Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

22 October 2015*

(Reference for a preliminary ruling — Public service contracts — Directive 2004/18/EC ruling — Article 23(2) — Management of public health services — Provision of health services under the remit of public hospitals in private establishments — Requirement that the services be provided in a particular municipality)

In Case C-552/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Juzgado de lo Contencioso-Administrativo No 6 de Bilbao (Administrative Court No 6, Bilbao, Spain), made by decision of 30 September 2013, received at the Court on 25 October 2013, in the proceedings

Grupo Hospitalario Quirón SA

v

Departamento de Sanidad del Gobierno Vasco,

Instituto de Religiosas Siervas de Jesús de la Caridad,

THE COURT (Fifth Chamber),

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

Advocate General: M. Szpunar,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 20 April 2015,

after considering the observations submitted on behalf of:

— Grupo Hospitalario Quirón SA, by J. Cabrera Ayala and I. Millán Fernández, abogados,

— the Departamento de Sanidad del Gobierno Vasco, by L. Pérez Ovejero, acting as Agent,

— the Instituto de Religiosas Siervas de Jesús de la Caridad, by L. Galdos Tobalina and A. Arenaza Artabe, abogados,

— the Spanish Government, by L. Banciella Rodríguez-Miñón, acting as Agent,

* Language of the case: Spanish.

— the European Commission, by A. Tokár and E. Sanfrutos Cano, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 11 June 2015,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of European Union public procurement law and, in particular, of Article 23(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).

2 The request has been made in proceedings between Grupo Hospitalario Quirón SA ('Grupo Hospitalario Quirón') and the Departamento de Sanidad del Gobierno Vasco (Department of Health of the Basque Government) and the Instituto de Religiosas Siervas de Jesús de la Caridad, concerning the validity of a condition inserted in two public procurement notices published by the Department of Health of the Basque Government.

Legal context

3 Recital 2 in the preamble to Directive 2004/18 states:

'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 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 1 of that directive, entitled 'Definitions', 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.

…

4. "Service concession" is a contract of the same type as a public service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in this right together with payment.

…’

5 Article 2 of Directive 2004/18, entitled ‘Principles of awarding contracts’, provides:

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

6 Under Article 7 of Directive 2004/18, entitled ‘Threshold amounts for public contracts’, as amended by Commission Regulation (EC) No 1177/2009 of 30 November 2009 (OJ 2009 L 314, p. 64), applicable *ratione temporis* to the main proceedings in the present case, that directive applies to public service contracts awarded by contracting authorities other than central government authorities, the estimated value of which, exclusive of value-added tax (VAT), is equal to or greater than EUR 193 000.

7 Article 21 of Directive 2004/18, entitled ’Service contracts listed in Annex II B’, is worded as follows:

‘Contracts which have as their object services listed in Annex II B shall be subject solely to Article 23 and Article 35(4).’

8 Under Annex II B to that directive, health services fall within Category 25 of that annex, entitled ‘Health and social services’.

9 Article 23 of Directive 2004/18, entitled ‘Technical specifications’, provides at paragraph 2:

‘Technical specifications shall afford equal access for tenderers and not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.’

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

10 It is apparent from the documents before the Court that, in the Basque Country (Spain), public health services are provided on the basis of a system of regional organisation and division into health-care districts. Under that system, patients covered by the public health service are served by a public hospital, known as the ‘hospital of reference’, located in the corresponding health-care district.

11 In order to relieve the pressure on public hospitals and to reduce waiting times for patients covered by those establishments who need medical treatment that the public health services cannot provide within a reasonable period, the competent authorities set up a mechanism for cooperation with private health-care establishments and hospitals, under which certain public medical care support services are outsourced and provided by those private establishments, on a contractual basis and following the award of a public service contract. Thus, those private establishments make available to the public health service their infrastructure and technical and human resources, namely, inter alia, nurses and assistants, with a view to contributing to the accomplishment of the tasks of the public health service system. However, the surgical procedures and other medical treatment are carried out by surgeons attached to the public health service, who travel to those private establishments for that purpose.

12 It is in that context that, on 15 December 2010, the Biscay Regional Director of the Department of Health of the Basque Government approved the specifications, expenditure and tender dossier for the contract for the management of public services concerning ’surgical procedures in the fields of minor, general and digestive tract surgery, gynaecology, urology and traumatology and orthopaedic surgery’ for patients covered by the public hospitals of Basurto, situated in the municipality of Bilbao, and Galdakao, situated in the municipality of Galdakao. The contract was to be awarded on the basis of an open procedure and the notice calling for applications was published in the *Boletín Oficial del País Vasco* (Official Journal of the Basque Country) of 31 January 2011. The estimated maximum value of the contract, taking into account any extensions of time, was EUR 5841041.84 (‘contract No 21/2011’).

