



## Reports of Cases

### JUDGMENT OF THE COURT (Fifth Chamber)

4 May 2017\*

(Reference for a preliminary ruling — Public procurement — Directive 2004/18/EC — Principles of equal treatment, non-discrimination and transparency — Technical and/or professional abilities of economic operators — Article 48(3) — Possibility to rely on the capacities of other entities — Article 51 — Possibility to supplement the tender — Article 45(2)(g) — Exclusion from participation in a public contract for serious misconduct)

In Case C-387/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Krajowa Izba Odwoławcza (National Appeal Chamber, Poland), made by decision of 25 July 2014, received at the Court on 14 August 2014, in the proceedings

**Esaprojekt sp. z o.o.**

v

**Województwo Łódzkie,**

third party

**Konsultant Komputer sp. z o.o.,**

THE COURT (Fifth Chamber),

composed of J.L. da Cruz Vilaça, President of the Chamber, A. Tizzano (Rapporteur), Vice-President of the Court, M. Berger, A. Borg Barthet and F. Biltgen, Judges,

Advocate General: M. Bobek,

Registrar: X. Lopez Bancelari, Administrator,

having regard to the written procedure and further to the hearing on 21 September 2016,

after considering the observations submitted on behalf of:

- Województwo Łódzkie, by M. Popielarczyk and A. Faliszek-Rosiak, radcy prawni, and by P. Krystynowicz and M. Kaczmarczyk, acting as Agents,
- the Polish Government, by B. Majczyna and D. Lutostańska, acting as Agents,
- the Italian Government, by G. Palmieri, acting as Agent, and C. Colelli, avvocato dello Stato,

\* Language of the case: Polish.

— the European Commission, by J. Hottiaux and A. Tokár, acting as Agents,  
after hearing the Opinion of the Advocate General at the sitting on 24 November 2016,  
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 concerning 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 Esaprojekt sp. z o.o. and Województwo Łódzkie (Voivode (district authority), Łódź, Poland, ‘the contracting authority’) concerning the conditions for selecting a tender submitted by the economic operator Konsultant Komputer sp. z o.o. in a procedure for the award of a public contract for the provision of IT systems for hospitals in Poland.

### **Legal context**

#### ***EU law***

- 3 Recital 46 of Directive 2004/18 states:

‘Contracts should be awarded on the basis of objective criteria which ensure compliance with the principles of transparency, non-discrimination and equal treatment and which guarantee that tenders are assessed in conditions of effective competition. As a result, it is appropriate to allow the application of two award criteria only: “the lowest price” and “the most economically advantageous tender”.

To ensure compliance with the principle of equal treatment in the award of contracts, it is appropriate to lay down an obligation — established by case-law — to ensure the necessary transparency to enable all tenderers to be reasonably informed of the criteria and arrangements which will be applied to identify the most economically advantageous tender. ...’

- 4 Article 1(2)(a) of the directive reads as follows:

“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.’

- 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 Article 44 of Directive 2004/18 entitled ‘Verification of the suitability and choice of participants and award of contracts’ states as follows:

‘1. Contracts shall be awarded on the basis of the criteria laid down in Articles 53 and 55, taking into account Article 24, after the suitability of the economic operators not excluded under Articles 45 and 46 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, and, where appropriate, with the non-discriminatory rules and criteria referred to in paragraph 3.

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.

These minimum levels shall be indicated in the contract notice.

...’

- 7 Article 45 of that directive, headed ‘Personal situation of the candidate or tenderer’, provides in paragraph 2:

‘Any economic operator may be excluded from participation in a contract where that economic operator:

...

- (g) is guilty of serious misrepresentation in supplying the information required under this Section, or has not supplied such information.

Member States shall specify, in accordance with their national law and having regard for Community law, the implementing conditions for this paragraph.’

- 8 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) ...

- (ii) a list of the principal deliveries effected or the main services provided in the past three years, with the sums, dates and recipients, whether public or private, involved. ...

...

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.

...'

- 9 Article 51 of Directive 2004/18, headed 'Additional documentation and information', is worded as follows:

'The contracting authority may invite economic operators to supplement or clarify the certificates and documents submitted pursuant to Articles 45 to 50.'

### ***Polish law***

- 10 Directive 2004/18 was transposed into the Polish national legal system by the Ustawa Prawo zamówień publicznych (Law on public contracts, codified text Dz. U of 2013, headings 907, 984, 1047 and 1473, and Dz. U of 2014, heading 423, 'Law on public contracts').

- 11 Article 24(2)(3) and (4) of the Law on public contracts is worded as follows:

'The following shall also be excluded from procedures for the award of public contracts:

3. economic operators which have submitted incorrect information which affects, or may affect, the result of the ongoing procedure;
4. has not proved that it has satisfied the conditions for participating in that procedure.'

