as follows:

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

...

(c) a statement of the undertaking's overall turnover and, where appropriate, of turnover in the area covered by the contract for a maximum of the last three financial years available, depending on the date on which the undertaking was set up or the economic operator started trading, as far as the information on these turnovers is available.

2. An economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. It must in that case prove to the contracting authority that it will have at its disposal the resources necessary, for example, by producing an undertaking by those entities to that effect.

3. Under the same conditions, a group of economic operators as referred to in Article 4 may rely on the capacities of participants in the group or of other entities.

...'

10 Article 48 of that directive, entitled 'Technical and/or professional ability', states as follows:

'1. The technical and/or professional abilities of the economic operators shall be assessed and examined in accordance with paragraphs 2 and 3.

2. Evidence of the economic operators' technical abilities may be furnished by one or more of the following means according to the nature, quantity or importance, and use of the works, supplies or services:

(a) (i) a list of the works carried out over the past five years, accompanied by certificates of satisfactory execution for the most important works. These certificates shall indicate the value, date and site of the works and shall specify whether they were carried out according to the rules of the trade and properly completed. Where appropriate, the competent authority shall submit these certificates to the contracting authority direct;

…

(b) an indication of the technicians or technical bodies involved, whether or not belonging directly to the economic operator's undertaking, especially those responsible for quality control and, in the case of public works contracts, those upon whom the contractor can call in order to carry out the work;

…

(h) a statement of the tools, plant or technical equipment available to the service provider or contractor for carrying out the contract;

...

3. An economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. It must in that case prove to the contracting authority that it will have at its disposal the resources necessary for the execution of the contract, for example, by producing an undertaking by those entities to place the necessary resources at the disposal of the economic operator.

4. Under the same conditions a group of economic operators as referred to Article 4 may rely on the abilities of participants in the group or in other entities.

...'

11 Article 52 of Directive 2004/18, entitled 'Official lists of approved economic operators and certification by bodies established under public or private law', provides in paragraph 1 thereof:

'Member States may introduce either official lists of approved contractors, suppliers or service providers or certification by certification bodies established in public or private law.

Member States shall adapt the conditions for registration on these lists and for the issue of certificates by certification bodies to the provisions of Article 45(1), Article 45(2)(a) to (d) and (g), Article 46, Article 47(1), (4) and (5), Article 48(1), (2), (5) and (6), Article 49 and, where appropriate, Article 50.

Member States shall also adapt them to Article 47(2) and Article 48(3) as regards applications for registration submitted by economic operators belonging to a group and claiming resources made available to them by the other companies in the group. In such case, these operators must prove to the authority establishing the official list that they will have these resources at their disposal throughout the period of validity of the certificate attesting to their being registered in the official list and that throughout the same period these companies continue to fulfil the qualitative selection requirements laid down in the Articles referred to in the second subparagraph on which operators rely for their registration.'

Italian Law

12 In accordance with Decree No 34 of the President of the Republic of 25 January 2000 introducing rules establishing the qualification system for persons who carry out public works in accordance with Article 8 of Law No 109 of 11 February 1994, as subsequently amended (decreto del Presidente della Repubblica n. 34 – Regolamento recante istituzione del sistema di qualificazione per gli esecutori di lavori pubblici, ai sensi dell'articolo 8 della legge 11 febbraio 1994, n. 109, e successive modificazioni, Ordinary Supplement to GURI No 49 of 29 February 2000), which is applicable in the main proceedings, public works contracts the value of which exceeds EUR 150 000 may be carried out only by undertakings in possession of 'SOA' certificates.

13 Those certificates correspond to qualification categories, depending on the nature of the works involved, and to classes, which determine the value of the contracts to which a certificate grants access.

14 Those certificates are issued by certification bodies – società organismi di attestazione – which are entrusted with the task, inter alia, of ensuring that each approved undertaking satisfies a set of general, economic, financial, technical and organisational criteria considered essential for the execution of public works.

15 It is apparent from the documents before the Court that appropriate economic and financial standing is established, inter alia, by works-related turnover equal to or greater than 100% of the amounts required for qualification in the various categories. As regards technical capacity, it is required, inter alia, for each category covered by an application for qualification, first, that works of a value equal to or greater than 90% of the amount of the class applied for have been carried out and, second, that one, two or three contracts the value of which is equal to or greater than 40%, 55% or 65% of that amount, respectively, have been performed.

