



Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

29 March 2012*

(Public procurement — Directive 2004/18/EC — Contract award procedures — Restricted call for tenders — Assessment of the tender — Requests by the contracting authority for clarification of the tender — Conditions)

In Case C-599/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Najvyšší súd Slovenskej republiky (Slovak Republic), made by decision of 9 November 2010, received at the Court on 17 December 2010, in the proceedings

SAG ELV Slovensko a.s.,

FELA Management AG,

ASCOM (Schweiz) AG,

Asseco Central Europe a.s.,

TESLA Stropkov a.s.,

Autostrade per l'Italia SpA,

EFKON AG,

Stalexport Autostrady SA

v

Úrad pre verejné obstarávanie,

intervening party:

Národná diaľničná spoločnosť a.s.,

THE COURT (Fourth Chamber),

composed of J.-C. Bonichot (Rapporteur), President of the Chamber, A. Prechal, K. Schieman, C. Toader and E. Jarašiūnas, Judges,

Advocate General: J. Kokott,

* Language of the case: Slovak.

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 14 December 2011,

after considering the observations submitted on behalf of:

- SAG ELV Slovensko a.s., FELA Management AG, ASCOM (Schweiz) AG, Asseco Central Europe a.s. and TESLA Stropkov a.s., by R. Gorej, L. Vojčík and O. Gajdošech, avocats,
- Autostrade per l'Italia SpA, EFKON AG and Stalexport Autostrady SA, by L. Poloma and G.M. Roberti, avocats,
- the Úrad pre verejné obstarávanie, by B. Šimorová, acting as Agent,
- Národná diaľničná spoločnosť a.s., by D. Nemčíková and J. Čorba, advokát,
- the Slovak Government, by B. Ricziová, acting as Agent,
- the European Commission, by C. Zadra and A. Tokár, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

- 1 This reference for a preliminary ruling concerns the interpretation of Articles 2, 51 and 55 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 reference has been made in proceedings between the Úrad pre verejné obstarávanie (Public Procurement Office; 'the Úrad') and undertakings which were unsuccessful in a call for tenders launched during 2007 by Národná diaľničná spoločnosť a.s. ('NDS'), a commercial undertaking wholly controlled by the Slovak State, with a view to the supply of services relating to toll collection on motorways and certain roads.

Legal context

European Union law

- 3 Article 2 of Directive 2004/18 provides:

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

- 4 Article 51 of that directive which, within Title II, Chapter VII, thereof, forms part of Section 2, entitled 'Criteria for qualitative selection', states:

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

5 Article 55 of that directive, which forms part of Section 3, entitled ‘Award of the contract’, provides:

‘1. If, for a given contract, tenders appear to be abnormally low in relation to the goods, works or services, the contracting authority shall, before it may reject those tenders, request in writing details of the constituent elements of the tender which it considers relevant.

Those details may relate in particular to:

- (a) the economics of the construction method, the manufacturing process or the services provided;
- (b) the technical solutions chosen and/or any exceptionally favourable conditions available to the tenderer for the execution of the work, for the supply of the goods or services;
- (c) the originality of the work, supplies or services proposed by the tenderer;
- (d) compliance with the provisions relating to employment protection and working conditions in force at the place where the work, service or supply is to be performed;
- (e) the possibility of the tenderer obtaining State aid.

2. The contracting authority shall verify those constituent elements by consulting the tenderer, taking account of the evidence supplied.

...’

National law

6 Article 42, entitled ‘Procedure for assessment of tenders’, of Law No 25/2006 on public procurement, in the version that the national court considers to be applicable to the main proceedings, provides:

‘1. Tenders shall be assessed by a committee *in camera*. The committee shall assess the tenders having regard to compliance with the requirements of the contracting authority or contracting entity concerning the object of the contract and shall exclude tenders which fail to meet those requirements specified in the contract notice or in the notice used as a means of calling for competition and in the tender specifications. ...