- 12 Article 26(2b) and (4) of that law provides:

'2b An economic operator may rely on the knowledge, experience, technical abilities and persons able to perform the contract or the financial capacities of other bodies, 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, in particular by producing for that purpose a written undertaking by those entities that they will make available to it the necessary resources for the period during which they are used to perform the contract.

4. Within a time limit specified by it the contracting authority shall also request clarifications concerning declarations or documents referred to in Paragraph 25(1).'

- 13 Article 93(1)(7) of that law states:

'The contracting authority shall annul the procedure for the award of the contract where ... the award procedure is vitiated by an irreparable defect which prevents the conclusion of a non-annullable public contract.'

- 14 Article 1(6) of the Rozporządzenie Prezesa Rady Ministrów z dnia 19 lutego 2013 r. w sprawie rodzajów dokumentów, jakich może żądać zamawiający od wykonawcy, oraz form, w jakich te dokumenty mogą być składane (Regulation of the President of the Council of Ministers of

19 February 2013 on the type of documents which may be required by the contracting authority from an economic operator and the method of production of those documents (Dz. U. of 2013, heading 231)), is worded as follows:

‘If, in order to establish that it meets the conditions referred to in Article 22(1) of the [Law on public contracts], an economic operator relies on the capacities of other entities pursuant to the provisions of Article 26(2b) of the [Law on public contracts], the contracting authority, in order to determine whether the economic operator will have capacities of other bodies to the extent necessary for the proper performance of the contract or whether the link between the economic operator and those entities does in fact ensure access to those capacities may require:

- (1) with regard to the conditions referred to in Article 22(1)(4) of the [Law on public contracts], the documents listed in Article 22(1)(9) to (11), and the same for other documents relating to the economic and financial standing, as laid down in the tender notice or the tender specifications;
- (2) documents relating in particular to:
  - (a) the extent of the resources of another entity which the economic operator is able to access;
  - (b) the rules governing the use by the economic operator of the resources of another entity in order to perform the contract;
  - (c) the nature of the link between an operator and another entity; and
  - (d) the extent and duration of the participation of another entity in the performance of the contract.’

### **The dispute in the main proceedings and the questions referred for a preliminary ruling**

- 15 It is apparent from the decision to refer that the contracting authority opened an award procedure for a public contract concerning the ‘modernisation of the existing IT systems and the installation of new systems in hospitals run by the Voïvode (district authority) of Łódź (Poland) as part of the project entitled ‘Services of a Regional Medical Information System (RMIS services)’. The call for tenders was published in the *Official Journal of the European Union* of 29 November 2013, under number 2013/S 232-402292.
- 16 For the purposes of the award of the contract, the contracting authority chose to conduct an open procedure and divided the subject matter of the contract in several lots covering different establishments. Thus, it enabled the economic operators interested to submit bids, not only for the whole contract, but also for a part of it.
- 17 The dispute in the main proceedings specifically concerns the award of lot No 3, relating to the purchase and supply of a hospital integrated system to serve the (grey) administrative sector and the (white) medical sector at the Nicolaus Copernicus Independent Provincial Hospital in Piotrków Tribunalski (Poland). The contract is for standard software that the economic operator is to deliver, install and configure in order to execute the contract.
- 18 As provided in Point 6.1 and subparagraph 6.1.2 of the tender specifications, in order to prove its experience, each candidate/tenderer submitting a bid for lot No 3 had to prove, inter alia, that it had performed at least two contracts, both consisting in the supply, installation, configuration and implementation of an integrated hospital system (HIS) in the white and grey departments of a hospital with a minimum of 200 beds and having a value of not less than 450 000 Polish zlotys (PLN) (approximately EUR 101676.08) including value added tax (VAT).