16 Article 49 of Legislative Decree No 163 of 12 April 2006 establishing the Code on public works contracts, public service contracts and public supply contracts pursuant to Directives 2004/17/EC and 2004/18/EC (decreto legislativo n. 163 – Codice dei contratti pubblici relativi a lavori, servizi e forniture in attuazione delle direttive 2004/17/CE e 2004/18/CE, Ordinary Supplement to GURI No 100 of 2 May 2006), as amended by Legislative Decree No 152 of 11 September 2008 (Ordinary Supplement to GURI No 231 of 2 October 2008, 'Legislative Decree No 163/2006'), provides as follows:

'1. The tenderer, be it an individual or a member of a consortium or group within the meaning of Article 34, in a specific tendering procedure for a public works, services or supply contract, may fulfil the requirements relating to possession of economic, financial, technical and organisational capacity, or possession of a SOA certificate ..., by relying on the capacity of another entity or the SOA certificate of another entity.

…

6. For works contracts, the tenderer may rely on the capacities of only one auxiliary undertaking for each qualification category. The invitation to tender may permit reliance on the capacity of more than one auxiliary undertaking having regard to the value of the contract or the special nature of the services to be provided ...'

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

17 The Provincia di Fermo initiated a tendering procedure for a works contract for the modernisation and extension of a road, the estimated value of which exceeds the relevant threshold for the application of Directive 2004/18, as laid down in Article 7 thereof. Under that procedure, tenderers were required to demonstrate their technical and professional ability by presenting an SOA certificate corresponding to the nature and value of the works covered by the contract.

18 The RTI formed by Swm and Mannocchi Luigino DI participated in that procedure through Swm. In order to meet the requirement concerning the relevant class of SOA certificate, Swm relied on the SOA certificates of two third-party undertakings.

19 By decision of 2 August 2011, the RTI was excluded from the tendering procedure on the basis of the general prohibition on reliance on the capacities of more than one entity within the same qualification category laid down by Article 49(6) of Legislative Decree No 163/2006.

20 An action against that decision was brought before the Tribunale amministrativo regionale per le Marche (Marche Regional Administrative Court).

21 That court refers to decisions of the Consiglio di Stato (Council of State) on that subject. The Consiglio di Stato has held, on the one hand, that the prohibition is not applicable to undertakings forming an RTI where the RTI is itself a candidate or tenderer. That decision was based on the rationale behind the right to rely on the capacities of third-party entities, namely to promote the broadest possible participation by undertakings in tendering procedures. On the other hand, the Consiglio di Stato has also found that a tenderer may not combine its SOA certificate with that of a third-party entity in order to fall within the class required for a particular contract. That decision was based on the objective of the European Union rules on public procurement, namely that of attaining the maximum level of competitiveness in order to achieve at the same time the most efficient and reliable performance of public contracts.

22 In those circumstances the Tribunale amministrativo regionale per le Marche decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Article 47(2) of Directive [2004/18] be interpreted as precluding, in principle, the [rule] of a Member State, such as [that] set out in Article 49(6) of Legislative Decree No 163/2006, which prohibits, except in special circumstances, [economic operators participating in a tendering procedure for a public works contract] [from relying] on the capacities of more than one auxiliary undertaking ... for each qualification category [with the proviso that] [t]he invitation to tender may permit reliance on the capacities of more than one auxiliary undertaking having regard to the value of the contract or the special nature of the services to be provided ...?'

Consideration of the question referred

23 As a preliminary point, it must be noted that the national provision referred to in the question referred for a preliminary ruling applies both to the criteria of economic and financial standing and to the criteria of technical and organisational capacity. Article 47(2) of Directive 2004/18 – the only provision of that directive referred to in the question – concerns only the economic and financial

standing of economic operators participating in a tendering procedure, while the text of paragraph 3 of Article 48 of that directive, which relates to the technical and/or professional ability of those operators, is in essence identical to that of Article 47(2).

24 The fact that a national court has, formally speaking, worded a question referred for a preliminary ruling with reference solely to certain provisions of European Union law does not preclude the Court from providing to the national court all the elements of interpretation which may be of assistance in adjudicating on the case pending before it, whether or not that court has referred to them in its questions (see, to that effect, Case C-248/11 *Nilaş and Others* [2012] ECR, paragraph 31 and the case-law cited).

25 The national court must therefore be regarded as asking, in essence, whether Articles 47(2) and 48(3) of Directive 2004/18 must be interpreted as precluding a national provision, such as that at issue in the main proceedings, which prohibits, as a general rule, economic operators participating in a tendering procedure for a public works contract from relying on the capacities of more than one undertaking for the same qualification category.

26 Under Article 44(1) of Directive 2004/18, it is for the contracting authorities to check the suitability of candidates or tenderers in accordance with the criteria referred to in Articles 47 to 52 of the directive.

27 In this respect, it must be noted, first, that Article 47(1)(c) provides that the contracting authority may, inter alia, require candidates or tenderers to prove their economic and financial standing by furnishing a statement of the undertaking's overall turnover and of turnover in the area covered by the contract for a maximum of the last three financial years available. Second, Article 48(2)(a)(i) provides that economic operators may be requested to provide evidence of their technical abilities by furnishing a list of the works carried out over the past five years.