13 On 10 May 2011, the same public authority approved the specifications, expenditure and tender dossier for the contract for the management of public services concerning 'surgical procedures in the field of ophthalmology', for patients covered by the public hospital of Galdakao. The contract was to be awarded on the basis of an open procedure and the notice calling for applications was published in the *Boletín Oficial del País Vasco* of 14 June 2011. The estimated maximum value of the contract, taking into account any extensions of time, was EUR 6273219.53 ('contract No 50/2011').

14 Under both contract No 21/2011 and contract No 50/2011, the successful tenderer-service provider was to be remunerated directly by the Department of Health of the Basque Government, in its capacity as the contracting authority.

15 The technical specifications concerning those two contracts, in the section relating to minimum requirements entitled 'Location', specify:

'Having regard to the need for those services to be provided with sufficient proximity to patients and their families, the availability of public transport and travelling time, and the need to minimise the necessary travel by the medical staff of the … hospitals, the health-care centres proposed must be situated in the municipality of Bilbao.'

16 Consequently, in accordance with the specifications of those contracts, the place of performance of the services covered by those contracts was to be the municipality of Bilbao exclusively.

17 Grupo Hospitalario Quirón, which owns a private general hospital situated in the municipality of Erandio, challenged the two public calls for tenders concerning contracts No 21/2011 and No 50/2011, initially through administrative channels and then through legal proceedings. It argued that the requirement as to performance of the services covered by those calls for tenders within the municipality of Bilbao was contrary to the principles of equal treatment, freedom of access to public procurement procedures and free competition.

18 The referring court observes that Grupo Hospitalario Quirón's hospital meets all the technical specifications referred to in the contract documents relating to those contracts, with the exception of that concerning location, since that establishment is situated not in the municipality of Bilbao, but in that of Erandio, which is adjacent to the former. However, the municipalities of Bilbao and Erandio, together with other municipalities, form what is known as 'Greater Bilbao' or the 'Metropolitan Area of Bilbao'. Moreover, none of the calls for tenders predating those at issue and relating to the same services, issued by the Department of Health of the Basque Government, contained the obligation to provide the health services concerned within a particular locality.

19 The referring court states that tenderers are not formally required to have available, nor to be the owners of, hospital facilities situated in the municipality of Bilbao, but they are required merely to be in a position to provide the health services that are the subject of contracts No 21/2011 and No 50/2011 in facilities situated in that municipality, irrespective of the legal title under which they have the use of those facilities. However, de facto, the truth is that, leaving aside the costs related to the use of such facilities, the only candidates who may participate in the calls for tenders would be those health-care operators who are established in Bilbao, since any other operators would not be in a position to have available the appropriate facilities and personnel within the periods between the dates of publication of the calls for tenders in respect of those contracts and those stipulated for the submission of tenders.

20 According to the referring court, the condition relating to location included in the specifications of those contracts constitutes a restriction on competition and a breach of the principle of free access by tenderers to public procurement procedures, which cannot be justified by any imperative need. Indeed, the adjacent municipalities of Erandio and Bilbao belonged to the same municipality between 1924

and 1982 and at present form, together with other municipalities, the Metropolitan Area of Bilbao. In addition, Grupo Hospitalario Quirón's hospital is easily accessible by public transport from the municipality of Bilbao.

21 Furthermore, again according to the referring court, the health services that are the subject of contract No 21/2011 are intended not only for patients covered by the public hospital of Basurto, situated in the municipality of Bilbao, but also for patients covered by the public hospital of Galdakao, situated in the municipality of Galdakao, which is separate from the municipality of Bilbao. So far as the services that are the subject of contract No 50/2011 are concerned, those services are intended solely for patients covered by the public hospital of Galdakao. Consequently, it would be highly likely that the patients for whom the services that are the subject of those two contracts are intended reside, in the main, in a municipality other than that of Bilbao, with the result that the argument based on the patients' place of residence is unfounded.

22 Therefore, the referring court reaches the conclusion that the condition at issue in the main proceedings cannot be regarded as being compatible with Article 23(2) of Directive 2004/18.