- 19 For that purpose, each economic operator had to provide, inter alia, a list of the main supplies made in the three years preceding the expiry of the time limit for submitting bids or, if appropriate, a shorter period of activity, indicating the subject matter, value, date of performance and the entities for which those supplies were made and attaching proof that they were, or are being, duly provided.
- 20 The economic operator Konsultant Komputer submitted in its tender a list of supplies, including two headings concerning the delivery, installation, configuration and implementation of two integrated hospital systems and performed for the J. Korczak specialist regional hospital in Słupsk (Poland) and the J. Śniadecki specialist hospital in Nowy Sącz (Poland), by the consortium composed of Konsultant IT sp. z o.o. and Konsultant Komputer.
- 21 The contracting authority selected Konsultant Komputer's bid, considering it to be the most economically advantageous for lot No 3.
- 22 As a candidate excluded from that procedure, Esaprojekt brought an action before the Krajowa Izba Odwoławcza (National Appeal Chamber, Poland) against the decision of the contracting authority selecting Konsultant Komputer's bid. In essence, Esaprojekt criticised the contracting authority for failing to establish that the bid in question was based on incorrect information and failed to meet the conditions laid down in subparagraph 6.1.2 of the tender specifications. Consequently, that bid should have been rejected in accordance with Article 24(2)(3) of the Law on public contracts.
- 23 By decision of 7 April 2014, the Krajowa Izba Odwoławcza (National Appeal Chamber) ordered the contracting authority to annul its acceptance of the most advantageous bid for lot No 3 and to request Konsultant Komputer to provide further information about the scope of the contracts which it had mentioned in its bid, pursuant to Article 26(4) of the Law on public contracts. The contracting authority therefore annulled its decision and asked Konsultant Komputer to supplement the documents in order to prove that the condition relating to knowledge and experience required to be a candidate, laid down in subparagraph 6.1.2 of the tender specifications, had been met.
- 24 In response to that request, by letter of 29 April 2014, Konsultant Komputer indicated, first, that the contract it had relied on concerned the services that the contracting authority had defined as the grey sector and, second, that the list of supplies annexed to its tender concerned the execution of two contracts, namely, Contract No 51/2/2010 of 5 October 2010 and Contract No 62/2010 of 6 December 2010.
- 25 However, it was clear from the information provided by Konsultant Komputer that, in reality, the supplies of services relating to the J. Korczak specialist hospital in Słupsk had been performed within the framework of two separate contracts, one of which did not include the white sector, while the other did not include the grey sector.
- 26 In the light of those clarifications, the contracting authority took the view that the services supplied to the J. Korczak specialist regional hospital in Słupsk did not fulfil the conditions laid down in subparagraph 6.1.2 of the tender specifications, according to which each contract had to contain all the elements listed therein, specifically, supply, installation, configuration and implementation of an integrated hospital system (HIS) in the white and grey sectors. Therefore, the contracting authority requested Konsultant Komputer to supplement the documents in that regard.
- 27 For that purpose, Konsultant Komputer provided a new list of supplies in which it relied on the experience of another entity, Medinet Systemy Informatyczne sp. z o.o. concerning two supplies, the first for the Independent Public Healthcare Establishment in Janów Lubelski, and the second for the District Railway Hospital in Lublin (Poland). It also sent an undertaking from Medinet Systemy Informatyczne to provide, as an advisor and consultant, the resources necessary for the performance of the contract and, again listed the supply to the J. Śniadecki specialist hospital in Nowy Sącz.



- 28 Satisfied with that response, the contracting authority again selected Konsultant Komputer's bid, since it was the most economically advantageous for lot No 3.
- 29 Esaprojekt brought an action before the Krajowa Izba Odwoławcza (National Appeal Chamber) seeking annulment of the contracting authority's decision, a fresh evaluation of the bids, and the exclusion of Konsultant Komputer on the ground that it had submitted false information and had failed to prove that it had fulfilled the conditions for participation in the procedure, in particular, those set out in subparagraph 6.1.2 of the tender specifications.
- 30 According to the Krajowa Izba Odwoławcza (National Appeal Chamber), the case in the main proceedings, first, raises the question whether Articles 2 and 51 of Directive 2004/18 preclude an economic operator, when it supplements documents at the request of the contracting authority, from relying on supplies of services other than those it included in its initial bid or from being able to rely, in that regard, on supplies of services made by another entity on whose resources it did not rely in its initial bid.
- 31 Second, that court is unsure whether, in the circumstances of the case in the main proceedings, the economic operator is able to rely on the right laid down in Article 48(3) of Directive 2004/18 to rely on the capacities of other entities where it does not itself fulfil the minimum conditions required in order to take part in the tender procedure for a service contract.
- 32 Moreover, the Krajowa Izba Odwoławcza (National Appeal Chamber) also asks in which circumstances an economic operator may be held liable for serious misconduct and, therefore, be excluded from taking part in a public contract for the purposes of Article 45(2)(g) of Directive 2004/18.
- 33 In those circumstances, the Krajowa Izba Odwoławcza (National Appeal Chamber) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:
- '(1) Does Article 51 of [Directive 2004/18], in conjunction with the principle of equal and non-discriminatory treatment of economic operators and the principle of transparency set out in Article 2 thereof, allow an economic operator, when clarifying or supplementing documents, to refer to the performance of contracts (that is to say, supplies provided) other than those which it referred to in the list of supplies attached to the tender, and in particular can it refer to the performance of contracts by another entity the use of whose resources it did not refer to in the tender?
- (2) In the light of the judgment of 10 October 2013, *Manova* [(C-336/12, EU:C:2013:647)], according to which "the principle of equal treatment must be interpreted as not precluding a contracting authority from asking a candidate, after the deadline for applying to take part in a tendering procedure, to provide documents describing that candidate's situation — such as a copy of its published balance sheet — which can be objectively shown to predate that deadline, so long as it was not expressly laid down in the contract documents that, unless such documents were provided, the application would be rejected", must Article 51 of Directive 2004/18 be interpreted as meaning that the supplementing of documents is possible only when it involves documents which can be objectively shown to predate the deadline for submitting tenders or requests to participate in the procedure, or that the Court of Justice stated only one of the possibilities and the supplementing of documents is possible also in other cases, for example by attaching documents which did not predate the deadline but which objectively confirm fulfilment of a condition?

