Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

27 October 2016*

(Reference for a preliminary ruling — Public procurement — Public passenger transport services by bus — Regulation (EC) No 1370/2007 — Article 4(7) — Subcontracting — Requirement that the operator perform a major part of the public passenger transport services itself — Scope — Article 5(1) — Contract-award procedure — Award of the contract in accordance with Directive 2004/18/EC)

In Case C-292/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Vergabekammer Südbayern (Public Procurement Board for Southern Bavaria, Germany), made by decision of 5 June 2015, received at the Court on 10 June 2015, in the proceedings

Hörmann Reisen GmbH

v

Stadt Augsburg,

Landkreis Augsburg,

THE COURT (Fourth Chamber),

composed of T. von Danwitz, President of the Chamber, E. Juhász (Rapporteur), C. Vajda, K. Jürimäe and C. Lycourgos, Judges,

Advocate General: E. Sharpston,

Registrar: A. Calot Escobar,

after considering the observations submitted on behalf of:

— Hörmann Reisen GmbH, by S. Roling and T. Martin, Rechtsanwälte,

— Stadt Augsburg and Landkreis Augsburg, by R. Wiemann, Rechtsanwalt,

— the European Commission, by G. Braun, A. Tokár and J. Hottiaux, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 28 June 2016,

gives the following

* Language of the case: German.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 4(7) and of Article 5(1) of Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 (OJ 2007 L 315, p. 1).

2 The request has been made in proceedings between Hörmann Reisen GmbH, on the one hand, and Stadt Augsburg (the City of Augsburg, Germany) and Landkreis Augsburg (the district authority of Augsburg) (together 'the contracting authorities'), on the other, concerning the lawfulness of a call for tenders relating to public passenger transport services by bus.

Legal context

3 Recital 4 of Regulation No 1370/2007 states:

'The main objectives of the [European] Commission's White Paper of 12 September 2001 "European transport policy for 2010: time to decide" are to guarantee safe, efficient and high-quality passenger transport services through regulated competition …'

4 Under recital 7 of that regulation:

'Studies carried out and the experience of Member States where competition in the public transport sector has been in place for a number of years show that, with appropriate safeguards, the introduction of regulated competition between operators leads to more attractive and innovative services at lower cost and is not likely to obstruct the performance of the specific tasks assigned to public service operators. …'

5 According to recital 9 of that regulation:

'In order to be able to organise their public passenger transport services in the manner best suited to the needs of the public, all competent authorities must be able to choose their public service operators freely, taking into account the interests of small and medium-sized enterprises, under the conditions stipulated in this Regulation. In order to guarantee the application of the principles of transparency, equal treatment of competing operators and proportionality, when compensation or exclusive rights are granted, it is essential that a public service contract between the competent authority and the chosen public service operator defines the nature of the public service obligations and the agreed reward. …'

6 Recital 19 of that regulation states:

'Subcontracting can contribute to more efficient public passenger transport and makes it possible for undertakings to participate, other than the public service operator which was granted the public service contract. However, with a view to the best use of public funds, competent authorities should be able to determine the modalities for subcontracting their public passenger transport services, in particular in the case of services performed by an internal operator. Furthermore, a subcontractor should not be prevented from taking part in competitive tenders in the territory of any competent authority. The selection of a subcontractor by the competent authority or its internal operator needs to be carried out in accordance with [EU] law.'

7 Article 1 of Regulation No 1370/2007, headed ‘Purpose and scope’, provides:

‘1. The purpose of this Regulation is to define how, in accordance with the rules of [EU] law, competent authorities may act in the field of public passenger transport to guarantee the provision of services of general interest which are among other things more numerous, safer, of a higher quality or provided at lower cost than those that market forces alone would have allowed.

To this end, this Regulation lays down the conditions under which competent authorities, when imposing or contracting for public service obligations, compensate public service operators for costs incurred and/or grant exclusive rights in return for the discharge of public service obligations.

