Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

5 December 2013 *

(Public procurement — Negotiated procedure with prior publication of a contract notice — Whether possible for the contracting authority to negotiate on tenders which do not comply with the mandatory requirements of the technical specifications relating to the contract)

In Case C-561/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Riigikohus (Estonia), made by decision of 23 November 2012, received at the Court on 5 December 2012, in the proceedings

Nordecon AS,

Ramboll Eesti AS

v

Rahandusministeerium,

THE COURT (Fourth Chamber),

composed of L. Bay Larsen (Rapporteur), President of the Chamber, M. Safjan, J. Malenovský, A. Prechal and S. Rodin, Judges,

Advocate General: N. Wahl,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Nordecon AS, by A. Ots,

— the Estonian Government, by M. Linntam and N. Grünberg, acting as Agents,

— the Czech Government, by M. Smolek and T. Müller, acting as Agents,

— the Spanish Government, by A. Rubio González, acting as Agent,

— the European Commission, by A. Tokár and L. Naaber-Kivisoo, acting as Agents,

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

* Language of the case: Estonian.

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 30(2) 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 request has been made in proceedings between Nordecon AS, the legal successor to Nordecon Infra AS, ('Nordecon') and Ramboll Eesti AS ('Ramboll Eesti'), on the one hand, and Rahandusministeerium (Ministry for Finance), on the other hand, concerning the annulment of a negotiated procedure for the award of a public contract with prior publication of a contract notice.

Legal context

European Union law

3 Article 1(11) of Directive 2004/18 provides:

'"Negotiated procedures" means those procedures whereby the contracting authorities consult the economic operators of their choice and negotiate the terms of contract with one or more of these.'

4 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.'

5 Article 23 of Directive 2004/18, entitled 'Technical specifications', provides at paragraphs 1 and 2 thereof:

'1. The technical specifications as defined in point 1 of Annex VI shall be set out in the contract documentation, such as contract notices, contract documents or additional documents. …

2. Technical specifications shall afford equal access for tenderers and not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.'

6 Article 24 of Directive 2004/18, entitled 'Variants', provides at paragraphs 1 to 4 thereof:

'1. Where the criterion for award is that of the most economically advantageous tender, contracting authorities may authorise tenderers to submit variants.

2. Contracting authorities shall indicate in the contract notice whether or not they authorise variants: variants shall not be authorised without this indication.

3. Contracting authorities authorising variants shall state in the contract documents the minimum requirements to be met by the variants and any specific requirements for their presentation.

4. Only variants meeting the minimum requirements laid down by these contracting authorities shall be taken into consideration.

…'

7 Article 30 of Directive 2004/18, entitled 'Cases justifying use of the negotiated procedure with prior publication of a contract notice', provides at paragraphs 1 to 3 thereof:

'1. Contracting authorities may award their public contracts by negotiated procedure, after publication of a contract notice, in the following cases:

(a) in the event of irregular tenders or the submission of tenders which are unacceptable under national provisions compatible with Articles 4, 24, 25, 27 and Chapter VII, in response to an open or restricted procedure or a competitive dialogue insofar as the original terms of the contract are not substantially altered.

...

(b) in exceptional cases, when the nature of the works, supplies, or services or the risks attaching thereto do not permit prior overall pricing;

(c) in the case of services, inter alia services within category 6 of Annex II A, and intellectual services such as services involving the design of works, insofar as the nature of the services to be provided is such that contract specifications cannot be established with sufficient precision to permit the award of the contract by selection of the best tender according to the rules governing open or restricted procedures;

...

2. In the cases referred to in paragraph 1, contracting authorities shall negotiate with tenderers the tenders submitted by them in order to adapt them to the requirements which they have set in the contract notice, the specifications and additional documents, if any, and to seek out the best tender in accordance with Article 53(1).

3. During the negotiation, the contracting authorities shall ensure equal treatment for all tenderers. In particular, they shall not provide information in a discriminatory manner which may give some tenderers an advantage over others.'

