Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

14 January 2016*

(Reference for a preliminary ruling — Public procurement contracts — Directive 2004/18/EC — Economic and financial standing — Technical and/or professional ability — Articles 47(2) and 48(3) — Tender specifications laying down the obligation for a tenderer to conclude a cooperation agreement or to set up a partnership with the entities on whose capacities it relies)

In Case C-234/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Augstākās tiesa (Supreme Court, Latvia), made by decision of 23 April 2014, received at the Court on 12 May 2014, in the proceedings

Ostas celtnieks SIA

v

Talsu novada pašvaldība,

Iepirkumu uzraudzības birojs

THE COURT (First Chamber),

composed of A. Tizzano (Rapporteur), Vice-President of the Court, acting as President of the First Chamber, F. Biltgen, E. Levits, M. Berger and S. Rodin, Judges,

Advocate General: M. Wathelet,

Registrar: I. Illéssy, Administrator,

having regard to the written procedure and further to the hearing on 16 April 2015,

after considering the observations submitted on behalf of:

— 'Ostas celtnieks' SIA, by J. Ešenvalds, advokāts,

— the Latvian Government, by I. Kalniņš and L. Skolmeistare, acting as Agents,

— the Greek Government, by K. Georgiadis and S. Lekkou, acting as Agents,

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

after hearing the Opinion of the Advocate General at the sitting on 4 June 2015,

* Language of the case: Latvian.

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation 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 'Ostas celtnieks' SIA ('Ostas celtnieks') and the Talsu novada pašvaldība (Municipality of Talsi) and the Iepirkumu uzraudzības birojs (Office for the Supervision of Public Contracts) concerning the requirements set out in the tender specifications relating to a procurement procedure for a public works contract.

The legal framework

EU law

3 Recital 32 in the preamble to Directive 2004/18 is worded 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 Article 7 of that directive sets the threshold amounts from which the measures for coordinating procedures for the award of public works contracts, public supply contracts and public service contracts which it lays down apply. For public works contracts, Article 7(c) of that directive sets the threshold at EUR 5 186 000.

5 Article 44 of the directive provides:

'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.

...'

6 Article 47(2) of Directive 2004/18, entitled 'Technical and/or professional ability':

'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.'

7 Article 48(3) of Directive 2004/18, entitled 'Technical and/or professional ability':

'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.'

Latvian law

8 It is clear from the request for a preliminary ruling that Articles 41(3) ('Economic and financial standing') and 42(3) ('Technical and professional ability') in the Law on Public Procurement (Publisko iepirkumu likums, Latvijas Vestnesis, 2006, No 65), which transposes Directive 2004/18 into Latvian law, provide that the tenderer may, if this is necessary for the performance of a particular contract, rely on the capacities of other contractors, regardless of the legal nature of the links which it has with them. In such a case, the tenderer must prove to the contracting authority that it will have at its disposal the necessary resources, by producing those contractors' attestations or agreements.

9 The basic rules for cooperation agreements are laid down in Chapter 16 of the Civil Code, while the conditions imposed on economic operators for the establishment and operation of partnerships are set out in Title IX of the Commercial Code.

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

10 As is apparent from the documents submitted to the Court, in November 2011, the Municipality of Talsi launched a procedure for the award of a public works contract for the improvement of the road infrastructure in the City of Talsi in order to promote accessibility ('the contract at issue').

11 Paragraph 9.5 of the tender specifications for that procedure provided:

'... in the event of the tenderer relying on the capacities of other contractors, it must mention all those contractors and provide evidence that it has the necessary resources at its disposal. If that tenderer is to be awarded the contract, it must have concluded a cooperation agreement with the contractors concerned before the award and forwarded this to the contracting authority. [That agreement] must include the following:

(1) a clause stipulating that each party is to be jointly and severally liable for the performance of the contract;

(2) the indication of the main operator authorised to sign the public contract and to direct its performance;

(3) a description of the part of the works to be completed by each of the participants;

(4) the volume of the works which each participant is to carry out, expressed as a percentage.

The conclusion of a cooperation agreement may be replaced by the setting up of a partnership.'