2. This Regulation shall apply to the national and international operation of public passenger transport services by rail and other track-based modes and by road, except for services which are operated mainly for their historical interest or their tourist value. …

…’

8 Article 2 of that regulation is worded as follows:

‘For the purposes of this Regulation:

(a) “public passenger transport” means passenger transport services of general economic interest provided to the public on a non-discriminatory and continuous basis;

(b) “competent authority” means any public authority or group of public authorities of a Member State or Member States which has the power to intervene in public passenger transport in a given geographical area or any body vested with such authority;

…

(i) “public service contract” means one or more legally binding acts confirming the agreement between a competent authority and a public service operator to entrust to that public service operator the management and operation of public passenger transport services subject to public service obligations. …

…’

9 Article 3(1) of Regulation No 1370/2007 provides:

‘Where a competent authority decides to grant the operator of its choice an exclusive right and/or compensation, of whatever nature, in return for the discharge of public service obligations, it shall do so within the framework of a public service contract.’

10 Article 4 of that regulation, headed ‘Mandatory content of public service contracts and general rules’, provides:

‘1. Public service contracts … shall:

…

(b) establish in advance, in an objective and transparent manner,
   (i) the parameters on the basis of which the compensation payment, if any, is to be calculated, and
   (ii) the nature and extent of any exclusive rights granted,

in a way that prevents overcompensation. …

…

7. Tender documents and public service contracts shall indicate, in a transparent manner, whether, and if so to what extent, subcontracting may be considered. If subcontracting takes place, the operator entrusted with the administration and performance of public passenger transport services in accordance with this Regulation shall be required to perform a major part of the public passenger transport services itself. A public service contract covering at the same time design, construction and operation of public passenger transport services may allow full subcontracting for the operation of those services. The public service contract shall, in accordance with national and [EU] law, determine the conditions applicable to subcontracting.'

11 Article 5 of that regulation, headed 'Award of public service contracts', reads as follows:

'1. Public service contracts shall be awarded in accordance with the rules laid down in this Regulation. However, service contracts or public service contracts as defined in Directives 2004/17/EC [of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1),] or 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)] for public passenger transport services by bus or tram shall be awarded in accordance with the procedures provided for under those Directives where such contracts do not take the form of service concessions contracts as defined in those Directives. Where contracts are to be awarded in accordance with Directives [2004/17] or [2004/18], the provisions of paragraphs 2 to 6 of this Article shall not apply.

…'

12 Article 5(2) to (6) of Regulation No 1370/2007 includes rules relating to the award of public service contracts which derogate from EU public procurement law. In particular, the first subparagraph of Article 5(4) of that regulation provides 'unless prohibited by national law, the competent authorities may decide to award public service contracts directly either where their average annual value is estimated at less than EUR 1 000 000 or where they concern the annual provision of less than 300 000 kilometres of public passenger transport services'.

13 Article 1(3)(b) of Directive 2004/17 defines, for the purposes thereof, a 'service concession' as being 'a contract of the same type as a 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 that right together with payment'.

14 Under Article 1 of Directive 2004/18, as amended by Commission Regulation (EU) No 1336/2013 of 13 December 2013 (OJ 2013 L 335, p. 17) ('Directive 2004/18, as amended'):

'1. For the purposes of this Directive, the definitions set out in paragraphs 2 to 15 shall apply.

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.

A public contract having as its object both products and services within the meaning of Annex II shall be considered to be a “public service contract” if the value of the services in question exceeds that of the products covered by the contract.

A public contract having as its object services within the meaning of Annex II and including activities within the meaning of Annex I that are only incidental to the principal object of the contract shall be considered to be a public service contract.

…

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.

…’

15 Article 7 of Directive 2004/18, as amended, entitled ‘Threshold amounts for public contracts’, sets the thresholds for the estimated values exclusive of value added tax (VAT) on the basis of which a contract must be awarded in accordance with the rules of that directive.

16 Those thresholds are amended at regular intervals by Commission regulations and are adapted to economic circumstances. On the date of publication of the contract notice at issue in the main proceedings, the threshold for service contracts awarded by contracting authorities other than central government authorities amounted to EUR 207 000 excluding VAT, under Article 7(b) of Directive 2004/18, as amended.