- (3) If the answer to Question 2 is to the effect that the supplementing of documents other than as stated in the judgment of 10 October 2013, *Manova* [(C-336/12, EU:C:2013:647)] is possible, is it possible to supplement by adding documents drawn up by the economic operator, subcontractors or other entities on whose capacities the economic operator relies, if they were not submitted together with the tender?
- (4) Does Article 44 of [Directive 2004/18], in conjunction with Article 48(2)(a) thereof and the principle of equal treatment of economic operators set out in Article 2, allow reliance on the resources of another entity, as referred to in Article 48(3), by combining the knowledge and experience of two entities, which, individually, do not have the knowledge and experience required by the contracting authority, where that experience cannot be divided (that is to say, the condition for participation in the procedure must be fulfilled in its entirety by the economic operator) and performance of the contract cannot be divided (constitutes a single whole)?
- (5) Does Article 44 of [Directive 2004/18], in conjunction with Article 48(2)(a) thereof and the principle of equal treatment of economic operators in Article 2, allow reliance on the experience of a group of economic operators in such a way that an economic operator which performed a contract as one of a group of economic operators can rely on the performance by that group, regardless of what its participation in the performance of that contract was, or can it rely only on the experience it itself has actually acquired in performing the relevant part of the contract which was assigned to it within that group?
- (6) Can Article 45(2)(g) of [Directive 2004/18], which states that any economic operator which is guilty of serious misrepresentation in supplying or not supplying information can be excluded from the procedure, be interpreted as excluding from the procedure an economic operator which submitted incorrect information which affected, or could affect, the result of the procedure, in that the guilt for misrepresentation lies in the very supply to the contracting authority of the factually inaccurate information which affects the decision of the contracting authority concerning exclusion of the economic operator (and rejection of its tender), regardless of whether the economic operator did so knowingly and wilfully, or unknowingly, through recklessness, negligence or failure to exercise due diligence? Is it possible to regard as “guilty of serious misrepresentation in supplying the information required ... or [not having] supplied such information” only an economic operator which has submitted incorrect (factually inaccurate) information, or also one which has submitted information which is correct, but has done so in such a way as to satisfy the contracting authority that it fulfils the requirements laid down by the contracting authority it, even though it does not?
- (7) Does Article 44 of [Directive 2004/18], in conjunction with Article 48(2)(a) thereof and the principle of equal treatment of economic operators in Article 2, allow reliance by an economic operator on experience in such a way that it relies jointly on two or more contractual agreements as a single public contract, despite the fact that the contracting authority did not refer to such a possibility in the contract notice or the tender specifications?

## Consideration of the questions referred

### Questions 1 to 3

- <sup>34</sup> By Questions 1 to 3, which must be examined together, the referring court asks essentially whether Article 51 of Directive 2004/18, in conjunction with Article 2 thereof, must be interpreted as precluding an economic operator, in order to prove that it satisfies the conditions for participating in a public procurement procedure, from submitting to the contracting authority, after the expiry of the period prescribed for applications to take part in a public tender procedure, documents not included



in its initial bid, such as a contract performed by another entity and the undertaking by the latter to place at the disposal of that operator the capacities and resources necessary for the performance of the relevant contract.