12 Before the Office for the Supervision of Public Contracts, Ostas celtnieks challenged, inter alia, Paragraph 9.5 of the tender specifications. However, by decision of 13 February 2012, the latter rejected the arguments raised by Ostas celtnieks in support of its complaint, holding that, under that

paragraph, the contracting authority had legitimately set out the detailed rules according to which the tenderer had to demonstrate that it had the necessary resources at its disposal to perform the contract at issue.

13 Ostas celtnieks brought an appeal against that decision before the Administratīvā rajona tiesa (Local Administrative Court) which upheld that appeal by judgment of 7 May 2013. In its judgment, that court observed, inter alia that, as regards Paragraph 9.5 of the tender specifications, it did not follow from the Law on public contracts or from Directive 2004/18 that the contracting authority may impose on a tenderer the obligation to produce an undertaking to conclude a cooperation agreement with other entities on whose capacities it relies for the execution of the contract at issue and require the tenderer to enter into such an agreement or set up a partnership with those entities.

14 That decision was the subject of appeals in cassation brought by the Municipality of Talsi and the Office for the Supervision of Public Contracts before the Augstākās tiesa (Supreme Court). In support of their appeals, those authorities argue, in particular, that the requirements laid down in Paragraph 9.5 of the tender specifications are justified by the need to reduce the risk of non-performance of the contract at issue.

15 The referring court considers in essence that, for the purposes of awarding a public contract, the contracting authority must be able to verify the ability of the tenderer to perform the contract at issue. However, it asks whether, to that end, Directive 2004/18 authorises the contracting authority to require tenderers to conclude a cooperation agreement or partnership agreement with the other contractors on whose capacities they rely in support of their own tender, or whether those tenderers are free to choose the manner in which they will engage the participation of those other contractors in the performance of the contract.

16 In those circumstances, the Augstākās tiesas (Supreme Court) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Must the provisions of Directive 2004/18/EC be interpreted as meaning that, in order to reduce the risk of non-performance of the contract, they authorise the insertion in the tender specifications of the condition that, in the event of the contract being awarded to a tenderer which relies on the capacities of other contractors, that tenderer must, before the contract is awarded, conclude with those entities a cooperation agreement (which includes the particular items set out in the specifications), or set up a partnership with them?’

The question referred

Preliminary observations

17 It must be observed from the outset that, while starting from the premiss that Directive 2004/18 is applicable to the dispute in the main proceedings, the order for reference contains no information making it possible to verify whether the market value of the contract at issue reaches the threshold for the application of Article 7(c) of that directive.

18 In answer to a question put by the Court at the hearing, the Latvian Government indicated, however, that the contract at issue was a works contract with a value of approximately EUR 3 million.

19 Furthermore, according to the Latvian Government, the provisions of the Law on public contracts are also applicable to public works contracts, such as the contract at issue, of an amount less than the threshold laid down by Directive 2004/18.

20 It is true that the Court has previously held that the interpretation of provisions of an act of the Union in situations outside that act's scope is justified where those provisions have been made applicable to such situations by national law directly and unconditionally in order to ensure that internal situations and situations governed by EU law are treated in the same way (judgment in *Generali-Providencia Biztosító*, C-470/13, EU:C:2014:2469, paragraph 23 and the case-law cited).

21 It is clear from the foregoing that, subject to the verifications to be made by the referring court, and in order to provide the latter with an answer useful for the resolution of the dispute in the main proceedings, the question referred for a preliminary ruling must be examined.

The question referred

22 By its question, the referring court asks essentially whether Articles 47(2) and 48(3) of Directive 2004/18 must be interpreted as meaning that they preclude a contracting authority in awarding a public contract from being able to impose on a tenderer which relies on the capacities of other entities the obligation, before the contract is awarded, to conclude with those entities a partnership agreement or to set up a partnership with them.

23 In order to answer that question it should be recalled that according to the Court's settled case-law, Articles 47(2) and 48(3) of Directive 2004/18 recognise the right of every economic operator to rely, for a particular contract, upon 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 performance of the contract (see, to that effect, judgment in *Swm Costruzioni 2 and Mannocchi Luigino*, C-94/12, EU:C:2013:646, paragraphs 29 and 33).