17 Article 20 of that directive provides:

‘Contracts which have as their object services listed in Annex II A shall be awarded in accordance with Articles 23 to 55.’

18 Article 25 of that directive, headed ‘Subcontracting’, provides:

‘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.

This indication shall be without prejudice to the question of the principal economic operator’s liability.’

19 The categories of services listed in Annex II A to that directive include category 2, which refers to the following services:

‘Land transport services …, including armoured car services, and courier services, except transport of mail.’

20 Under the first sentence of Article 90(1) 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):

‘Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than 18 April 2016.’

21 According to the first paragraph of Article 91 of Directive 2014/24:

'Directive [2004/18, as amended,] is repealed with effect from 18 April 2016.'

The facts in the main proceedings and the questions referred

22 On 7 March 2015, the contracting authorities published in the supplement to the *Official Journal of the European Union*, under number 2015/S 047-081632, a contract notice inviting tenders for the provision of public passenger transport services by bus on certain regional routes. According to that contract notice, tenderers were authorised to award up to 30% of the transport services, measured in timetable kilometres, to subcontractors.

23 Hörmann Reisen applied to the Vergabekammer Südbayern (Public Procurement Board for Southern Bavaria, Germany) for the purposes of challenging the legality of such a limitation on subcontracting. It claims that that limitation is incompatible with Directive 2004/18, as amended, and adds that, while it is true that Article 4(7) of Regulation No 1370/2007 does indeed provide for the limitation of recourse to subcontracting, that regulation is not applicable to the main proceedings by reason of Article 5(1) thereof.

24 The contracting authorities reiterate that the third sentence of Article 5(1) of Regulation No 1370/2007 provides that 'where contracts are to be awarded in accordance with Directives [2004/17] or [2004/18], the provisions of paragraphs 2 to 6 of [that] Article shall not apply'. Those contracting authorities infer from this that the other provisions of that regulation, including Article 4(7) thereof, continue to apply to such contracts. Finally, according to those contracting authorities, the limitation on recourse to subcontracting to a proportion of 30% of the transport services, imposed in the contract notice at issue in the main proceedings, corresponds to the obligation set out in Article 4(7), according to which the operator 'shall be required to perform a major part of the public passenger transport services itself'.

25 The referring court states that the dispute in the main proceedings concerns, in essence, the question of whether the contracting authorities were entitled to limit recourse to subcontracting to 30% of the transport services at issue, measured in timetable kilometres, by application of Article 4(7) of Regulation No 1370/2007, in the context of an award procedure carried out under Article 5(1) of that regulation, in conjunction with Directive 2004/18, as amended, or with Directive 2014/24.

26 As regards the public service contract at issue in the main proceedings, that court states that the value of that contract exceeds the threshold laid down in the first indent of Article 7(b) of Directive 2004/18, as amended, namely EUR 207 000 excluding VAT.

27 In those circumstances, the Vergabekammer Südbayern (Public Procurement Board for Southern Bavaria) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) In the case of an award procedure under Article 5(1) of Regulation No 1370/2007 in conjunction with Directive 2004/18, as amended, or Directive 2014/24, in principle are the provisions of those directives alone applicable, with the result that any provisions of Regulation No 1370/2007 which derogate from those directives are not to be applied?

(2) In the case of an award procedure under Article 5(1) of Regulation No 1370/2007 in conjunction with Directive 2004/18, as amended, or Directive 2014/24, is the permissibility of subcontracting therefore governed exclusively by the rules developed by the Court of Justice in connection with Directive 2004/18, as amended, and by the provisions of Article 63(2) of Directive 2014/24 or can

a contracting authority, in derogation from the foregoing, stipulate a percentage rate of self-provision (measured in timetable kilometres), in accordance with Article 4(7) of Regulation No 1370/2007, even in the case of an award procedure of the kind mentioned above?

(3) In the event that Article 4(7) of Regulation No 1370/2007 is applicable to award procedures under Article 5(1) of Regulation No 1370/2007 in conjunction with Directive 2004/18, as amended, or Directive 2014/24, does the determination of the self-provision rate lie within the discretion of the contracting authority, taking into account recital 19 of Regulation No 1370/2007, with the result that the requirement by the contracting authority of a self-provision rate of 70%, measured in timetable kilometres, is justifiable?'