In the evaluation of tenders with a variant, Article 37(3) shall be applied.

2. The committee may ask tenderers in writing to explain their tenders. However, it may not seek or accept a proposal from a tenderer to make a change that would give the tender an advantage.

3. Where a tender contains an abnormally low price, the committee shall ask the tenderer in writing to explain its price proposal. The request must be designed to obtain details of the basic characteristic parameters of the tender which the committee considers important and which apply in particular to:

- (a) the economics of the construction methods, manufacturing processes or the services provided;
- (b) the technical solution or particularly favourable conditions available to the tenderer for the delivery of supplies, performance of construction works, provision of service;
- (c) the special nature of the supplies, the construction works or the services proposed by the tenderer;

(d) compliance with the laws relating to the protection of employment and labour conditions in force in the place of the supplies, construction works or services,

(e) whether the tenderer may be granted State aid.

(4) The committee shall take into consideration the clarification of a tender or of an abnormally low price and the evidence provided by a tenderer. The committee shall exclude a tender in the case where:

(a) the tenderer has failed to submit a written explanation within three working days from the date of receipt of a request for clarification, unless the committee has fixed a longer period, or

(b) the clarification submitted fails to comply with the requirement under paragraphs (2) or (3).

...

(7) The committee shall assess tenders which have not been excluded pursuant to the criteria specified in the contract notice or in the notice used as a means of calling for competition or in the tender specifications, and on the basis of the rules of their application, as specified in the tender documents, which are non-discriminatory and support fair competition.

...'

The actions in the main proceedings and the questions referred for a preliminary ruling

7 NDS launched a restricted call for tenders by notice published in the *Official Journal of the European Union* on 27 September 2007, with a view to concluding a public contract having an estimated value in excess of EUR 600 million for the supply of toll collection services on motorways and certain roads.

8 In the course of that procedure, NDS sent requests for tender clarification to two groups of undertakings, including candidates. These were, firstly, SAG ELV Slovensko a.s., FELA Management AG, ASCOM (Schweiz) AG, Asseco Central Europe a.s. and TESLA Stropkov a.s. ('SAG ELV and Others'), and, secondly, Autostrade per l'Italia SpA, EFKON AG and Stalexport Autostrady SA ('Slovakpass'). In addition to questions specific to each of the tenders relating to their technical aspects, those two groups were asked to provide clarification of the abnormally low prices which they had proposed. Answers were given to those questions.

9 Subsequently, SAG ELV and Others and Slovakpass were excluded from the procedure by decisions of 29 April 2008.

10 Those decisions were challenged before NDS, which upheld them, and subsequently before the competent administrative appeal body, the Úrad, which on 2 July 2008 in turn dismissed the appeals brought before it.

11 The Úrad took the view that, although one of the grounds put forward by NDS to justify the exclusion of the two groups concerned from the call for tender procedure, namely the failure to produce certificates for installations not yet approved, was unfounded, the other two grounds advanced did, however, justify that exclusion. Firstly, those two groups had failed to provide an adequate response to the request for clarification of the abnormally low price in their tenders. Secondly, those tenders failed to comply with certain conditions set out in the tender specifications, namely those in Article 11.1. P 1.20 as regards SAG ELV and Others, requiring, in essence, determination of the parameters enabling calculation of tolls as a function of the toll sections by season, days of the week, hours of the day, and those set out in Article 12. T. 1.5 as regards Slovakpass, requiring provision of a diesel-powered emergency electricity generator.