24 Such an interpretation, as the Court has already held, is consistent with the aim of the widest possible opening-up of public contracts to competition pursued by the relevant directives to the benefit not only of economic operators but also of contracting authorities. In addition, 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 (judgment in *Swm Costruzioni 2 and Mannocchi Luigino*, C-94/12, EU:C:2013:646, paragraph 34 and the case-law cited).

25 Thus, where, in order to prove its financial, economic, technical and/or professional standing with a view to being admitted to participate in a tendering procedure, a company relies on the resources of entities or undertakings with which it is directly or indirectly linked, whatever the legal nature of those links may be, it must establish that it actually has available to it the resources of those entities or undertakings which it does not itself own and which are necessary for the performance of the contract (see, to that effect, judgment in *Holst Italia*, C-176/98, EU:C:1999:593, paragraph 29 and the case-law cited).

26 In that connection, it must be observed that, in accordance with Article 44(1) of Directive 2004/18, it is for the contracting authority to verify the suitability of the service providers in accordance with the criteria laid down. That verification is intended, in particular, to enable the contracting authority to ensure that the successful tenderer will be able to use whatever resources it relies on throughout the period covered by the contract. (see, by analogy, judgment in *Holst Italia*, C-176/98, EU:C:1999:593, paragraph 28).

27 In the context of that assessment, Articles 47(2) and 48(3) of Directive 2004/18 do not make it possible either to assume that a tenderer has or has not the means necessary to perform the contract or, *a fortiori*, to exclude *a priori* certain types of proof (see, by analogy, *Holst Italia*, C-176/98, EU:C:1999:593, paragraph 30).

28 It follows that the tenderer is free to choose, on the other hand, the legal nature of the links it intends to establish with the other entities on whose capacities it relies in order to perform a particular contract and, on the other, the type of proof of the existence of those links.

29 Furthermore, as the Advocate General observes, in paragraph 43 of his Opinion, Articles 47(2) and 48(3) of Directive 2004/18 expressly provide that it is only by way of example that the production of an undertaking by other entities to make available to the tenderer the resources necessary for the performance of the contract is acceptable proof of the fact that it actually has those resources. Therefore, those provisions by no means preclude the tenderer from establishing in another way the existence of the links between it and other entities on whose capacities it relies for the proper performance of the contract.

30 In the present case, the Municipality of Talsi, as the contracting authority requires a tenderer, namely Ostas celtnieks, which relies on the capacities of other entities for the performance of the contract concerned, to establish links of a precise legal nature with those entities, so that only those particular links are capable, in the eyes of the contracting authority, of proving that the contract does in fact have the resources necessary to perform that contract.

31 In accordance with Paragraph 9.5 of the tender specifications, the contracting authority requires the tenderer, before the award of the public contract, to conclude a cooperation agreement with those entities or to set up a partnership with them.

32 Paragraph 9.5 of the tender specifications therefore provides for only two methods by which the tenderer may demonstrate that it has the resources necessary for the execution of the relevant contract, to the exclusion of any other type of evidence of legal relationships existing between the tenderer and the entities on whose capacities it relies.

33 In those circumstances, a rule such as that set out in Paragraph 9.5 of the tender specifications manifestly deprives the provisions of Articles 47(2) and 48(3) of Directive 2004/28 of their effectiveness.

34 Having regard to the foregoing, the answer to the question referred is that Articles 47(2) and 48(3) of Directive 2004/18 must be interpreted as meaning that they preclude a contracting authority, in the tender specifications relating to the award of a public contract, from imposing on a tenderer which relies on the capacities of other entities the obligation, before the contract is awarded, to conclude a cooperation agreement with those entities or to form a partnership with them.

Costs

35 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 (First 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 must be interpreted as meaning that they preclude a contracting authority, in the tender specifications relating to the award of a public contract, from imposing on a tenderer which relies on the capacities of other entities the obligation, before the contract is awarded, to conclude a cooperation agreement with those entities or to form a partnership with them.

[Signatures]