Consideration of the questions referred

Preliminary observations

28 It should be borne in mind, first, that the Court has already categorised the Vergabekammer bei der Bezirksregierung Arnsberg (Public Procurement Board attached to the Arnsberg regional government, Germany) as a 'court or tribunal' within the meaning of Article 267 TFEU (judgment of 18 September 2014, *Bundesdruckerei*, C-549/13, EU:C:2014:2235, paragraphs 20 to 23).

29 There is nothing in the file submitted to the Court to suggest that, in the present case, that categorisation cannot also be applied to the Vergabekammer Südbayern (Public Procurement Board for Southern Bavaria).

30 Second, it should be noted that the referring court mentions Directive 2014/24, in the questions referred for a preliminary ruling, in addition to Regulation No 1370/2007 and Directive 2004/18, as amended.

31 As regards the applicability of Directive 2014/24, it should be noted that the contract notice at issue in the main proceedings was published on 7 March 2015, that is, before the expiry date of the period for transposition of the relevant provisions of Directive 2014/24, fixed at 18 April 2016 under Article 90(1) thereof.

32 According to settled case-law of the Court, the applicable directive is, as a rule, the one in force when the contracting authority chooses the type of procedure to be followed and decides definitively whether it is necessary for a prior call for tenders to be issued for the award of a public contract. Conversely, a directive is not applicable if the period prescribed for its transposition expired after that point in time (judgment of 7 April 2016, *Partner Apelski Dariusz*, C-324/14, EU:C:2016:214, paragraph 83 and the case-law cited).

33 In those circumstances, Directive 2014/24 is not applicable *ratione temporis* to the case in the main proceedings.

The first and second questions

34 By its first and second questions, which should be examined together, the referring court asks, in essence, whether Article 5(1) of Regulation No 1370/2007 must be interpreted as meaning that, in a contract award procedure for public passenger transport services by bus, Article 4(7) of that regulation remains applicable to that contract.

35 According to the information in the order for reference, the contract at issue in the main proceedings relates to public passenger transport services by road, within the meaning of Article 1(2) of Regulation No 1370/2007, and concerns public passenger transport services by bus, as provided for in Article 5(1) of that regulation, without, however, taking the form of a service concession contract.

36 Under the first sentence of Article 5(1) of Regulation No 1370/2007, a contract such as that at issue in the main proceedings must in principle be awarded in accordance with the rules laid down in that regulation.

37 However, when a contract is not in the form of a service concession contract, as defined in Directives 2004/17 or 2004/18, as amended, the contract for public passenger transport services by bus is awarded, under the second sentence of Article 5(1) of Regulation No 1370/2007, in accordance with the procedures provided for under those directives.

38 Furthermore, the third sentence of Article 5(1) of Regulation No 1370/2007 provides, for such a case of awarding a contract for public passenger transport services by bus, that 'the provisions of paragraphs 2 to 6 of [that] Article shall not apply'.

39 Accordingly, it must be stated that the second sentence of Article 5(1) of Regulation No 1370/2007 contains a derogation from the general rule established in the first sentence of Article 5(1) of that regulation and that the exact scope of that derogation is then specified in the third sentence of Article 5(1) of that regulation setting out the non-application of Article 5(2) to (6) thereof.

40 No other provision of Article 5 or of Regulation No 1370/2007 further broadens the scope of that derogation.

41 It follows that, for the purposes of the award of a contract for public passenger transport services by bus, such as that at issue in the main proceedings, solely the provisions of Article 5(2) to (6) of Regulation No 1370/2007 are not to be applied, whereas the other provisions of that regulation remain applicable.

42 In those circumstances, it must be held that Article 4(7) of Regulation No 1370/2007 applies in the event of the award of a contract for public passenger transport services by bus coming within the scope of Article 5(1) of that regulation.