Estonian law

8 Article 27(1) Law on public procurement (riigihangete seadus; 'the RHS') provides:

'A negotiated procedure with publication of a contract notice is a procurement procedure in which any interested person may submit an application to take part in the procedure and in which the contracting authority makes a proposal to at least three applicants, to be chosen by the contracting authority on the basis of objective, non-discriminatory criteria, to submit tenders and negotiates the tenders with those applicants in order to adapt them to the requirements laid down in the specifications and choose the successful tender.'

9 Article 31(5) of the RHS provides:

'Where the contracting authority awards a contract to the tenderer who has submitted the most economically advantageous tender and the contract notice provides for the possibility of submitting in the tender, in addition to solutions corresponding to all the conditions laid down in the contract notice and the specifications, alternative solutions as well, it is to define in the specifications the conditions relating to the alternative solutions and the conditions under which they shall be submitted.'

10 Article 52(1) of the RHS provides:

'The contracting authority shall evaluate alternative solutions where it awards the contract to the tenderer who has submitted the most economically advantageous tender and where the contract notice permits alternative solutions to be submitted.'

11 Article 67(1) of the RHS provides:

'The contracting authority shall open all the tenders, except in the cases provided for in Article 65(4) herein, and negotiate with the tenderers the tenders submitted in order to adapt them, if necessary, to the requirements laid down in the contract notice and in the specifications and choose the successful tender.'

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

12 On 25 September 2008, the Maanteeamet (the Estonian Highways Office) launched a negotiated procedure with the publication of a contract notice entitled 'Planning and construction of the Aruvalla to Kose section of the E263 [road]'.

13 In accordance with points 4.3.1 and 4.7.1 of Annex III to the specifications relating to the contract at issue in the main proceedings, the central reservation of that section of road was to be 13.5 metres wide from the 26.6 kilometre mark to the 32 kilometre mark and 6 metres wide from the 32 kilometre mark to the 40 kilometre mark.

14 On 20 January 2010, the Maanteeamet declared that the four tenders submitted, namely, the tenders of the Lemminkäinen and Marko consortiums, the joint tender of Ehitusfirma Rand ja Tuulberg AS, Binders SIA and Insenierbuve SIA, and the tender of the Nordecon consortium, made up of Nordecon Infra AS and Ramboll Eesti, were admissible, even though the tender from the latter consortium proposed a central reservation 6 metres wide along the entire length of that section of road.

15 During the negotiations which followed the submission of those tenders, the Maanteeamet, by letter of 26 April 2010, invited the tenderers other than the Nordecon consortium to alter the width of the central reservation in their original tenders and to set it at 6 metres for the entire length of the section of road concerned, as the Nordecon consortium had proposed. After negotiations with all the tenderers, the latter submitted their offers by 27 May 2010, the date fixed by the contracting authority, after correcting the price because of the alteration requested.

16 By two decisions of 10 June 2010 the Maanteeamet first declared all the tenders admissible and secondly accepted the joint tender of the Lemminkäinen consortium, which was the lowest in price.

17 On 21 July 2010, in response to a complaint by Nordecon Infra AS, those two decisions were annulled by the Rahandusministeerium's complaints committee, which found that, in a negotiated procedure with prior publication of a contract notice, the negotiation conducted by the contracting authority could not relate to matters satisfying the requirements clearly and unambiguously laid down in the contract documents, such as those relating to the width of the central reservation. On 27 September 2010, the Maanteeamet's director general rejected the joint tender of the Lemminkäinen consortium and accepted the tender of the Nordecon consortium, that offer being the lowest in price after the tender of the Lemminkäinen consortium.

18 Following the Merko consortium's introducing an application for annulment, the Rahandusministeerium, by decision of 26 October 2010, annulled the procurement procedure at issue in the main proceedings on the grounds, in particular, that the contracting authority had unlawfully

declared the tender of the Nordecon consortium admissible and declared that tender, which included an alternative solution not permitted under the contract notice, successful and that the negotiations conducted by the contracting authority could not concern matters satisfying the requirements clearly and unambiguously laid down in the contract documents, such as those relating to the width of the central reservation of the section of road concerned.

