



Reports of Cases

Case C-406/14

Wrocław – Miasto na prawach powiatu
v
Minister Infrastruktury i Rozwoju

(Request for a preliminary ruling from the
Wojewódzki Sąd Administracyjny w Warszawie)

(Reference for a preliminary ruling — Directive 2004/18/EC — Public works contracts — Regularity of the obligation imposed on tenderers to perform a certain percentage of the contract without using subcontractors — Regulation (EC) No 1083/2006 — General provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund — Obligation for the Member States to carry out a financial correction in relation to the irregularities identified — Concept of ‘irregularity’ — Need for a financial correction in the event of infringement of EU law on public procurement)

Summary — Judgment of the Court (Third Chamber), 14 July 2016

1. *Approximation of laws — Procedures for the award of public works contracts, public supply contracts and public service contracts — Directive 2004/18 — Public works contracts of the European Communities — Imposition by the contracting authority of special conditions relating to the performance of a contract — Tenderers’ obligation to perform a certain percentage of the contract without using subcontractors — Unlawful*

(European Parliament and Council Directive 2004/18, as amended by Regulation No 2083/2005, Arts 25, first para., 26 and 48(3))

2. *Own resources of the European Union — Regulation on protection of the financial interests of the Union — Irregularity — Concept — Imposition, in the context of a public contract relating to a project supported by the EU, of a clause contrary to EU law — Included — Application of a financial correction — Condition — Potential impact on the budget of the fund at issue*

(Council Regulation No 1083/2006, Arts 2, point 7, and 98; European Parliament and Council Directive Regulations No 2004/18, as amended by Regulation No 2083/2005)

1. Directive 2004/18 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, as amended by Regulation No 2083/2005, must be interpreted as meaning that a contracting authority is not authorised to require, by a stipulation in the tender specifications of a public works contract, that the future contractor of that contract perform with its own resources a certain percentage of the works covered by that contract.

First, Article 48(3) of Directive 2004/18 provides for the possibility, for tenderers, to use subcontractors for the performance of a contract, and that in a way which is, in principle, unlimited. Secondly, where the procurement documents require tenderers to indicate, in their tenders, the share of the contract

they may intend to subcontract and the proposed subcontractors, in accordance with the first paragraph of Article 25 of Directive 2004/18, the contracting authority is entitled to prohibit use of subcontractors whose capacities could not be verified at the level of examination of tenders and selection of the contractor, for the performance of essential parts of the contract. Such is not however the effect of a stipulation, which imposes limitations on the use of subcontractors for a share of the contract fixed in abstract terms as a certain percentage of that contract, and that irrespective of the possibility of verifying the capacities of potential subcontractors and without any mention of the essential character of the tasks which would be concerned. In all those respects, such a stipulation is incompatible with Directive 2004/18.

Moreover, such a stipulation, assuming it constitutes a condition for the performance of the contract for the purposes of Article 26 of Directive 2004/18, cannot be accepted under that article, by reason of the very terms thereof, since it is contrary to Article 48(3) of that directive, and thus is contrary to EU law.

(see paras 33-37, operative part 1)

2. Article 98 of Regulation No 1083/2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund, read in conjunction with Article 2(7) of that regulation, must be interpreted as meaning that the fact that a contracting authority imposed a requirement, in the context of a public works contract relating to a project receiving EU financial aid, in infringement of Directive 2004/18, on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, as amended by Regulation No 2083/2005, constitutes an ‘irregularity’ within the meaning of Article 2(7) of that regulation, justifying the need to apply a financial correction under Article 98 thereof, in so far as it cannot be excluded that that infringement had an impact on the budget of the Fund at issue. The amount of that correction must be calculated by taking into account all of the specific circumstances which are relevant in the light of the criteria referred to in the first paragraph of Article 98(2) of that regulation, namely the nature and gravity of the irregularity and the resulting financial loss to the Fund concerned. The amount of that correction must be calculated by taking into account all of the specific circumstances which are relevant in the light of the criteria referred to in the first subparagraph of Article 98(2) of that regulation, namely the nature and gravity of the irregularity and the resulting financial loss to the Fund concerned.

(see para. 51, operative part 2)