- 35 In order to answer those questions, it must be recalled that, in accordance with recital 46 and Article 2 of Directive 2004/18, the contracting authorities are required to afford economic operators equal, non-discriminatory and transparent treatment (judgment of 7 April 2016, *Partner Apelski Dariusz*, C-324/14, EU:C:2016:214, paragraph 60).
- 36 Thus, first, the principles of equal treatment and non-discrimination require tenderers to be afforded equality of opportunity when formulating their bids, which therefore implies that the bids of all tenderers must be subject to the same conditions. Second, the principle of transparency is essentially intended to preclude any risk of favouritism or arbitrariness on the part of the contracting authority. That obligation implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the contract notice or tender specifications so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way and, second, the contracting authority is able to ascertain whether the tenders submitted satisfy the criteria applying to the contract in question (judgment of 7 April 2016, *Partner Apelski Dariusz*, C-324/14, EU:C:2016:214, paragraph 61 and the case-law cited).
- 37 Furthermore, as the Court has already held, the principles of equal treatment and non-discrimination and the obligation of transparency preclude any negotiation between the contracting authority and a tenderer during a public procurement procedure, which means that, as a general rule, a tender cannot be amended after it has been submitted, whether at the request of the contracting authority or at the request of the tenderer concerned. It follows that, where the contracting authority regards a tender as imprecise or as failing to meet the technical requirements of the tender specifications, it cannot require the tenderer to provide clarification (judgment of 7 April 2016, *Partner Apelski Dariusz*, C-324/14, EU:C:2016:214, paragraph 62 and the case-law cited).
- 38 However, the Court has explained that Article 2 of Directive 2004/18 does not preclude the correction or amplification of details of a tender, on a limited and specific basis, particularly when it is clear that they require mere clarification, or to correct obvious material errors (judgment of 7 April 2016, *Partner Apelski Dariusz*, C-324/14, EU:C:2016:214, paragraph 63 and the case-law cited).
- 39 To that end, the contracting authority must ensure, in particular, that the request for clarification does not lead to the submission, by a tenderer, of what would appear in reality to be a new tender (judgment of 7 April 2016, *Partner Apelski Dariusz*, C-324/14, EU:C:2016:214, paragraph 64 and the case-law cited).
- 40 Furthermore, when exercising its right to ask a tenderer to clarify its tender, the contracting authority must treat tenderers equally and fairly, in such a way that a request for clarification does not appear unduly to have favoured or disadvantaged the tenderer or tenderers to which the request was addressed, once the procedure for selection of tenders has been completed and in the light of its outcome (judgment of 7 April 2016, *Partner Apelski Dariusz*, C-324/14, EU:C:2016:214, paragraph 65 and the case-law cited).
- 41 In the present case, Konsultant Komputer submitted documents to the contracting authority which were not included in its initial bid after the expiry of the time limit laid down for submitting applications for the public tender concerned. In particular, as stated in paragraph 27 of the present judgment, it relied on a contract performed by another entity and the undertaking by the latter to place at the disposal of that operator the resources necessary for the performance of the contract at issue in the main proceedings.

- 42 Such further information, far from being merely a clarification made on a limited or specific basis or a correction of obvious material errors, within the meaning of the case-law set out in paragraph 38 of the present judgment, is in reality a substantive and significant amendment of the initial bid, which is more akin to the submission of a new tender.
- 43 As the Advocate General noted, in substance, in point 30 of his Opinion, such a communication directly affects the essential elements of the award procedure, namely the very identity of the economic operator which may be awarded the public contract concerned, and the verification of the capacities of that operator and, therefore, its ability to perform the contract concerned within the meaning of Article 44(1) of Directive 2004/18.
- 44 In those circumstances, by allowing the presentation by the economic operator concerned of the documents in question in order to supplement its original tender, the contracting authority unduly favours that operator as compared with other candidates and, thereby, breaches the principles of equal treatment and non-discrimination of economic operators and the obligation of transparency which derives from them, to which the contracting authorities are subject by virtue of Article 2 of Directive 2004/18.
- 45 It is clear from the foregoing that the answer to Questions 1 to 3 is that Article 51 of Directive 2004/18, in conjunction with Article 2 thereof, must be interpreted as precluding an economic operator from submitting to the contracting authority, in order to prove that it satisfies the conditions for participating in a public tender procedure, documents which were not included in its initial bid, such as a contract performed by another entity and the undertaking of the latter to place at the disposal of that operator the capacities and resources necessary for the performance of the contract concerned after the expiry of the time limit laid down for submitting tenders for a public contract.

#### Question 4

- 46 By Question 4, the referring court asks essentially whether Article 44 of Directive 2004/18, in conjunction with Article 48(2) thereof and the principle of equal treatment of economic operators in Article 2 of that directive, must be interpreted as meaning that it allows an economic operator to rely on the capacities of another entity, within the meaning of Article 48(3) thereof, by combining the knowledge and experience of the two entities, which separately do not have the capacities required to perform a particular contract, if the contracting authority takes the view that the contract concerned cannot be divided and must, therefore, be performed by a single operator.
- 47 In order to answer that question it should be recalled that, according to the Court's settled case-law, Article 47(2) and Article 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 (judgment of 7 April 2016, *Partner Apelski Dariusz*, C-324/14, EU:C:2016:214, paragraph 33 and the case-law cited).
- 48 However, the Court has already held that the provisions of Directive 2004/18 do not preclude the exercise of the right established in Article 47(2) and Article 48(3) thereof from being limited in exceptional circumstances (judgment of 7 April 2016, *Partner Apelski Dariusz*, C-324/14, EU:C:2016:214, paragraph 39 and the case-law cited).
- 49 It is conceivable 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, on its own 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 (judgment of 7 April 2016, *Partner Apelski Dariusz*, C-324/14, EU:C:2016:214, paragraph 40 and the case-law cited).