19 Nordecon, which in the meantime had become the legal successor to Nordecon Infra AS, and Ramboll Eesti brought an action against that decision before the Tallina halduskohus (Administrative Court, Tallinn), which dismissed the action by judgment of 2 March 2011. According to the Tallina halduskohus, the tender of the appellants in the main proceedings ought to have been declared inadmissible, for the contract notice concerned had, in breach of Article 31(5) and 52 of the RHS, provided, not for the possibility of submitting alternative solutions and of awarding the contract to be awarded to the tenderer offering the most economically advantageous tender, but for the lowest price to be taken into consideration. Moreover, in a negotiated procedure with prior publication of a contract notice, negotiations might relate only to aspects that were not defined at the time of the submission of the tender or that did not appear in the contract documents.

20 Nordecon and Ramboll Eesti brought an appeal against the Tallina halduskohuss's judgment before the Tallina ringkonnakohus (Regional Court, Tallinn). By judgment of 21 December 2011, the Tallina ringkonnakohus upheld the Tallina halduskohuss's judgment.

21 As regards point 8.1 of the tender specifications relating to the contract at issue in the main proceedings, under which the Maanteeamet had allowed alternative solutions, except for the construction of the surface structures of a main road (including access roads), the Tallina ringkonnakohus held that the contract notice did not provide for the possibility of submitting alternative solutions or for the award of the contract to the tenderer offering the most economically advantageous tender. The Maanteeamet therefore allowed, in infringement of Articles 31(5) and 52(1) of the RHS, alternative solutions to be submitted. Furthermore, the original tender of the appellants in the main proceedings ought to have been rejected.

22 Nordecon AS and Ramboll Eesti AS appealed on a point of law to the Riigikohus (Supreme Court), asking it to set aside the judgment of the Tallina ringkonnakohus, deliver a new judgment and declare the decision of the Rahandusministeerium of 26 October 2010 unlawful.

23 According to the referring court, it is not in dispute that the submission of alternative solutions was not allowed by the contract notice or that the evaluation of the tenders was not carried out by the yardstick of the most economically advantageous tender.

24 While granting that, in a negotiated procedure with prior publication of a contract notice, questions relating to the conditions under which a contract is awarded may, at least in part, be left open to negotiation, without its being necessary to consider alternative solutions, the referring court asks whether the contracting authority may also undertake negotiations when there are tenders that do not satisfy the mandatory requirements of the contract documents and whether the negotiations undertaken must, at the very least, lead to the successful tender's being consistent with those mandatory requirements.

25 In that regard, the referring court notes that Article 30(2) of Directive 2004/18 leaves open the question whether, during such negotiations, tenders may also be adapted to the mandatory requirements of the technical specifications. If such an adaptation is possible, the referring court asks whether it is also possible to conduct negotiations on the basis of tenders which, in their original form, do not fully satisfy the mandatory requirements. Nor, according to the referring court, does the directive clearly indicate whether the adaptation following from negotiations must result in the tender's fully complying with the technical specifications and whether, so as to achieve such compliance, the contracting authority may also alter the technical specifications.

26 It is on that basis that the Riigikohus decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

‘1. Must Article 30(2) of Directive [2004/18] be interpreted as allowing the contracting authority to conduct negotiations with tenderers in respect of tenders which do not comply with the mandatory requirements laid down in the technical specifications relating to the contract?

2. If the answer to [the first question] is in the affirmative, must Article 30(2) of Directive 2004/18 then be interpreted as allowing the contracting authority during the negotiations, after the tenders have been opened, to alter the mandatory requirements of the technical specifications, provided that the subject-matter of the contract is not altered and equal treatment of all tenderers is ensured?

3. If the answer to [the second question] is in the affirmative, must Article 30(2) of Directive 2004/18 then be interpreted as precluding legislation which, after the tenders have been opened, excludes alteration of the mandatory requirements of the technical specifications during the negotiations?

4. If the answer to [the first question] is in the affirmative, must Article 30(2) of Directive 2004/18 then be interpreted as prohibiting the contracting authority from accepting as the best tender a tender which, at the end of the negotiations, does not comply with the mandatory requirements of the technical specifications?’

