



Reports of Cases

OPINION OF ADVOCATE GENERAL
JÄÄSKINEN
delivered on 28 February 2013¹

Case C-94/12

**Swm Costruzioni 2 SpA
Mannocchi Luigino DI
v
Provincia di Fermo**

(Request for a preliminary ruling from the Tribunale Amministrativo Regionale per le Marche (Italy))

(Directive 2004/18/EC — Award of public works contracts — Economic and financial standing of an economic operator — Technical and/or professional ability of an economic operator — Reliance on the capacities of more than one auxiliary undertaking)

I – Introduction

1. Undertakings wishing to participate in a tendering procedure for a public works contract may be required to meet minimum levels relating to economic and financial standing or technical and/or professional ability in accordance with Articles 47 and 48 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 ('Directive 2004/18').² In addition to possessing such capacities itself, an economic operator may fulfil these requirements by reference to the reliance on the capacities of 'other entities, regardless of the legal nature of the links which it has with them'.³

2. This request for a preliminary ruling concerns the question whether national legislation which limits to one the number of entities on whose capacity an economic operator wishing to participate in a public works tendering procedure may rely is in line with Directive 2004/18, in particular with Articles 47(2) and 48(3) thereof. Answering this question requires the Court to define the extent of the discretion the Member States have in implementing the provisions codifying the case-law of the Court predating Directive 2004/18.

¹ — Original language: English.

² — OJ 2004 L 134, p. 114.

³ — Articles 47(2) and 48(3) of Directive 2004/18.

II – Legal framework

A – *European Union law*

3. Article 47(2) of Directive 2004/18 titled ‘Economic and financial standing’ provides that:

‘An economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. It must in that case prove to the contracting authority that it will have at its disposal the resources necessary, for example, by producing an undertaking by those entities to that effect.’

4. Article 48(3) of Directive 2004/18 titled ‘Technical and/or professional ability’ provides that:

‘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.’

5. Article 52(1) of Directive 2004/18 titled ‘Official lists of approved economic operators and certification by bodies established under public or private law’ provides that:

‘Member States may introduce either official lists of approved contractors, suppliers or service providers or certification by certification bodies established in public or private law.

Member States shall adapt the conditions for registration on these lists and for the issue of certificates by certification bodies to the provisions of Article 45(1), Article 45(2)(a) to (d) and (g), Articles 46, Article 47(1), (4) and (5), Article 48(1), (2), (5) and (6), Article 49 and, where appropriate, Article 50.

Member States shall also adapt them to Article 47(2) and Article 48(3) as regards applications for registration submitted by economic operators belonging to a group and claiming resources made available to them by the other companies in the group. In such case, these operators must prove to the authority establishing the official list that they will have these resources at their disposal throughout the period of validity of the certificate attesting to their being registered in the official list and that throughout the same period these companies continue to fulfil the qualitative selection requirements laid down in the Articles referred to in the second subparagraph on which operators rely for their registration.’

B – *National law*

6. Article 49(6) of Legislative Decree No 163/2006 provides, with regard to participation in public tendering procedures, that ‘[f]or works contracts, the tenderer may rely on the capacities of only one auxiliary undertaking for each qualification category. The invitation to tender may permit reliance on the capacity of more than one auxiliary undertaking on account of the value of the contract or the special nature of the services to be provided, subject to the prohibition on the shared use by the tenderer of the individual economic, financial, technical and organisation capacities referred to in Article 40(3)(b), on the basis of which the certificate for that category was issued.’

III – The dispute in the main proceedings and the question referred

7. The applicant in the main proceedings, Raggruppamento Temporaneo Imprese ('RTI'), an ad hoc tendering consortium consisting of Swm Costruzioni 2 SpA (head of the consortium) and Mannocchi Luigino DI, who are also applicants in the main proceedings, participated in the tendering procedure for a public works contract for the modernisation and extension of Strada Provinciale (Provincial Road) No 238 Valdaso.