- 50 In the present case, as stated in paragraph 18 of the present judgment, the specifications of the public contract at issue in the main proceedings required the tenderers to present at least two contracts performed in a specific sector.
- 51 Following the request of the contracting authority, in order to prove that it had the necessary skill to perform the public contract at issue in the main proceedings, Konsultant Komputer relied on the experience of another entity consisting in two supplies, as set out in paragraph 27 of the present judgment, performed by Medinet Systemy Informatyczne.
- 52 However, as the Advocate General noted, in point 46 of his Opinion, the question referred for a preliminary ruling is based on the premiss, confirmed by the referring court, that the public contract at issue in the main proceedings cannot be divided, so that the minimum level of capacity concerned must be attained by a single economic operator and not by relying on the capacities of several economic operators. Moreover, as is apparent from the decision to refer, the Krajowa Izba Odwoławcza (National Appeal Chamber) considers that the exclusion of the possibility to rely on the experience of several economic operators is related and proportionate to the subject matter of the contract concerned.
- 53 In those circumstances and having regard to the case-law set out in paragraphs 48 and 49 of the present judgment, the economic operator concerned cannot rely on the capacities of another entity in order to prove that it has the capacities necessary for the performance of the public contract at issue in the main proceedings.
- 54 Consequently, the answer to the fourth question referred is that Article 44 of Directive 2004/18, in conjunction with Article 48(2)(a) thereof and the principle of equal treatment of economic operators in Article 2 thereof, must be interpreted as meaning that it does not allow an economic operator to rely on the capacities of another entity, within the meaning of Article 48(3) of that directive, by combining the knowledge and experience of two entities which, individually, do not have the capacities required for the performance of a particular contract, where the contracting authority considers that the contract concerned cannot be divided, in that it must be performed by a single operator, and that such exclusion of the possibility to rely on the experience of several economic operators is related and proportionate to the subject matter of the contract which must be therefore performed by a single operator.

### **Question 5**

- 55 By Question 5, the referring court asks essentially whether Article 44 of Directive 2004/18, in conjunction with Article 48(2)(a) thereof and the principle of equal treatment of economic operators in Article 2 of that directive, must be interpreted as meaning that it enables an economic operator which participates individually in an award procedure for a public contract, to rely on the experience of a group of undertakings, of which it was part in connection with another public contract, irrespective of the nature of its participation in the performance of the latter.
- 56 That question relates to the fact, set out in paragraph 20 of the present judgment that, in the case in the main proceedings, the supply of hospital integrated systems for the hospitals concerned was carried out by a group composed of two undertakings, namely Konsultant Komputer and Konsultant IT.

- 57 In order to answer those questions it must be recalled, that, according to Article 44(1) of Directive 2004/18, it is for the contracting authorities to check the suitability of the candidates or tenderers in accordance with the criteria referred to in Articles 47 to 52 thereof.
- 58 Furthermore, under 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 thereof.
- 59 In particular, Article 48(2)(a) of Directive 2004/18 provides that evidence of the technical and/or professional abilities of economic operators may be furnished, taking account in particular of the nature and importance of the supplies of services made, by the presentation of the list of works carried out during the last five years and by the presentation of a list of the principle deliveries effected or main services supplied in the last three years.
- 60 In accordance with the case-law set out in paragraph 47 of the present judgment, Article 48(3) of that directive allows an economic operator, for a particular contract, to rely on the capacities of other entities, such as a group of undertakings of which it is a member, so long as it proves to the contracting authority that that operator will have at its disposal the resources necessary for the execution of the contract.
- 61 In that connection, the experience acquired by an economic operator constitutes a particularly important criterion for the qualitative selection of that operator, as it enables the contracting authority to check the ability of the candidates or tenderers to execute a specific public contract, in accordance with Article 44(1) of Directive 2004/18.
- 62 Therefore, where an economic operator relies on the experience of a group of undertakings in which it has participated, that experience must be assessed in relation to the effective participation of that operator and, therefore, to its actual contribution to the performance of an activity required of that group in the context of a specific public contract.
- 63 As the Polish Government rightly observed in its written submissions, in practice an economic operator acquires experience not by the mere fact of being a member of a group of undertakings without any regard for its contribution to that group, but only by directly participating in the performance of at least part of the contract, the whole of which is to be performed by that group.
- 64 It follows that an economic operator cannot rely on the supplies of services by other members of a group of undertakings in which it has not actually and directly participated as experience required by the contracting authority.
- 65 Having regard to the foregoing, the answer to Question 5 is that Article 44 of Directive 2004/18, in conjunction with Article 48(2)(a) thereof and the principle of equal treatment of economic operators in Article 2 of that directive, must be interpreted as meaning that it does not allow an economic operator, which has individually participated in an award procedure for a public contract, to rely on the experience of a group of undertakings of which it was a member, in connection with another public contract, if it has not actually and directly participated in the performance of the latter.

### ***Question 6***

- 66 By Question 6, the referring court asks essentially whether Article 45(2)(g) of Directive 2004/18, which allows an economic operator to be excluded from participating in a public contract, inter alia, if it is guilty of serious misrepresentation when supplying information requested by the contracting



authority, must be interpreted as meaning that that provision may be applied where the information is of such a nature as to affect the outcome of the call for tenders, irrespective of whether the economic operator acted intentionally or not.