- 12 SAG ELV and Others and Slovakpass challenged those decisions before the Krajský súd Bratislava (Bratislava Regional Court) (Slovak Republic). By judgment of 6 May 2009, that court dismissed the action brought by SAG ELV and Others. Similarly, by judgment of 13 October 2009, it dismissed the actions brought by Slovakpass, which it had joined and which sought, first, annulment of the decision of the Úrad of 2 July 2008 and, second, annulment of the decision by which NDS had confirmed the soundness of its measure creating a tender assessment committee, also contested by Slovakpass.
- 13 Appeals against those two judgments were lodged before the Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic). Having regard to the arguments raised by SAG ELV and Others and by Slovakpass, and in the light of the grounds relied on by the European Commission in the action for failure to fulfil obligations brought against the Slovak Republic because of irregularities in the public procurement procedure at issue in the main proceedings, the national court has doubts as to whether the NDS decisions concerned comply with the principles of European Union law on non-discrimination and transparency in the award of public contracts. In particular, it is unsure whether those principles preclude the contracting authority from being able to reject a tender on a ground alleging non-compliance with the tender specifications without first having asked the tenderer to clarify that failure to comply, or on a ground alleging that the price offered is abnormally low, without having questioned the tenderer sufficiently clearly on that point.
- 14 In those circumstances, the Najvyšší súd Slovenskej republiky decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:
1. Is the interpretation that, under Article 51, in conjunction with Article 2, of [Directive 2004/18], taking account of the principle[s] of non discrimination and transparency in the award of public contracts, the contracting authority is obliged to seek clarification of a tender, respecting the subjective procedural right of the individual to be requested to supplement or clarify certificates and documents submitted pursuant to Articles 45 to 50 of the Directive, if a disputable or unclear understanding of the tenderer's bid could result in the exclusion of that tenderer, in conformity with the above Directive in the wording in effect in the relevant period?
 2. Is the interpretation that, under Article 51, in conjunction with Article 2, of [Directive 2004/18], taking account of the principle[s] of non discrimination and transparency in the award of public contracts, the contracting authority is not obliged to seek clarification of a tender if the contracting authority considers it established that the requirements regarding the subject matter of the contract have not been met, in conformity with the Directive in the wording in effect in the relevant period?
 3. Is a provision of national law under which a committee established to evaluate tenders only may request tenderers in writing to clarify their bid in conformity with Article 51 and Article 2 of [Directive 2004/18] in the wording in effect in the relevant period?

Is a contracting authority's procedure, according to which it is not obliged to request a tenderer to clarify an abnormally low price, in conformity with Article 55 of [Directive 2004/18], and, on the formulation of the question put by the contracting authority to the applicants in connection with the abnormally low price, did [the applicants] have the opportunity to explain sufficiently the constituent features of the tender submitted?

Admissibility of the questions referred

- 15 In accordance with settled case-law, questions on the interpretation of European Union law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious

that the interpretation of European Union law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, *inter alia*, Joined Cases C-188/10 and C-189/10 *Melki and Abdeli* [2010] ECR I-5667, paragraph 27 and the case-law cited).

- 16 In the light of those principles, the Slovak Government has argued, in its written observations, that the reference for a preliminary ruling is inadmissible on the ground, first, that, in the dispute brought before the national court by SAG ELV and Others, no complaint was raised regarding clarification of the tenders made in the public procurement procedure by the tenderers.
- 17 It is, however, common ground that the Court has received one single reference for a preliminary ruling made by the national court concerning two disputes which were brought before that court at the same time and which have been joined. Accordingly, the situation referred to by the Slovak Government as regards the appeal lodged by SAG ELV and Others could in any event affect the admissibility of that reference only if it were established that no complaint relating to the clarification of the offer of tenderers in the public procurement procedure had been raised in the other dispute in the main proceedings either. Since such a situation has not been established or even alleged, the first objection to admissibility must be rejected.
- 18 Second, the Slovak Government submits that that part of the national court's third question, which concerns the request for clarification of the abnormally low tender, as formulated by the contracting authority, has no bearing on the action brought by Slovakpass, in which the challenge related to the assessment made of that request by the court at first instance.
- 19 Although the Slovak Government submits in that regard that, in accordance with national procedural law, the national court could not consider a plea other than that which had been raised before it, such a complaint, which is thus based on a rule of national law, does not necessarily mean that the question referred is manifestly unconnected with the facts or subject-matter of the disputes in question.
- 20 Finally, it is common ground that, in the main proceedings, the unsuccessful tenderers were declared unsuccessful after the contracting authority had assessed the answers to the requests for clarification of the tenders which they had submitted. In those circumstances, the questions referred by the national court, which relate to the conditions in which such requests must or may be made, having regard to the requirements of European Union law, do not appear to be manifestly unconnected with the facts or subject-matter of the disputes in question.
- 21 Accordingly, it is appropriate for the Court to give a ruling.