8. For the purposes of satisfying the certification requirements of the Società Organismo di Attestazione (SOA), the certifying body authorised to verify whether undertakings have the necessary qualifications and fulfil the requirements for participation in public tendering procedures, the main applicant, Swm Costruzioni 2 relied on the capacities of two undertakings of the same qualification category concerning modernisation and extension works.

9. On 2 August 2011, the contracting authority, Provincia di Fermo sent to RTI its decision of the same date excluding RTI from the tendering procedure. The reason for that decision was the breach of the prohibition on reliance on the capacities of more than one undertaking within the same category laid down by Article 49(6) of Legislative Decree No 163/2006.

10. RTI challenged this decision by application lodged on 5 August 2011 before the referring court, the Tribunale Amministrativo Regionale per le Marche. RTI's application was based on the argument that Article 49(6) of Legislative Decree No 163/2006 was not compatible with the relevant provisions of Directive 2004/18. The Tribunale Amministrativo Regionale per le Marche decided to stay the proceedings and refer the following question for a preliminary ruling:

'Must Article 47(2) of Directive 2004/18/EC be interpreted as precluding, in principle, the legislation of a Member State, such as the Italian legislation set out in Article 49(6) of Legislative Decree No 163/2006, which prohibits, except in special circumstances, reliance on the capacities of more than one auxiliary undertaking, and provides that "[f]or works contracts, the tenderer may rely on the capacities of only one auxiliary undertaking for each qualification category. The invitation to tender may permit reliance on the capacities of more than one auxiliary undertaking on account of the value of the contract or the special nature of the services to be provided ..."?'

11. Swm Costruzioni 2 SpA and Mannocchi Luigino DI, the Italian Government and the Commission have presented written observations.

IV – The scope of the question referred

12. The Italian Government points out that the main proceedings concern the technical and professional ability of an undertaking, and not its economic and financial capacity, therefore making Article 48(3) of Directive 2004/18 the relevant article. The referring court however has referred solely to Article 47(2) of Directive 2004/18, which concerns the economic and financial capacity of participating undertakings.

13. Here I find it sufficient to refer to settled case-law which states that the order for reference from a national court provides the basis for determining the scope of the question of European Union law to be interpreted, but that the Court is not completely bound by the wording of the question(s) submitted. The Court may have to reformulate the question referred to it in order to provide the referring court with an answer which will be of use to it and enable it to determine the case before it.⁴

4 — See Case C-62/00 *Marks & Spencer* [2002] ECR I-6325, paragraph 32 and case-law cited. See also more recently Case C-503/09 *Stewart* [2011] ECR I-6497, paragraph 105.

14. Articles 47 and 48 of Directive 2004/18 are combined in Article 44(2) of Directive 2004/18 for purposes of allowing contracting authorities to ‘require candidates and tenderers to meet minimum capacity levels’. These two articles follow the same logic, and the same principles of interpretation are valid in the application of both. In *Strong Securança* the Court noted *en passant* that Articles 48(3) and 47(2) of Directive 2004/18 are substantially identical.⁵ Both provisions codify the legal principle developed in the Court’s case-law on earlier public procurement directives concerning the criteria for qualitative selection of candidates or tenderers.⁶

15. During the written procedure, the Court asked the parties to submit their views on the relevance to the present case of Article 44(2) of Directive 2004/18, which is the general provision on the verification of the suitability and choice of participants and award of contracts.⁷ Only the Commission replied within the given deadline, concluding that an assessment of Article 44(2) was not relevant for the matter at hand.

16. Therefore, in order to provide Tribunale Amministrativo Regionale per le Marche with a useful answer in the main proceedings, I find that the Court’s preliminary ruling should focus on the interpretation of both Articles 47(2) and 48(3) of Directive 2004/18.