- 67 In order to answer that question, it must be recalled that Article 45(1) and (2) of Directive 2004/18 lays down a series of obligatory and optional grounds by which a tenderer may be excluded from participation in a public contract, which relate to its personal situation.
- 68 In particular, for the purposes of Article 45(2)(g) of that directive, an economic operator may be excluded from participating in a public contract if it is guilty of ‘serious misrepresentation’ in supplying the information required by the contracting authority, or has not supplied such information.
- 69 By its question, the Krajowa Izba Odwoławcza (National Appeal Chamber) asks, for the purposes of the application of that provision, whether it is necessary that the candidate/tenderer acted intentionally, and whether it is necessary that the information submitted to the contracting authority has or could have affected the outcome of the call for tenders.
- 70 In that connection, it must be observed, as a preliminary point, that the wording of Article 45(2)(g) of Directive 2004/18 does not contain any reference to intentional behaviour by the economic operator. Therefore, the establishment of such conduct cannot be regarded as being an element necessary for the exclusion of such an operator from participating in a public contract.
- 71 To the contrary, in order to consider the candidate/tenderer as being guilty of ‘serious misrepresentation’ within the meaning of that provision in order to exclude it from a public contract, it is sufficient if the candidate/tenderer is guilty of some degree of negligence which may have a decisive effect on the decisions to exclude candidates from being selected or awarded as public contract.
- 72 Therefore, in order to sanction an economic operator which has submitted false declarations by excluding its participation in a public contract, the contracting authority is not required, contrary to the submissions, *inter alia*, of the Polish Government and the European Commission, to provide evidence of the existence of wilful misconduct on the part of that economic operator.
- 73 Second, it must be observed that, in accordance with Article 45(2), second subparagraph, of Directive 2004/18, the Member States must specify, in accordance with their national law and having regard for Community law, the implementing conditions for that paragraph.
- 74 It follows that the concepts in Article 45(2), first paragraph, including ‘serious misrepresentation’, can be specified and explained in national law, provided that it has regard for EU law (see, to that effect, judgment of 13 December 2012, *Forposat and ABC Direct Contact*, C-465/11, EU:C:2012:801, paragraph 26).
- 75 In the present case, Article 24(2)(3) of the Law on public contracts provides for the possibility to exclude from the award of a contract, any economic operator which has submitted false information which affects, or is of such a nature as to affect, the result of the ongoing tender procedure.
- 76 As is clear from the decision to refer, the declarations and information provided by the economic operator concerned did in fact affect the outcome of the award procedure for the contract at issue in the main proceedings. According to the Krajowa Izba Odwoławcza (National Appeal Chamber), it is specifically on the basis of those declarations and that information that Konsultant Komputer was awarded the tender.

- 77 In those circumstances, it must be held that, by providing such declaration and information, the economic operator concerned was guilty of negligence which had a decisive effect on the decisions to exclude, select or award the public contract concerned, so that that operator may be regarded as being guilty of 'serious misrepresentation' for the purposes of Article 45(2)(g) of Directive 2004/18. Therefore, such an attitude is able to justify the decision of the contracting authority to exclude that operator from the public contract concerned.
- 78 Having regard to the foregoing considerations, the answer to Question 6 is that Article 45(2)(g) of Directive 2004/18, which allows the exclusion of an economic operator from participation in a public contract, in particular if it is guilty of 'serious misrepresentation' for making false declarations when submitting the information requested by the contracting authority, must be interpreted as meaning that it may be applied where the operator concerned is guilty of a certain degree of negligence, that is to say negligence of a nature which may have a decisive effect on decisions concerning exclusion, selection or award of a public contract, irrespective of whether there is a finding of wilful misconduct on the part of that operator.

### Question 7

- 79 By Question 7, the referring court asks essentially whether Article 44 of Directive 2004/18, in conjunction with Article 48(2)(a) thereof and the principle of equal treatment of economic operators in Article 2 of that directive, must be interpreted as meaning that it allows an economic operator to rely on experience by relying simultaneously on two or more contracts as a single contract, although the contracting authority has not expressly provided for such a possibility either in the contract notice or in the tender specifications.
- 80 In order to answer that question, it must be observed, as a preliminary point, as set out in paragraph 57 of the present judgment, pursuant to Article 44(1) of Directive 2004/18, the contracting authority is required to check the suitability of candidates or tenderers to perform the contract concerned in accordance with the requirements laid down in Articles 47 to 52 of that directive.
- 81 The candidates or tenderers themselves must prove to the contracting authority that they have or will have the capacities necessary to ensure the proper performance of the public contract concerned.
- 82 In that connection, the contracting authority is justified in expressly setting out, in principle in the tender notice or the tender specifications, the requirement to provide evidence of specific capacities and practical arrangements by which the candidate/tenderer must demonstrate its suitability to be awarded and perform the contract concerned. Likewise, it is conceivable that, in specific circumstances, having regard to the nature of the works concerned and the subject matter and purpose of the contract, the contracting authority may lay down limits, in particular regarding the use of a limited number of economic operators, pursuant to Article 44(2) of Directive 2004/18 (see, to that effect, judgments of 7 April 2016, *Partner Apelski Dariusz*, C-324/14, EU:C:2016:214, paragraphs 39 to 41, and of 5 April 2017, *Borta*, C-298/15, EU:C:2017:266, paragraph 90 and the case-law cited).
- 83 However, if the contracting authority decides to make use of such a possibility, it must ensure that the rules it adopts are related and proportionate to the subject matter and objectives of that contract (see, to that effect, judgment of 7 April 2016, *Partner Apelski Dariusz*, C-324/14, EU:C:2016:214, paragraphs 40 and 56).
- 84 In the present case, as is clear from the decision to refer, although it is true that the contracting authority has not expressly provided in the contract documents for the possibility for the candidate/tenderer to rely on two or more contracts as a single contract, the fact remains that such a possibility was not expressly excluded, either in the contract notice or in the tender specifications.