Admissibility of the request for a preliminary ruling

27 Nordecon, while not raising an objection of inadmissibility, contests the relevance of the questions referred for a preliminary ruling, claiming that resolution of the dispute in the main proceedings does not depend on any answer that may be given to those questions. In particular, it contends that the main question asked by the Riigikohus, that is to say, the first, to which all the other questions are connected, is not relevant, for the negotiations were not conducted with tenderers that had submitted irregular tenders. Accordingly, those questions are based on erroneous assumptions.

28 In that regard, it is settled case-law that, in proceedings under Article 267 TFEU, the Court is empowered to give rulings on the interpretation or the validity of a European Union provision only on the basis of the facts which the national court puts before it (see Case 104/77 *Oehlschlger* [1978] ECR-791, paragraph 4; Case C-11/07 *Eckelkamp and Others* [2008] ECR I-6845, paragraph 52; and Order of 8 November 2012 in Case C-433/11 *SKP* [2012], paragraph 24).

29 In the context of those proceedings, which are based on a clear separation of functions between the national courts and the Court, any assessment of the facts of the case is a matter for the national court. Similarly it is solely for the national court before which the dispute has been brought and which must assume responsibility for the forthcoming judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of European Union law, the Court is, in principle, bound to give a ruling on the substance (see, to that effect, *Eckelkamp and Others*, paragraph 27).

30 The Court may refuse to give a substantive ruling on a question referred for a preliminary ruling 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 facts of the main action or its subject-matter, 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 (*Eckelkamp and Others*, paragraph 28).

31 In the present case, the referring court takes as its starting-point the finding that the contracting authority negotiated tenders that did not comply with the mandatory requirements of the specifications, which it is not for the Court to call in question. Moreover, none of the situations referred to in paragraph 30 of the present judgment that allow the Court to refuse to rule on a question referred for a preliminary ruling has, in the present case, been established.

32 The reference for a preliminary ruling must therefore be considered to be admissible.

Consideration of the questions referred

33 By its first question, the referring court asks whether Article 30(2) of Directive 2004/18 allows the contracting authority to negotiate with tenderers tenders that do not comply with the mandatory requirements laid down in the technical specifications of the contract.

34 In that regard, it must be recalled that, in certain cases, Article 30(2) of Directive 2004/18 allows the negotiated procedure to be used in order to adapt the tenders submitted by the tenderers to the requirements set in the contract notice, the specifications and additional documents, if any, and to seek out the best tender.

35 According to Article 2 of Directive 2004/18, contracting authorities are to treat economic operators equally and in a non-discriminatory manner and are to act in a transparent way.

36 The Court has stated that the obligation of transparency is essentially intended to preclude any risk of favouritism or arbitrariness on the part of the contracting authority (Case C-599/10 *SAG ELV Slovensko and Others* [2012] ECR, paragraph 25).

37 Accordingly, even though the contracting authority has the power to negotiate in the context of a negotiated procedure, it is still bound to see to it that those requirements of the contract that it has made mandatory are complied with. Were that not the case, the principle that contracting authorities are to act transparently would be breached and the aim mentioned in paragraph 36 above could not be attained.

38 Moreover, allowing a tender that does not comply with the mandatory requirements to be admissible with a view to negotiations would entail the fixing of mandatory conditions in the call for tenders being deprived of useful effect and would not allow the contracting authority to negotiate with the tenderers on a basis, made up of those conditions, common to those tenderers and would not, therefore, allow it to treat them equally.

39 In the light of the foregoing considerations, the answer to the first question is that Article 30(2) of Directive 2004/18 does not allow the contracting authority to negotiate with tenderers tenders that do not comply with the mandatory requirements laid down in the technical specifications of the contract.

40 In the light of the answer to the first question, there is no need to reply to the second to fourth questions.

Costs

41 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

Article 30(2) 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 does not allow the contracting authority to negotiate with tenderers tenders that do not comply with the mandatory requirements laid down in the technical specifications of the contract.

[Signatures]