V – Assessment

17. In my view, a literal interpretation of Articles 47(2) and 48(3) of Directive 2004/18 does not support the view that national legislation such as Article 49(6) of Legislative Decree No 163/2006 complies with European Union law on public procurement.

18. Articles 47(2) and 48(3) of Directive 2004/18 expressly state that economic operators may rely on the capacities of other entities for the establishment of their economic, financial, technical and professional capacity requirements for a particular public works contract. In other words, those provisions refer to *other entities* in the plural. It is useful to observe that Articles 47(3) and 48(4) of Directive 2004/18 provide for the same possibility in regard to economic operators belonging to a group.

19. Article 52 of Directive 2004/18 provides for the same possibility in regard to inclusion on official lists of approved economic operators or the granting of certifications to participate in tendering procedures. The wording of Article 52(1) of Directive 2004/18 also indicates, by use of the plural form *other companies* that the European Union legislator had not intended to impose restrictions on the number of auxiliary undertakings on whose capacity a prospective tenderer could rely.

20. The wording of Articles 47(2), 48(3) and 52 of Directive 2004/18 codify settled case-law of the Court relating to earlier public procurement directives. In *Ballast Nedam Groep I*, the Court concluded that a holding company which does not itself execute works may not, because its subsidiaries which carry out works are separate legal persons, be precluded on that ground from participation in public works contract procedures if it could establish that it actually has available to it the resources of the subsidiaries necessary for carrying out the contract.

5 — Case C-95/10 *Strong Securança* [2011] ECR I-1865, paragraph 13.

6 — See for example Case C-389/92 *Ballast Nedam Groep I* [1994] ECR I-1289, Case C-5/97 *Ballast Nedam Groep II* [1997] ECR I-7549, and Case C-176/98 *Holst Italia* [1999] ECR I-8607.

7 — Article 44(2) of Directive 2004/18 provides that ‘[t]he 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.’

21. In *Ballast Nedam Groep II* the Court re-stated its position in *Ballast Nedam Groep I* and defined this further by concluding that when assessing a parent company's technical capacity, public authorities compiling lists of approved contractors are obliged to take into account the technical capacity of companies belonging to the same group.

22. In *Holst Italia* the Court applied the *Ballast* case-law to a situation in which the company wishing to participate in a tendering procedure was not the dominant legal person in the group of companies, and confirmed that such a company could rely on the capacities of other companies in the group, *regardless of the legal nature of links between them*.⁸ The Court stated that a tenderer cannot be eliminated from a procedure solely on the ground that it proposes to use resources which are not its own but belong to *one or more other entities*.⁹

23. This position of the Court that European Union law does not require that, in order to be classified as an economic operator qualifying for tendering, a person wishing to enter into a contract with a contracting authority must be capable of direct performance using his own resources has been confirmed also in subsequent case-law.¹⁰ The Court has emphasised that undertakings wishing to participate in a tendering procedure must prove that they actually have available to them the resources of the other entities necessary for the carrying-out of the contract in question. The onus rests on the tenderer who relies on the resources of others.¹¹

24. Both Articles 47(2) and 48(3) of Directive 2004/18 provide in almost identical terms that 'an economic operator *may* ... rely on the capacities of other entities'. The wording suggests the recognition of a *right* of economic operators to choose this method of fulfilling the selection criteria, provided that they can prove that they actually have at their disposal the resources of the other entities necessary for executing the contract.

25. Where the capacity of an undertaking to carry out a public works contract has been disputed in a particular case, the evaluation whether adequate proof has been produced is left to national courts. As I have already observed, this principle has been stated in the Court's case-law which now has been codified in Articles 47(2) and 48(3) of Directive 2004/18.¹²

26. In addition, there is nothing in Article 52 of Directive 2004/18 to suggest that it was intended to limit the scope of Articles 47(2) and 48(3) which relate to cooperation between economic operators in the context of tendering for *a particular contract*. To the contrary, Article 52(1) requires that the conditions for registration on lists of approved contractors, suppliers or service providers or for certification are adapted to the principle underlying Articles 47(2) and 48(3) as regards applications for registration submitted by economic operators belonging to a *group* and claiming resources made available to them by the other companies in the group.