- 85 In those circumstances, it is conceivable *prima facie* that the experience necessary for the performance of the contract concerned, acquired by the economic operator in the performance of not one, but two or more different contracts, may be regarded as sufficient by the contracting authority and thereby enables that operator to win the public contract concerned.
- 86 As the Advocate General noted, in paragraph 62 of his Opinion, if the requirements of a specific contract can be fulfilled by bringing together capacities or experience split between different operators, *a fortiori*, it would simply be illogical to exclude, as a matter of principle, the possibility of bringing together capacities or experience gained by the same operator in relation to different contracts.
- 87 Therefore, as in the case in the main proceedings, in so far as the possibility to rely on experience acquired in relation to several contracts has not been excluded either in the contract notice or in the tender specifications, it is for the contracting authority, subject to review by the competent national courts, to check whether the experience gained from two or more contracts, having regard to the nature of the works concerned and the subject matter and purpose of the contract concerned, ensures the proper performance of that contract.
- 88 Having regard to the foregoing, the answer to Question 7 is that Article 44 of Directive 2004/18, in conjunction with Article 48(2)(a) thereof and the principle of equal treatment of economic operators in Article 2 of that directive, must be interpreted as meaning that it allows an economic operator to rely on experience derived from two or more contracts treated as a single contract, unless the contracting authority has excluded such a possibility pursuant to requirements which are related and proportionate to the subject matter and purpose of the public contract concerned.

### **Costs**

- 89 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:

1. Article 51 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 concerning the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, in conjunction with Article 2 thereof, must be interpreted as precluding an economic operator from submitting to the contracting authority, in order to prove that it satisfies the conditions for participating in a public tender procedure, documents which were not included in its initial bid, such as a contract performed by another entity and the undertaking of the latter to place at the disposal of that operator the capacities and resources necessary for the performance of the contract concerned after the expiry of the time limit laid down for submitting tenders for a public contract.
2. Article 44 of Directive 2004/18, in conjunction with Article 48(2)(a) thereof and the principle of equal treatment of economic operators in Article 2 of that directive, must be interpreted as meaning that it does not allow an economic operator to rely on the capacities of another entity, within the meaning of Article 48(3) of that directive, by combining the knowledge and experience of two entities which, individually, do not have the capacities required for the performance of a particular contract, where the contracting authority considers that the contract concerned cannot be divided, in that it must be performed by a single operator, and that such exclusion of the possibility to rely on the experience of several economic operators is related and proportionate to the subject matter of the contract which must be performed by a single operator.

3. Article 44 of Directive 2004/18, in conjunction with Article 48(2)(a) thereof and the principle of equal treatment of economic operators in Article 2 of that directive, must be interpreted as meaning that it does not allow an economic operator, which has individually participated in an award procedure for a public contract, to rely on the experience of a group of undertakings of which it was a member, in connection with another public contract, if it has not actually and directly participated in the performance of the latter.
4. Article 45(2)(g) of Directive 2004/18, which allows the exclusion of an economic operator from participation in a public contract, in particular if it is guilty of 'serious misrepresentation' for making false declarations when submitting the information requested by the contracting authority, must be interpreted as meaning that it may be applied where the operator concerned is guilty of a certain degree of negligence, that is to say negligence of a nature which may have a decisive effect on decisions concerning exclusion, selection or award of a public contract, irrespective of whether there is a finding of wilful misconduct on the part of that operator.
5. Article 44 of Directive 2004/18, in conjunction with Article 48(2)(a) thereof and the principle of equal treatment of economic operators in Article 2 of that directive, must be interpreted as meaning that it allows an economic operator to rely on experience derived from two or more contracts treated as a single contract, unless the contracting authority has excluded such a possibility pursuant to requirements which are related and proportionate to the subject matter and purpose of the public contract concerned.

[Signatures]