28 Under the first subparagraph of Article 44(2) of Directive 2004/18, a contracting authority may require candidates or tenderers to meet minimum levels of economic and financial standing and technical and professional ability in accordance with Articles 47 and 48 of that directive.

29 For that purpose, the contracting authority must take account of the right conferred on every economic operator by Articles 47(2) and 48(3) of Directive 2004/18 to rely on, for a particular contract, the capacities of other entities, regardless of the nature of the links which it has with them, provided that it proves to the contracting authority that it will have at its disposal the resources necessary for the execution of the contract.

30 It should be noted, as the Advocate General observed at point 18 of his Opinion, that the systematic use of the plural in those provisions indicates that they do not prohibit, in principle, candidates or tenderers from relying on the capacities of more than one third-party entity in order to prove that they meet a minimum capacity level. *A fortiori*, those provisions do not lay down any general prohibition regarding a candidate or tenderer's reliance on the capacities of one or more third-party entities in addition to its own capacities in order to fulfil the criteria set by a contracting authority.

31 That finding is corroborated by several provisions in Directive 2004/18. Thus, Article 48(2)(b) thereof refers to reliance on technicians or technical bodies, whether or not they belong directly to the undertaking of the economic operator concerned, upon whom the contractor can call in order to carry out the work. Similarly, Article 48(2)(h) of the directive refers to the tools, plant or technical equipment available to the contractor for carrying out the contract, without imposing any limit on the number of entities who will provide them. To the same effect, Article 4(2) of the directive permits groups of economic operators to participate in public procurement procedures without imposing any limit on the combining of capacities, in the same way as Article 25 of the directive provides for the use of subcontractors without imposing any limit in that regard.

32 Finally, the Court has expressly referred to an economic operator's right to use resources belonging to one or more other entities, possibly in addition to its own resources, in order to carry out a contract (see, to that effect, Case C-176/98 *Holst Italia* [1999] ECR I-8607, paragraphs 26 and 27, and Case C-314/01 *Siemens and ARGE Telekom* [2004] ECR I-2549, paragraph 43).

33 Therefore, it must be held that Directive 2004/18 permits the combining of the capacities of more than one economic operator for the purpose of satisfying the minimum capacity requirements set by the contracting authority, provided that the candidate or tenderer relying on the capacities of one or more other entities proves to that authority that it will actually have at its disposal the resources of those entities necessary for the execution of the contract.

34 Such an interpretation is consistent with the objective pursued by the directives in this area of attaining the widest possible opening-up of public contracts to competition to the benefit not only of economic operators but also contracting authorities (see, to that effect, Case C-305/08 *CoNISMa* [2009] ECR I-12129, paragraph 37 and the case-law cited). In addition, as the Advocate General noted at points 33 and 37 of his Opinion, that interpretation also facilitates the involvement of small- and medium-sized undertakings in the contracts procurement market, an aim also pursued by Directive 2004/18, as stated in recital 32 thereof.

35 It is true that there may be works with special requirements necessitating a certain capacity which cannot be obtained by combining the capacities of more than one operator, which, individually, would be inadequate. In such circumstances, the contracting authority would be justified in requiring that the minimum capacity level concerned be achieved by a single economic operator or, where appropriate, by relying on a limited number of economic operators, in accordance with the second subparagraph of Article 44(2) of Directive 2004/18, as long as that requirement is related and proportionate to the subject-matter of the contract at issue.

36 However, since those circumstances constitute an exception, Directive 2004/18 precludes that requirement being made a general rule under national law, which is the effect of a provision such as Article 49(6) of Legislative Decree No 163/2006.

37 The fact that, in the present case, the assessment of the capacity level of an economic operator, as regards the value of the public works contracts which are open to that operator, is broadly predetermined under a national certification system or a system entailing registration on lists is irrelevant in that regard. The right given to Member States by Article 52 of Directive 2004/18 to introduce such a system may be exercised only in a manner that is consistent with the other provisions of that directive, particularly Articles 44(2), 47(2) and 48(3) thereof.

38 In the light of all of the foregoing considerations, the answer to the question referred is that Articles 47(2) and 48(3) of Directive 2004/18, read in conjunction with Article 44(2) of that directive, must be interpreted as precluding a national provision, such as that at issue in the main proceedings, which prohibits, as a general rule, economic operators participating in a tendering procedure for a public works contract from relying on the capacities of more than one undertaking for the same qualification category.

Costs

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

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

Articles 47(2) and 48(3) 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, read in conjunction with Article 44(2) of that directive, must be interpreted as precluding a national provision, such as that at issue in the main proceedings, which prohibits, as a general rule, economic operators participating in a tendering procedure for a public works contract from relying on the capacities of more than one undertaking for the same qualification category.

[Signatures]