27. Registration on an official list or certification in accordance with Article 52 of Directive 2004/18 constitutes a presumption of the suitability of the registered or certified undertakings, but only in relation to the conditions upon which the registration or certification is based. Contracting authorities have discretion to determine the level of financial and economic standing and technical knowledge and ability required in order to participate in a given contract and, if necessary, to demand proof beyond the presumption of registration or certification.¹³

8 — *Holst Italia*, paragraph 31.

9 — *Holst Italia*, paragraph 26.

10 — See, inter alia, Case C-305/08 *CoNISMa* [2009] ECR I-12129, paragraph 41 and case-law cited.

11 — See Case C-314/01 *Siemens and ARGE* [2004] ECR I-2549, paragraph 44 and case-law cited.

12 — See *Ballast Nedam Groep I*, paragraph 17, and *Holst Italia*, paragraphs 29 and 30.

13 — See Joined Cases 27/86, 28/86 and 29/86 *CEI-Bellini* [1987] ECR 3347, paragraphs 25 to 27.

28. Moreover, the Court has stated that Directive 92/50¹⁴ did not preclude a prohibition or a restriction on the use of subcontracting for the performance of essential parts of the contract precisely in the case where the contracting authority has not been in a position to verify the technical and economic capacities of the subcontractors when examining the tenders and selecting the lowest tenderer.¹⁵

29. This would suggest that a national provision excluding from tendering procedures economic operators relying on the capacities of more than one other entity would be contrary to the right of economic operators to choose this method of fulfilling the selection criteria and therefore would not be compatible with Directive 2004/18. Indeed, the Court has stated that a tenderer claiming to have at its disposal the technical and economic capacities of third parties on which it intends to rely if the contract is awarded to it may be excluded only if it fails to demonstrate that those capacities are in fact available to it.¹⁶

30. Therefore, a national provision such as Article 49(6) of Legislative Decree No 163/2006 which does not entirely prohibit reliance on the capacities of auxiliary undertakings in order to fulfil selection criteria, but which nevertheless imposes a quantitative restriction not provided in European Union law on that option cannot be compatible with Directive 2004/18.

31. This argument is further supported by analysis of the objectives of Articles 47(2) and 48(3) of Directive 2004/18. According to the Court, one of the primary objectives of the public procurement rules of the European Union is to attain the widest possible opening-up to competition, and that it is the concern of European Union law to ensure the widest possible participation by tenderers in a call for tenders.¹⁷

32. The objective of widest possible opening-up to competition is regarded not only from the interest in the free movement of goods and services, but also in regard to the interest of contracting authorities, who will thus have greater choice as to the most advantageous tender.¹⁸ Exclusion of tenderers based on the number of other entities participating in the execution of the contract such as allowing only one auxiliary undertaking per qualitative criteria category does not allow for a case by case evaluation, thus actually reducing the choices of the contracting authority and affecting effective competition.

33. Another objective of the public procurement rules is to open up the public procurement market for all economic operators, regardless of their size. The inclusion of small and medium-sized enterprises (SMEs) is especially to be encouraged as SMEs are considered to form the backbone of European Union economy.¹⁹ The chances of SMEs to participate in tendering procedures and to be awarded public works contracts are hindered, among other factors, by the size of the contracts. Because of this, the possibility for bidders to participate in groups relying on the capacities of auxiliary undertakings is particularly important in facilitating the access to markets of SMEs.²⁰

14 — Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, repealed by Directive 2004/18.

15 — *Siemens and ARGE*, paragraph 45.

16 — See, *Siemens and ARGE*, paragraph 46.

17 — See *CoNISMa*, paragraph 37 and case-law cited.

18 — See *CoNISMa*, paragraph 37 and case-law cited.