23 Having regard to those considerations, the Juzgado de lo Contencioso-Administrativo No 6 de Bilbao (Administrative Court No 6, Bilbao), decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is the requirement, included in public contracts for the management of public health-care services, that the provision of health services which is the subject-matter of such contracts be carried out only in a determined municipality, which is not necessarily the municipality in which the patients reside, compatible with EU law?'

Consideration of the question referred

24 In the first place, it should be observed that, as is apparent from the documents before the Court, the two contracts, No 21/2011 and No 50/2011, constitute public service contracts within the meaning of Article 1(2)(a) and (d) of Directive 2004/18, the values of which exceed the threshold provided for in Article 7 thereof, and not service concessions within the meaning of Article 1(4) of that directive, since the remuneration of the successful tenderer is paid in its entirety by the contracting authority, which also bears the economic risk.

25 It must also be observed that, as is apparent from paragraphs 7 and 8 above, those contracts, relating to health services, are subject solely to the provisions of Articles 23 and 35(4) of Directive 2004/18.

26 In the second place, it must be noted, first, that Article 23(2) of Directive 2004/18, a provision to which those contracts are subject and which constitutes an expression of the principle of equal treatment, states that technical specifications are to afford equal access for tenderers.

27 Secondly, as is apparent from paragraph 15 above, the technical specifications of the two contracts at issue in the main proceedings refer to the need to ensure the proximity and accessibility of the private support hospital establishment that is to be chosen, in the interests of patients, their families and the medical personnel who are required to travel to that establishment, criteria which are inherent in the nature of the services sought.

28 However, the requirement that such an establishment must imperatively be situated in a given municipality that is to be the place where the medical services concerned are exclusively to be provided, laid down in the special administrative tender specifications and the technical specifications of contracts No 21/2011 and No 50/2011, constitute, having regard to the geographic location in the main proceedings, a territorial constraint on performance, which by its nature is not such as to enable

the objective set out in paragraph 27 above to be achieved, namely to ensure the proximity and accessibility of the private support hospital establishment, in the interests of patients, their families and the medical personnel who are required to travel to that establishment, while ensuring equal and non-discriminatory access to those contracts by all tenderers.

29 In the case of the geographic location in question in the main proceedings, a requirement as to geographic location, such as that set out in the special administrative tender specifications and technical specifications of contracts No 21/2011 and No 50/2011, has the effect of automatically excluding those tenderers who cannot provide the services in question in an establishment situated within a given municipality, despite the fact that they may satisfy the other conditions laid down in the contract documents and technical specifications of the contracts under consideration.

30 The referring court observes that the applicant in the main proceedings is in that very position; its establishment satisfies all of the requisite conditions, including those of proximity and accessibility, with the exception of the requirement as to location within the territory of the municipality of Bilbao since that establishment is situated in a municipality adjacent to the latter.

31 It must also be noted in this connection, that, as the referring court observes, many patients who ought to receive the services to be delivered in the successful tenderer's private hospital establishment reside outside the municipality within the territory of which that establishment has to be situated under the location clause under consideration.

32 Consequently, that requirement does not ensure equal and non-discriminatory access to the two contracts at issue in the main proceedings by all tenderers who might be able to ensure the proximity and accessibility of the private support hospital establishment, since that requirement renders those contracts accessible only to those tenderers who can provide the services in question in an establishment situated within the municipality designated in the corresponding contract notices. That requirement is therefore contrary to Article 23(2) of Directive 2004/18.

33 In the light of the foregoing considerations, the answer to the question referred is that Article 23(2) of Directive 2004/18 precludes a requirement such as that at issue in the main proceedings, expressed as a technical specification in public procurement notices relating to the provision of health services, whereby the medical services that are the subject of the calls for tenders must be provided by private hospital establishments situated exclusively within a given municipality, which is not necessarily that in which the patients concerned by those services reside, where that requirement involves the automatic exclusion of tenderers who cannot provide those services in such an establishment situated within that municipality but who satisfy all the other conditions of those calls for tenders.

Costs

34 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:

Article 23(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 precludes a requirement, such as that at issue in the main proceedings, expressed as a technical specification in public procurement notices relating to the provision of health services, whereby the medical services that are the subject of the calls for tenders must be provided by private hospital establishments situated exclusively within a given municipality, which is not necessarily that in which the patients

concerned by those services reside, where that requirement involves the automatic exclusion of tenderers who cannot provide those services in such an establishment situated within that municipality but who satisfy all the other conditions of those calls for tenders.

[Signatures]