43 That conclusion is supported by the purpose of Regulation No 1370/2007.

44 Under the first subparagraph of Article 1(1) of that regulation, the purpose thereof 'is to define how, in accordance with the rules of [EU] law, competent authorities may act in the field of public passenger transport to guarantee the provision of services of general interest which are among other things more numerous, safer, of a higher quality or provided at lower cost than those that market forces alone would have allowed'.

45 The fact that Regulation No 1370/2007, by its nature, seeks to provide for methods of intervention in general schemes for public contracts implies that it contains special rules in relation to such schemes.

46 In that regard, it should be noted that Directive 2004/18, as amended, is of general application, whereas Regulation No 1370/2007 applies only to public passenger transport services by rail and road.

47 In so far as both Article 4(7) of that regulation and Article 25 of Directive 2004/18, as amended, contain rules on subcontracting, the view must be taken that the first provision constitutes a special rule with respect to the rules laid down in the second provision, and, as a *lex specialis*, takes precedence over the latter.

48 In those circumstances, the answer to the first and second questions raised is that Article 5(1) of Regulation No 1370/2007 must be interpreted as meaning that, in a contract award procedure for public passenger transport services by bus, Article 4(7) of that regulation remains applicable to that contract.

The third question

49 By its third question, the referring court asks, in essence, whether Article 4(7) of Regulation No 1370/2007 must be interpreted as meaning that it precludes the contracting authority from setting at 70% the proportion of self-provision by the operator responsible for the administration and performance of a contract for public passenger transport services by bus, such as that at issue in the main proceedings.

50 Under the first sentence of Article 4(7) of Regulation No 1370/2007, tender documents and public service contracts must specify transparently whether, and if so to what extent, subcontracting may be considered.

51 It follows that the EU legislature, as regards the subcontracting of the administration and performance of a public transport service governed by that regulation, conferred a broad discretion on the competent authorities.

52 In that regard, it should be noted that, in so far as it is permissible for a contracting authority to prohibit the contractor subcontracting public passenger transport services by bus, in the event of the award of that contract in accordance with Article 4(7) of Regulation No 1370/2007, the discretion mentioned in the previous paragraph includes the possibility of prohibiting subcontracting solely for part of a contract.

53 Furthermore, where subcontracting is envisaged in the context of the administration and performance of public passenger transport services by bus, the second sentence of Article 4(7) of Regulation No 1370/2007 does not authorise full subcontracting for the contract concerned, since it provides that the operator responsible for that service is itself required to perform a major part of it. It is only if the public service contract covers at the same time the design, construction and operation of public passenger transport services that full subcontracting for the operation of those services may be authorised under the third sentence of Article 4(7) of that regulation.

54 It follows that Article 4(7) of Regulation No 1370/2007 does not preclude the contracting authority from limiting, to a significant extent, the possibility of recourse to subcontracting in the context of a contract such as that at issue in the main proceedings.

55 In the present case, the contract notice at issue in the main proceedings constitutes a pre-tendering document which specifies, in a transparent manner, as emerges unequivocally from the order for reference, that the use of subcontracting is limited to a proportion corresponding to 30% of the transport services, measured in timetable kilometres.

56 Having regard to the foregoing, it must be held that such a limitation does not exceed the discretion that Article 4(7) of Regulation No 1370/2007 confers on the competent authorities.

57 Accordingly, the answer to the third question raised is that Article 4(7) of Regulation No 1370/2007 must be interpreted as meaning that it does not preclude the contracting authority from setting at 70% the proportion of self-provision by the operator responsible for the administration and performance of a contract for public passenger transport by bus, such as that at issue in the main proceedings.

Costs

58 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 (Fourth Chamber) hereby rules:

1. **Article 5(1) of Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 must be interpreted as meaning that, in a contract award procedure for public passenger transport services by bus, Article 4(7) of that regulation remains applicable to that contract.**

2. **Article 4(7) of Regulation No 1370/2007 must be interpreted as meaning that it does not preclude the contracting authority from setting at 70% the proportion of self-provision by the operator responsible for the administration and performance of a contract for public passenger transport by bus, such as that at issue in the main proceedings.**

[Signatures]