Consideration of the questions referred

Preliminary observations

- 22 As the Slovak Government and the Commission have pointed out, it is necessary to note, firstly, that Article 51 of Directive 2004/18 is among the provisions which form part of Section 2 relating to the criteria for qualitative selection of tenderers. The provisions of that article are therefore irrelevant to the assessment which the Court must make in order to answer the questions which have been referred and which relate, having regard to the facts of the cases in the main proceedings, solely to that stage of the restricted call for tenders procedure in which, following selection of the tenderers entitled to submit a tender, it is for the contracting authority to assess those tenders. There is therefore no need for the Court to rule on the interpretation of Article 51 of Directive 2004/18.

- 23 Secondly, the fact that the contracting authority has, in the present proceedings, set up a committee responsible for assessing, on its behalf, the tenders submitted by the tenderers does not relieve that authority of its responsibility to comply with the requirements of European Union law in the field of public procurement. Thus, although the national court asks whether a provision of national law providing that the committee set up to assess the tenders can only ask the tenderers in writing to clarify the tender is compatible with European Union law, that question must be understood as being asked generally as if the contracting authority itself were placed in that position.
- 24 In those circumstances, the Court must understand the questions referred to it, taken as a whole, as seeking to ascertain to what extent contracting authorities, when they take the view, in a restricted public procurement procedure, that the tender submitted by a tenderer is abnormally low or imprecise or does not meet the technical requirements of the tender specifications, may or must seek clarification from the tenderer concerned, having regard to Articles 2 and 55 of Directive 2004/18.
- 25 With regard to Article 2 of Directive 2004/18, it must be borne in mind that the principal objectives of the European Union rules in the field of public procurement include that of ensuring the free movement of services and the opening-up to undistorted competition in all the Member States. In order to pursue that twofold objective, European Union law applies, inter alia, the principle of equal treatment of tenderers and the obligation of transparency resulting therefrom (see, to that effect, Case C-454/06 *pressetext Nachrichtenagentur* [2008] ECR I-4401, paragraphs 31 and 32 and the case-law cited). The obligation of transparency, for its part, is essentially intended to preclude any risk of favouritism or arbitrariness on the part of the contracting authority (see, to that effect, Case C-496/99 P *Commission v CAS Succhi di Frutta* [2004] ECR I-3801, paragraph 111). As regards the award of contracts, Article 2 of Directive 2004/18 requires contracting authorities to comply with the same principles and obligations.
- 26 It is in the light of those considerations that the questions referred to the Court must be answered, by examining in turn the situation in which the contracting authority considers the tender to be abnormally low and that in which it takes the view that the tender is imprecise or does not meet the technical requirements of the tender specifications.

An abnormally low tender

- 27 It must be borne in mind that, under Article 55 of Directive 2004/18, if, for a given contract, tenders appear to be abnormally low in relation to the goods, works or services, the contracting authority must, before it may reject those tenders, 'request in writing details of the constituent elements of the tender which it considers relevant'.
- 28 It follows clearly from those provisions, which are stated in a mandatory manner, that the European Union legislature intended to require the awarding authority to examine the details of tenders which are abnormally low, and for that purpose obliges it to request the tenderer to furnish the necessary explanations to prove that those tenders are genuine (see, to that effect, Joined Cases C-285/99 and C-286/99 *Lombardini and Mantovani* [2001] ECR I-9233, paragraphs 46 to 49).
- 29 Accordingly, the existence of a proper exchange of views, at an appropriate time in the procedure for examining tenders, between the contracting authority and the tenderer, to enable the latter to demonstrate that its tender is genuine, constitutes a fundamental requirement of Directive 2004/18, in order to prevent the contracting authority from acting in an arbitrary manner and to ensure healthy competition between undertakings (see, to that effect, *Lombardini and Mantovani*, paragraph 57).