19 — See for example Commission Green Paper on the modernisation of EU public procurement policy. Towards a more efficient European Procurement Market, COM(2011) 15 final.

20 — The Commission guidance document European Code of Best Practices Facilitating Access by SMEs to Public Procurement Contracts recommends taking advantage of the possibility for economic operators to rely on their combined economic and financial standing and technical ability in the selection stage of tendering procedures. See Commission Staff Working Document European Code of Best Practices Facilitating Access by SMEs to Public Procurement Contracts, SEC(2008) 2193.

34. As a final point, I shall address the issue of Member States' discretion in the implementation of Directive 2004/18. The Commission and the Italian Government are of the opinion that a national provision such as Article 49(6) of Legislative Decree No 163/2006 is within the discretion left to Member States in the implementation of the directive.

35. According to the Commission, it is sufficient for the proper implementation of the directive that the possibility to rely on capacity of an auxiliary undertaking in order to fulfil the economic and financial capacity, and technical and/or professional ability levels is not excluded, and that the principles expressed in Directive 2004/18 are applied in order to guarantee effective qualitative selection of tenderers based on transparent, objective and non-discriminatory criteria.

36. I do not dispute the fact that Member States have a relatively wide discretion in the implementation of the public procurement directives. However, this does not extend to issues expressly covered by the European Union legislator, which in my opinion is the case concerning the possibility to rely on third party capacities in the context of tendering for public contracts. As I have pointed out above, both case-law of the Court and Directive 2004/18 expressly permit reliance on capacities of other entities, regardless of the legal nature of the links which it has with them.

37. Excluding tenderers relying on the capacities of more than one auxiliary entity per qualitative selection criteria category favours larger undertakings at the expense of *ad hoc* consortia of SMEs. It is likely to privilege dominant local or regional players in relation to public works which fit their capacities but are too demanding for smaller operators acting alone and too small to interest bigger nationally or internationally operating companies. This cannot be regarded as non-discriminatory.

38. I agree with the Italian Government in that there may be a difference between the situations where an economic operator relies on the economic and financial capacity of another entity and where the reliance concerns technical and/or professional ability. In certain situations the necessary technical or professional ability must be possessed by a single entity. For example, whereas two undertakings with a capacity of 50 000 tonnes of asphalt may together fulfil the required capacity of 100 000 tonnes needed for the renovation of a highway, two enterprises having each the expertise level required for maintenance and repair of clocks in railway stations do not automatically fulfil the ability criteria required for reparation works of ancient clocks in medieval churches.

39. However, the problem relating to the possibilities of agglomerating certain types of technical and/or professional abilities is qualitatively independent from the number of entities on whose abilities an economic operator relies. The fact that economic operators may rely on the capacities of other entities for purposes of qualifying as prospective tenderers, does not do away with the realities of particular tendering procedures. Thus, regardless of whether an economic operator possesses the economic and financial capacity and technical and professional ability by itself or by means of reliance on the capacities of other operators, it will still have to prove that it fulfils the criteria established for the execution of a particular public works contract.

40. Moreover, Article 48(5) of Directive 2004/18 provides specific rules for the evaluation of abilities of economic operators with regard to their skills, efficiency, experience and reliability applicable for certain categories of public contracts. This provision is applicable also to economic operators which rely on the technical or professional abilities of other entities. In addition, as I have stated above, in cases of official lists or national certification, contracting authorities still have discretion to determine the level of financial and economic standing and technical knowledge and ability required in order to participate in a given contract.

VI – Conclusion

41. On the basis of the preceding reasons, I propose that the Court give the following answer to the Tribunale Amministrativo Regionale per le Marche:

Articles 47(2) and 48(3) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts preclude national legislation such as that at issue in the main proceedings which prohibits, except in special circumstances, reliance on the capacities of more than one auxiliary undertaking in order to fulfil the selection criteria concerning the economic and financial standing and/or technical and/or professional ability of an economic operator.