- 30 In that regard, it must be borne in mind, firstly, that although the list in the second subparagraph of Article 55(1) of Directive 2004/18 is not exhaustive, it is also not purely indicative, and therefore does not leave contracting authorities free to determine which are the relevant factors to be taken into consideration before rejecting a tender which appears to be abnormally low (judgment of 23 April 2009 in Case C-292/07 *Commission v Belgium*, paragraph 159).
- 31 Secondly, in order for Article 55(1) of Directive 2004/18 to be effective, the contracting authority must set out clearly the request sent to the tenderers concerned so that they are in a position fully and effectively to show that their tenders are genuine.
- 32 It is, however, for the national court alone to ascertain, having regard to all the documents in the file placed before it, whether the request for clarification enabled the tenderers concerned to provide a sufficient explanation of the composition of their tender.
- 33 Furthermore, Article 55 of Directive 2004/18, far from precluding a provision of national legislation such as Article 42(3) of Law No 25/2006, which, in essence, provides that if a tenderer offers an abnormally low price, the contracting authority must ask it in writing to clarify its price proposal, requires the inclusion of such a provision in the national legislation on public procurement (see, to that effect, *Commission v Belgium*, paragraph 161).
- 34 Accordingly, Article 55 of Directive 2004/18 does preclude, in particular, a contracting authority from claiming, as the national court states in its third question, that it is not obliged to request a tenderer to clarify an abnormally low price.

An imprecise tender or one which does not meet the technical requirements of the tender specifications

- 35 In this regard, it must be noted that, in contrast to the situation concerning abnormally low prices, Directive 2004/18 does not contain any provision which expressly sets out the procedure to be followed in the event that the contracting authority finds, in a restricted public procurement procedure, that the tender submitted by a tenderer is imprecise or does not meet the technical requirements of the tender specifications.
- 36 By its very nature, the restricted public procurement procedure means that, once the tenderers have been selected and once their respective tenders have been submitted, in principle those tenders can no longer be amended either at the request of the contracting authority or at the request of the tenderers. The principle of equal treatment of tenderers and the obligation of transparency resulting therefrom preclude, in that procedure, any negotiation between the contracting authority and one or other of the tenderers.
- 37 To enable the contracting authority to require a tenderer whose tender it regards as imprecise or as failing to meet the technical requirements of the tender specifications to provide clarification in that regard would be to run the risk of making the contracting authority appear to have negotiated with the tenderer on a confidential basis, in the event that that tenderer was finally successful, to the detriment of the other tenderers and in breach of the principle of equal treatment.
- 38 In any event, it does not follow from Article 2 or from any other provision of Directive 2004/18, or from the principle of equal treatment or the obligation of transparency, that, in such a situation, the contracting authority is obliged to contact the tenderers concerned. Those tenderers cannot, moreover, complain that there is no such obligation on the contracting authority since the lack of clarity of their tender is attributable solely to their failure to exercise due diligence in the drafting of their tender, to which they, like other tenderers, are subject.

- 39 Article 2 of Directive 2004/18 does not therefore preclude the absence, in national legislation, of a provision which would oblige the contracting authority to request tenderers, in a restricted public procurement procedure, to clarify their tenders in the light of the technical requirements of the tender specifications before rejecting them because they are imprecise or do not meet those requirements.
- 40 None the less, Article 2 of that directive does not preclude, in particular, the correction or amplification of details of a tender where appropriate, on an exceptional basis, particularly when it is clear that they require mere clarification, or to correct obvious material errors, provided that such amendment does not in reality lead to the submission of a new tender. Nor does that article preclude a provision of national legislation such as Article 42(2) of Law No 25/2006, according to which, in essence, the contracting authority may ask tenderers in writing to clarify their tender without, however, requesting or accepting any amendment to the tender.
- 41 In the exercise of the discretion thus enjoyed by the contracting authority, that authority must treat the various 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.
- 42 In order to provide a useful answer to the national court, it must be added that a request for clarification of a tender may be made only after the contracting authority has looked at all the tenders (see, to that effect, *Lombardini and Mantovani*, paragraphs 51 and 53).
- 43 Furthermore, that request must be sent in an equivalent manner to all undertakings which are in the same situation, unless there is an objectively verifiable ground capable of justifying different treatment of the tenderers in that regard, in particular where the tender must, in any event, in the light of other factors, be rejected.
- 44 In addition, that request must relate to all sections of the tender which are imprecise or which do not meet the technical requirements of the tender specifications, without the contracting authority being entitled to reject a tender because of the lack of clarity of a part thereof which was not covered in that request.
- 45 Having regard to all of the foregoing considerations, the answer to the questions referred is that:
- Article 55 of Directive 2004/18 must be interpreted as requiring the inclusion in national legislation of a provision such as Article 42(3) of Law No 25/2006 on public procurement, which, in essence, provides that if a tenderer offers an abnormally low price, the contracting authority must ask it in writing to clarify its price proposal. It is for the national court to ascertain, having regard to all the documents in the file placed before it, whether the request for clarification enabled the tenderer concerned to provide a sufficient explanation of the composition of its tender;
 - Article 55 of Directive 2004/18 precludes a contracting authority from taking the view that it is not required to ask a tenderer to clarify an abnormally low price;
 - Article 2 of Directive 2004/18 does not preclude a provision of national law, such as Article 42(2) of Law No 25/2006, according to which, in essence, the contracting authority may ask tenderers in writing to clarify their tenders without, however, requesting or accepting any amendment to the tenders. In the exercise of the discretion thus enjoyed by the contracting authority, that authority must treat the various tenderers equally and fairly, in such a way that a request for clarification cannot 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.

The application for suspension of the effects of the judgment

- 46 The Slovak Government has requested the Court to limit in time the effects of the present judgment should it interpret the general principles referred to in Article 2 of Directive 2004/18 in such a way as to deduce from them an obligation on the part of the contracting authority to request a tenderer, in the context of the assessment of the conformity of a tender with the requirements relating to the subject-matter of the contract as defined in the tender specifications, to clarify its tender.
- 47 However, the interpretation of Article 2 of Directive 2004/18 arrived at in the present judgment does not lead to such a finding. The request of the Slovak Government is, accordingly and in any event, devoid of purpose.

Costs

- 48 Since these proceedings are, for the parties to the main proceedings, a step in the actions pending before the national court, the decisions on costs are 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:

Article 55 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 requiring the inclusion in national legislation of a provision such as Article 42(3) of Slovak Law No 25/2006 on public procurement, in the version applicable in the main proceedings, which, in essence, provides that if a tenderer offers an abnormally low price, the contracting authority must ask it in writing to clarify its price proposal. It is for the national court to ascertain, having regard to all the documents in the file placed before it, whether the request for clarification enabled the tenderer concerned to provide a sufficient explanation of the composition of its tender.

Article 55 of Directive 2004/18 precludes a contracting authority from taking the view that it is not required to ask a tenderer to clarify an abnormally low price.

Article 2 of Directive 2004/18 does not preclude a provision of national law, such as Article 42(2) of the abovementioned Law No 25/2006, according to which, in essence, the contracting authority may ask tenderers in writing to clarify their tenders without, however, requesting or accepting any amendment to the tenders. In the exercise of the discretion thus enjoyed by the contracting authority, that authority must treat the various tenderers equally and fairly, in such a way that a request for clarification cannot 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.

[Signatures]